Petition

81-920

No. .....

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IN THE

Supreme Court of the United States

October Term, 1981

VERLINDEN B.V.,

Petitioner,

—v.—

CENTRAL BANK OF NIGERIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX FOR PETITIONER

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Question Presented

Does Article III of the Constitution preclude Congress from granting jurisdiction to United States District Courts over a suit against a foreign sovereign by a foreign corporation, asserting claims having a substantial nexus with the United States, when the jurisdictional grant is an integral part of the Foreign Sovereign Immunities Act, comprehensively regulating actions against foreign sovereigns in all courts of this country, and enacted in the exercise of the power of Congress over foreign affairs?

TABLE OF CONTENTS

PAGE

Question Presented 1

Opinions Below 1

Jurisdiction 1

Constitutional Provision and Statutes Involved 1

Statement of the Case 4

REASONS FOR ALLOWING THE WRIT:

I. In Holding 28 U.S.C. § 1330 Unconstitutional as Applied to Suits Brought by Foreign Plaintiffs, the Court of Appeals Decided an Important Question of Constitutional Law, Not Yet Decided by This Court, in a Way that Conflicts with the Applicable Decisions of this Court 7

II. In Rendering its Constitutional Decision Without Briefs or Argument of the Parties Specifically Directed to the Issue and Without Affording the United States an Opportunity to Intervene as Required by 28 U.S.C. § 2403, the Court of Appeals Has so Far Departed from the Accepted Course of Judicial Proceedings as to Call for the Exercise of this Court's Supervisory Power 13

CONCLUSION 14

APPENDIX:

Opinion of the United States Court of Appeals for the Second Circuit, dated April 16, 1981 ..... 1a

Opinion of the United States District Court for the Southern District of New York, dated April 21, 1980 ..... 21a

PAGE

Order of the United States Court of Appeals for the Second Circuit, dated August 17, 1981, Denying Plaintiff's and the Government's Petitions for Rehearing en Banc 55a

Order of the United States Court of Appeals for the Second Circuit, dated May 4, 1981, Denying the Government's Motion for Leave to Intervene ... 56a

TABLE OF AUTHORITIES

Cases:

Louisville & Nashville R.R. v. *Mottley*, 211 U.S. 149 (1908) 10

National Mutual Assurance Co. v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582 (1949) 11

Osborn v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) 10

Pacific Railroad Removal Cases, 115 U.S. 1 (1885) .. 11

Ex Parte *Peru*, 318 U.S. 578 (1943) 8

Powell v. *McCormack*, 395 U.S. 486 (1969) 10

Reale International, Inc. v. *Federal Republic of Nigeria*, 647 F.2d 330 (2d Cir. 1981) 5

Republic of Mexico v. *Hoffman*, 324 U.S. 30 (1945) .. 8

Romero v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) 10

Tennessee v. *Davis*, 100 U.S. 257 (1880) 11

Tennessee v. *Union Planters' Bank*, 152 U.S. 454 (1894) 10

Texas Trading Co. v. *Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) 5

Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 10

PAGE

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 12

Williams v. *Austrian*, 331 U.S. 642 (1947) 11

Statutes:

28 U.S.C. § 1330(a) 1, 4, 5, 7-9

28 U.S.C. § 1330(b) 7

28 U.S.C. § 1331 9

28 U.S.C. § 1349 11

28 U.S.C. § 1441(d) 7

28 U.S.C. § 1442 11

28 U.S.C. § 1602 8

28 U.S.C. § 1605(a) 2, 5, 8, 9

28 U.S.C. § 1608 ..... 7, 8

28 U.S.C. § 1610 ..... 7, 8

28 U.S.C. § 2403(a) 3, 6, 13

Federal Rules of Civil Procedure:

Rule 12(h)(3) 10

Rule 24(a) 13

Other Authorities:

I Chayes, Ehrlich and Lowenfeld, The International Legal Process (1968) 7

The Federalist, Nos. III, IV, V 12

Hart and Wechsler, The Federal Courts and the Federal System (2d ed. Bator, Shapiro and Mishkin 1973) 11, 12

L. Henkin, Foreign Affairs and the Constitution (1972) 12

PAGE

House Report No. 94-1487, 94th Cong., 2d Sess. (1976), *reprinted in* (1976) U.S. Code Cong. & Admin. News 6604 8-9

Letter from the Acting Legal Adviser to the Attorney General of May 19, 1952, 26 Dept. State Bull. 984 (1952) 7

Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157 (1953) 12

Senate Report No. 94-1310, 94th Cong., 2d Sess. (1976) 8

Wright, Miller & Cooper, Fed. Practice & Procedure, § 3562 (1975) 10

Verlinden B.V. (Verlinden) petitions for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, written by Judge Kaufman, is dated April 16, 1981, and is reported at 647 F.2d 320. (App., *infra*, 1a). Judge Weinfeld's opinion in the District Court for the Southern District of New York is dated April 30, 1981, and is reported at 488 F.Supp. 1284. (App., *infra*, 21a).

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Second Circuit was rendered on April 16, 1981. Plaintiff's petition for rehearing *en banc* was denied on August 17, 1981. (App., *infra*, 55a).

Constitutional Provision and Statutes Involved

U.S. Const., Art. III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 2(a) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a):

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Section 4(a) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a):

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state;

or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or ommission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 2403(a):

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evi-

dence is otherwise admissible in the case, and for argument on the question of constitutionality. The United Staes shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Statement of the Case

Petitioner, Verlinden, a Dutch corporation, sued Central Bank of Nigeria (CBN) in the District Court for the Southern District of New York when CBN repudiated its irrevocable letter of credit issued to pay for a $14.4 million purchase of cement by the Republic of Nigeria from Verlinden. Jurisdiction was asserted under Section 2(a) of the Foreign Sovereign Immunities Act (the Act), 28 U.S.C. § 1330. That section provides for original jurisdiction in the federal district courts over "any nonjury civil action against a foreign sovereign . . . as to any claim for relief in personam with respect to which the foreign sovereign is not entitled to immunity . . . under sections 1605-1607 of [the Act]. . . ." Suit was brought in the United States because CBN caused the letter of credit to be advised and made payable by and at Morgan Guaranty Trust Company of New York (Morgan), out of Nigeria's funds on deposit with Morgan.

Defendant moved to dismiss on the ground that the claim was not one as to which the defense of sovereign immunity was precluded. In the closing phases of the District Court proceeding on that motion, defendant raised the further objection that the statute failed to meet the requirements of Article III of the Constitution. It was conceded that there was no diversity jurisdiction; and, defendant argued, the case was not one "arising under" the Constitution, laws or treaties of the United States. After supplementary briefs and argument on this point,

Judge Weinfeld rejected defendant's contention. He went on to grant the motion to dismiss, however, on the ground originally asserted: that the claim was not one as to which sovereign immunity was unavailable under § 1605 of the Act, and thus did not fall within the jurisdictional grant of § 1330.

On appeal, this case was consolidated with five others that were identical with it in all respects except that the five other plaintiffs were United States corporations. The only issue briefed by either side was whether the claim was one falling within § 1605 so that defendant was not entitled to sovereign immunity. On this issue the Court of Appeals, in an extended opinion, held for the United States plaintiffs. *Texas Trading Co.* v. *Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981).* It concluded that the decision to interpose Morgan, and thus to make the United States the place of payment (and later the locus of repudiation), "came in the course of a longstanding relationship between Nigeria and Morgan," pursuant to which Nigeria and CBN used Morgan to carry out a broad panoply of functions in the United States on their behalf. 647 F.2d at 304-05; see also *id.* at 314-15. CBN's own conduct thus created the vital nexus between the transactions in suit and the United States.

As to Verlinden, the Court of Appeals, *sua sponte*, raised the question of Article III jurisdiction on oral argument, asking a few questions of plaintiff's counsel on this point. Thereafter, and without providing an opportunity for briefs or oral argument directed to the issue, the Court of Appeals held the Act *pro tanto* unconstitutional. It held, as did Judge Weinfeld below, that § 1330, in vesting jurisdiction in the district courts over "any . . .

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* One case, *Reale International, Inc.* v. *Federal Republic of Nigeria*, 647 F.2d 330 (2d Cir. 1981), was remanded to the District Court on a ground not relevant here.

action against a foreign state . . .," must be construed to include actions brought by an alien plaintiff. The Court asserted, however, that such a case is not one "arising under . . . the Laws of the United States . . ." within the meaning of Article III. Congress was thus without power to grant federal court jurisdiction of this case. The District Court's dismissal of the action was affirmed on this ground.

Upon learning of the decision, the United States moved for leave to intervene and for rehearing on the ground that the Court of Appeals had not certified to the Attorney General, as required by 28 U.S.C. § 2403, that "the constitutionality of [an] Act of Congress affecting the public interest [was] drawn in question"; nor had the United States been permitted "to intervene . . . for argument on the question of constitutionality" as is also required by the section. This motion was summarily denied on May 4, 1981. (App., *infra*, 56a). A subsequent petition by the United States for rehearing *en banc* on these issues was denied on August 17, 1981. (App., *infra*, 55a). Verlinden's petition for rehearing *en banc* was also denied by that same order of August 17, 1981.

Petitioner now seeks review of these actions in this Court.

REASONS FOR ALLOWING THE WRIT

I. In Holding 28 U.S.C. § 1330 Unconstitutional As Applied To Suits Brought By Foreign Plaintiffs, The Court Of Appeals Decided An Important Question Of Constitutional Law, Not Yet Decided By This Court, In A Way That Conflicts With The Applicable Decisions Of This Court.

The Foreign Sovereign Immunities Act is a major remedial enactment, more than a decade in gestation,* by which Congress sought to regulate the whole field of suits against foreign sovereigns in United States courts. The statute does more than simply codify the "restrictive theory" of sovereign immunity, to which the United States has adhered as a matter of policy since 1952. See Letter from the Acting Legal Adviser to the Attorney General of May 19, 1952 (the Tate letter), 26 Dept. State Bull. 984 (1952). By including provisions for personal service, 28 U.S.C. §§ 1330(b), 1608, and for enforcement of judgments, 28 U.S.C. § 1610, Congress has for the first time provided an effective remedy against foreign sovereigns in commercial cases and other ordinary transactions having significant contacts with the United States.

As part of this comprehensive scheme, the statute vests in federal district courts both original and removal jurisdiction of cases brought by any person (whether citizen or alien) against a foreign sovereign, 28 U.S.C. §§ 1330, 1441(d), provided that the claim has sufficient contacts with the United States and the other requirements of § 1605 are met. These jurisdictional arrangements evidence a congressional purpose, in expanding the remedies against foreign sovereigns, to provide a cen-

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* For the original memorandum proposing a statutory solution to the problem of sovereign immunity, presented to the State Department Legal Adviser in 1966, see I Chayes, Ehrlich and Lowenfeld, The International Legal Process, 150 (1968).

tralized forum in the federal courts for adjudication of such claims. In so doing, Congress took account of the impact of such litigation on the foreign relations of the United States, *See e.g.*, H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), pp. 7, 8, 12.* It can perhaps no longer be said that a suit against a foreign sovereign may "vex the peace of nations." It remains true nevertheless, as this Court has repeatedly held, that such suits involve matters of great delicacy touching the foreign relations of the United States. See, *e.g.*, Ex Parte *Peru*, 318 U.S. 578, 588 (1943); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945). This is especially so in the present setting, since the Act for the first time provides for levy on the assets of a foreign sovereign to enforce a judgment against it. 28 U.S.C. § 1610. The procedures by which this is done and the officers who carry them out are surely matters of great sensitivity. The interplay of the provisions for original and removal jurisdiction implements the statutory purpose to ensure that these actions are heard in a court of the nation unless both parties are content with another forum.

The decision below frustrates this central congressional purpose. The provisions of the Act determining whether sovereign immunity should be allowed, as well as those covering service of process and enforcement of judgments, are applicable in all the courts of this country, 28 U.S.C. §§ 1602, 1605(a), 1608. Thus, under the Court of Appeals' holding, foreign plaintiffs can maintain their suits in the state courts without the possibility of removal by the sovereign defendant.

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* *Reprinted in* (1976) U.S. Code Cong. & Admin. News 6604 (hereafter cited as "H.R. Rep."). The House Report is identical to the one issued by the Senate. *Compare*, H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) *with* S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976). To avoid duplication, this petition cites only the House Report.

The case of the foreign corporate plaintiff is by no means a trivial or unusual one. It will often happen that American enterprises, which everyone acknowledges were to be the principal beneficiaries of the Act, *e.g.* H.R. Rep. pp. 6-7, will be able or can be required to deal with foreign sovereigns through foreign subsidiaries or affiliates. In such cases, the federal forum intended by Congress will be unavailable. Indeed, either party could easily escape the remedial purposes of the Act simply by insisting that the transaction be cast in that form.

On the other hand, there is no danger that alien plaintiffs will inundate U.S. courts with litigation essentially unrelated to the United States or its concerns. The provisions of § 1605, incorporated by reference in § 1330, require that the claim must have a substantial nexus with the United States, as does the claim in *Verlinden*, in order for jurisdiction to attach.

In holding that Congress was powerless to provide a federal forum for suits by an alien plaintiff against a foreign sovereign, even though the jurisdictional grant is part of a comprehensive legislative enactment governing an important aspect of the foreign relations of the United States, the Court of Appeals has ignored applicable decisions of this Court.

The opinion below, although construing Article III, relies almost exclusively on cases interpreting the general federal question section of the Judicial Code, 28 U.S.C. § 1331. The Act should be sustained even on this niggardly reading of Article III. It comprises substantive legislation defining the conditions under which foreign sovereigns can be sued in the courts of this country and providing for enforcement of judgments against them. These provisions are binding as a matter of federal law on all courts in which such suits may be brought. And Congress has devolved upon the federal courts, under the supervision of this Court, broad responsibility for the development and elaboration of the statutory norms. H.R. Rep. pp. 7, 8.

Finally, by making the absence of sovereign immunity an essential element of subject matter jurisdiction, Congress ensured that the federal question would necessarily appear, as it did in this case, on the face of a well-pleaded complaint. *Tennessee* v. *Union Planters' Bank*, 152 U.S. 454 (1894); *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908). Moreover, since the issue is jurisdictional, it cannot be waived or avoided by the defendant. Fed. R. Civ. P. 12(h)(3). In every case the trial court must make an affirmative finding that the conditions necessary to subject matter jurisdiction exist, including the substantive condition of absence of sovereign immunity. The Court of Appeals thought that the presence of a question of subject matter jurisdiction, which necessarily occurs in every federal case, could not satisfy the "arising under" clause of Article III But in a case brought under § 1330 against a foreign state, unlike a diversity case for example, resolution of the jurisdictional question depends on federal substantive law—the Act—defining one of the essential elements of the claim—the absence of sovereign immunity.

It is axiomatic, however, that § 1331 does not exhaust the power conferred by the "arising under" clause of Article III. See, *e.g.*, *Powell* v. *McCormack*, 395 U.S. 486, 515 (1969); *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 379, n.5 (1959); Wright, Miller & Cooper, Fed. Practice & Procedure, § 3562 (1975). The principle was first laid down in the seminal decision of Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Although the opinion below pays lip service to this principle, it disparages *Osborn* as, in effect, a political response to political attacks on the Bank. It is erroneously said to have been confined to the facts of the case. (App., *infra*, 19-20a). The only authority cited for this proposition is Justice Frankfurter's dissenting opinion in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 481 (1957), a dissent in which he was not joined by a single other member of the Court.

Osborn is the only case Judge Kaufman discusses at any length. His opinion ignores repeated holdings of this Court that Congress can in certain circumstances grant jurisdiction under Article III of cases between co-citizens where the claim is not founded directly on federal law. Among these are:

— The *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), holding on the authority of *Osborn* that a federal forum is potentially available under the Constitution in every case brought by or against a federally chartered corporation. The practical scope of this holding has been circumscribed by subsequent jurisdictional enactments, but it has never been questioned in principle and still supports the statutory grant of jurisdiction in cases brought by corporations more than 50% owned by the United States. 28 U.S.C. § 1349.

— *Tennessee* v. *Davis*, 100 U.S. 257 (1880), upholding a statute authorizing the removal of a state prosecution for murder brought against a federal official acting in the line of duty. Removal of civil actions brought under state law against federal officers has been authorized by statutes going back to 1815 without provoking serious constitutional challenge, although such suits are not enumerated in Article III. See 28 U.S.C. § 1442. The statutes are summarized in Hart and Wechsler, The Federal Courts and the Federal System, 1335-38 (2d ed. Bator, Shapiro and Mishkin 1973).

— *Williams* v. *Austrian*, 331 U.S. 642 (1947), and predecessor cases under the Bankruptcy Acts authorizing suit in federal court by the trustee on claims of the bankrupt estate arising under state law without regard to the citizenship of the parties. For a summary of these cases and statutes, see Hart and Wechsler, *supra*, at 868.

— *National Mutual Assurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582 (1949), in which

the Court held that Congress could provide for District Court jurisdiction over suits between a citizen of a state and a citizen of the District of Columbia. Again, such cases are not within the enumeration of Article III.

A number of different theories have been advanced to explain these cases. But the unifying element in all of them is the existence of an important federal interest or concern that could be effectively vindicated by making a federal forum available. Such an interest is central in this case as well, although it was not touched on in the opinion of the Court of Appeals. The statute in which this jurisdictional grant appears is an exercise of the foreign affairs power. The preeminent if not exclusive competence of the federal government in the field of foreign affairs has been long and universally recognized. See, *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); L. Henkin, Foreign Affairs and the Constitution, c.I (1972), and authorities there cited. Indeed the establishment of such a power was one of the major purposes of the Constitution. See The Federalist, Nos. III, IV, V; L. Henkin, *supra*, at 15-16. Scholarly opinion is uniform in attributing central importance to the presence of such federal interests and concerns in the sound interpretation of the "arising under" clause of Article III. See, *e.g.*, Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 184, 192-94 (1953); Hart and Wechsler, *supra*, at 868. Yet the bearing of the foreign affairs power was not only disregarded, it was not even mentioned by the court below.

II. In Rendering Its Constitutional Decision Without Briefs Or Argument Of The Parties Specifically Directed To The Issue And Without Affording The United States An Opportunity To Intervene As Required By 28 U.S.C. § 2403, The Court Of Appeals Has So Far Departed From The Accepted Course Of Judicial Proceedings As To Call For The Exercise Of This Court's Supervisory Power.

The constitutional issue was raised by the court below *sua sponte* at the oral argument. It was decided without briefs or argument specifically directed to the issue.

Moreover, the Act of Congress was held unconstitutional although the court failed to "certify such fact to the Attorney General" and to "permit the United States to intervene . . . for argument on the question of constitutionality," as required by 28 U.S.C. § 2403. Such certification and permission to intervene are positive requirements of "a statute of the United States [conferring] an unconditional right to intervene" under Rule 24(a) of the Federal Rules of Civil Procedure. The court below by its actions violated both the statute and the Rule. More important, it deliberately flouted the fundamental precept embodied in § 2403 that the constitutionality of an Act of Congress affecting the public interest ought not to be decided in a suit solely between private litigants. Congress rightly viewed such questions as of public importance. It imposed a duty on the United States to defend the validity of its enactments, and a duty on the courts to listen. The court below refused to fulfill this obligation.

Both the Attorney General and plaintiff, by timely petitions for intervention and rehearing *en banc*, provided opportunities for the court to rectify these serious breaches of statutory duty and of fair procedure. These petitions were summarily denied.

By these actions, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 643, Docket No. 80-7413

(Argued March 6, 1981 Decided April 16, 1981)

VERLINDEN B. V.,

Plaintiff-Appellant,

—against—

CENTRAL BANK OF NIGERIA,

Defendant-Appellee.

Before:

KAUFMAN and TIMBERS, *Circuit Judges*, and WARD, *District Judge.**

Opinion

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge*, dismissing plaintiff's complaint for lack of personal jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(b).

Affirmed, on the ground that the court lacks jurisdiction over the subject matter.

ABRAM CHAYES, Cambridge, Mass. (Berthold H. Hoeniger, New York, N.Y., of counsel), *for Plaintiff-Appellant.*

JAMES G. SIMMS, New York, N.Y. (Craig P. Murphy, Peter J. Dranginis, Jr., Kissam, Halpin & Genovese, New York, N.Y., of counsel), *for Defendant-Appellee.*

* Of the United States District Court for the Southern District of New York, sitting by designation.

KAUFMAN, *Circuit Judge :*

Throughout the long summer of 1787, the Framers of the Constitution, assembled at Philadelphia, hammered the parochial prejudices of thirteen colonies into the rough framework of a union. There, a fundamental tenet of American jurisprudence was forged: federal courts are courts of limited jurisdiction. Alexander Hamilton, Luther Martin, James Madison, and others honed such rough verbiage as "cases respecting the national peace and harmony" to the precision of "cases arising under . . . the Laws of the United States,"[1] and Article III, thus tempered, emerged.

Nearly two centuries later, in 1976, Congress passed the Foreign Sovereign Immunities Act ("FSIA" or "Act").[2] The Act purports to create, pursuant to that same Article III, original jurisdiction in the district courts over "any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . ." 28 U.S.C. § 1330(a). This case, one of seven decided today involving the FSIA,[3] presents a sharp

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[1] *See generally* 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 46 (notes of James Madison), 133 (notes of Committee of Detail), 186 (notes of James Madison), 238 (notes of Robert Yates), 576 (notes of Committee of Style), 661 (Constitution) (rev. ed. 1937) (hereinafter "Farrand").

[2] Act of October 21, 1976, Pub. L. 94-583, 90 Stat. 2891, *codified at* 28 U.S.C. §§ 1330; 1332(a)(2)—1332(a)(4); 1391(f); 1441(d); and 1602-1611.

[3] The other six are *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981); *Decor by Nikkei International, Inc.* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981); *Chenax Majesty, Inc.* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981); *East Europe Import-Export, Inc.* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981); *Reale International, Inc.* v. *Federal Republic of Nigeria*, 647 F.2d 330 (2d Cir. 1981); and *Gemini Shipping, Inc.* v. *Foreign Trade Organization for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981).

issue under the Act: may a foreign plaintiff sue a foreign state in a federal court for breach of an agreement not governed by federal law? The language of the statute seems to allow it. After exhaustive examination of the context, language, and history of Article III, we defer to the Framers' prescient restraint, and find jurisdiction lacking in the constitutional sense.

I.

The facts relevant to the issues on appeal can be stated quite briefly. Verlinden B. V. is a Dutch corporation. It has its principal offices in Amsterdam, The Netherlands. On April 21, 1975, Verlinden signed a contract with the Federal Republic of Nigeria agreeing to ship to Nigeria 240,000 metric tons of cement over the course of several months. Nigeria, in turn, promised to establish "an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favor of the seller for the total purchase price through Slavenburg's Bank, Amsterdam, Netherlands." On June 23, 1975, Nigeria established the letter of credit at the Central Bank of Nigeria,[4] and made it payable through the Morgan Guaranty Trust Company in New York. Under the letter of credit, Verlinden could collect, upon presentation of certain documents, $60 per ton for shipments made to Nigeria. The letter of credit provided it was to be governed by "[U]niform [C]ustoms and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222."[5]

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[4] The Central Bank of Nigeria is an instrumentality of the Federal Republic of Nigeria. It performs functions similar to the United States Federal Reserve and the Bank of England.

[5] The Uniform Customs and Practice for Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222 ("UCP") is a document setting forth standards of conduct relating to letters of credit. It is published by the International Chamber of Commerce, which has its headquarters in Paris.

On August 21, 1975, Verlinden subcontracted with a third party, Interbuco (a Liechtenstein corporation), for the purchase of 240,000 tons of cement at $51 per ton. Verlinden agreed to pay Interbuco $5 per ton if Verlinden reneged on the purchase.

In September, Nigeria found its ports clogged with ships.[6] Central Bank instructed Morgan, and Morgan notified Verlinden, that Morgan was not to pay Verlinden under the letter of credit for a shipment of cement unless Verlinden had obtained, two months before sailing, Nigeria's permission to enter the port. Verlinden, alleging Central Bank's action constituted an anticipatory breach of the letter of credit,[7] sued Central Bank in the Southern District of New York. Verlinden's complaint claimed $4.66 million, consisting mostly of lost profits and of money Verlinden was forced to pay Interbuco under the terms of the subcontract. Central Bank moved

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[6] Nigeria's cement contract with Verlinden was one of 109 such contracts Nigeria entered in 1975. The details of this massive program for the purchase of cement, the port congestion it caused, and the litigation that ensued are described more fully in *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, *supra* note 3, decided this day.

[7] Article 3 of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce provides:

> An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and bona fide holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with. . . . Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

Central Bank does not seriously dispute that its instructions to Morgan violated the UCP.

to dismiss the complaint for lack of jurisdiction under the FSIA. The district court granted the motion, assuming, as we have in setting forth the facts above, all the allegations of Verlinden's complaint to be true. Verlinden appeals.

II.

Turning to the law, our first inquiry must be whether Verlinden's complaint meets a threshold requirement under the FSIA. Do both Verlinden and Central Bank fall into the category of parties contemplated by the Act? Section 2(a) of the FSIA, *codified at* 28 U.S.C. § 1330(a), provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

The parties agree that Central Bank is an "instrumentality of a foreign state" under 28 U.S.C. § 1603(b), and therefore is a "foreign state" under § 1603(a). Accordingly, Verlinden's suit is one "against a foreign state" for purposes of § 1330(a).

Verlinden's qualification under the Act is less clear, since it is a foreign corporation. The Report of the House Judiciary Committee on the bill that later became the Act (H.R. 11315) proclaims the Act's purpose to be to ensure that "*our citizens* will have access to the courts" in suits against foreign states. House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. Code Cong. & Admin.

News 6604, 6605 *("House Report")* (emphasis added).[8] The draftsmen of § 1330(a) assumed "U.S. businessmen" and "American property owner[s]" would bring suit under the Act. *Id.* The experts who testified at subcommittee hearings spoke of protecting "American citizens," [9] "American businesses," [10] 'American parties," [11] and "American nationals." [12] Looking back to the hearings surrounding the introduction of a 1973 predecessor to H.R. 11315, references to "our citizens" again abound.[13]

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[8] *See also* Senate Judiciary Committee, *Define Jurisdiction of U.S. Courts in Suits Against Foreign States*, S. Rep. No. 1310, 94th Cong., 2d Sess. 8. The House and Senate Committees filed identical reports, and reference *infra* to the House Report may be deemed to represent the views of the Senate Committte as well.

[9] *Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, House of Representatives, 94th Cong., 2d Sess. 24 (1976) (*"1976 Hearings"*) (testimony of Monroe Leigh, Legal Adviser, Dep't of State). President Ford, in signing the bill into law, stated that the Act's provisions were "available to all American citizens." 12 Weekly Comp. of Pres. Docs. 1554 (1976).

[10] *1976 Hearings* at 80 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Dep't of Justice).

[11] *1976 Hearings* at 80 (testimony of Cecil J. Olmstead, Chairman, The Rule of Law Committee).

[12] *1976 Hearings* at 100 (statement of Charles N. Brower, Yale Law School).

[13] *Hearings on H.R. 3493 before Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary*, 93d Cong., 1st Sess. 18 (1973). (*"1973 Hearings"*) (testimony of Charles N. Brower, Legal Adviser, Dep't of State). The 1973 bill was introduced as S. 566, 93d Cong., 1st Sess., *see* 119 Cong. Rec. 2204 (1973), and H.R. 3493, 93d Cong., 1st Sess., *see id.* at 2880. The language of § 2 of those bills is identical in material respects to the text of the present 28 U.S.C. § 1330(a). *See, e.g.*, 119 Cong. Rec. 2213-15 (1973) (reprinting S. 566). The 1973 bills were withdrawn by their sponsors, and introduced as revised in H.R. 11315, 94th Cong., 1st Sess., *see* 121 Cong. Rec. 42017 (1975), and S. 3553, 94th Cong., 2d Sess., *see* 122 Cong. Rec. 17454 (1976). H.R. 11315 became the FSIA.

In general, Congress emphasized that it did not intend "to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." *Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 31 (1976) *("1976 Hearings")* (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Dep't of Justice).

On the other hand, extensive language in the legislative history supports the belief that Congress did not limit the Act to suits brought by Americans. The House Report states the Act provides "when and how *parties*" can sue a foreign state in American courts, *House Report* at 6604 (emphasis added), and that it applies to "any claim" against a foreign state, *id.* at 6611. Testimony before the subcommittee at the 1976 hearings referred broadly to relief for "private parties with claims," *1976 Hearings* at 31 (testimony of Bruno A. Ristau), and "private litigants," *id.* at 58 (testimony of Peter D. Trooboff, Chairman, Committee on Transnational Judicial Procedure, International Law Section, American Bar Association). Professor Moore finds a "plain intention . . . to confer on the district court jurisdiction of an action by an alien against a foreign state if the action otherwise meets the requirements" of the Act. 1 J. Moore, *Federal Practice and Procedure* ¶ 0.66[4] at 700.178-79 (2d ed. 1979). This conclusion is buttressed by the Act's removal provision, 28 U.S.C. § 1441(d), which is not limited to suits brought by U.S. citizens, and purports to allow removal to federal court of *"any* civil action brought in a State court against a foreign state" (emphasis added).

From this murky and confused legislative history, only one conclusion emerges: Congress formed no clear intent

as to the citizenship of plaintiffs under the Act. It probably did not even consider the question. In the absence of determinative—or even persuasive—guidance from the legislative history, the words of the statute control. Section 1330(a) is not limited to suits brought by Americans. It applies to "*any* nonjury civil action against a foreign state" (emphasis added). Accordingly, we hold that a suit brought in a federal court by an alien against a foreign state is properly filed—at least under the terms of the Act.

III.

Having concluded that both plaintiff and defendant are within the class of parties contemplated by § 1330(a), we are forced to confront the constitutional dilemma: does Congress possess the power to grant jurisdiction over a suit such as this?

Article III of the federal Constitution provides that the national government's "judicial Power shall extend to" certain types of disputes, which it lists in clause 1 of section 2.[14] That Congressional power to confer jurisdiction to those cases and no further has been established on a number of occasions. *E.g.*, *Hodgson* v. *Bowerbank*, 9 U.S. (5 Cranch) 303 (1809). *See also National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 604

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[14] The clause provides in full:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(Rutledge and Murphy, *JJ., concurring*); 626 (Vinson and Douglas, *JJ., dissenting*); 646 (Frankfurter and Reed, *JJ., dissenting*); *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 51 (2d Cir. 1980) *(per curiam) (en banc)*. To satisfy federal jurisdictional requirements, therefore, every case must be supported by both a Congressional grant of jurisdiction [15] and a constitutional base on which the statute rests. *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922). The legislative diversity grant, for example, 28 U.S.C. § 1332, stands squarely on similar words in Article III. The statutory federal question grant also tracks the constitutional phrase. 28 U.S.C. § 1331. Section 1330 can claim no such parallel language for support, and must seek it among the finite—and incongruent —words of Article III.

A.

The search for a constitutional basis for a § 1330 suit between two aliens brings us first, but only briefly, to Article III's diversity grant. It provides, *inter alia*, that the judicial power shall extend to "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The phrase nowhere mentions a case between two aliens. Accordingly, Congress is powerless to confer jurisdiction over such suits, at least on the basis of the diversity grant,[16] *Hodgson* v. *Bowerbank*,

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[15] *See Ex parte Edelstein*, 30 F.2d 636 (2d Cir.) (L. Hand, J.), *cert. denied*, 279 U.S. 851 (1929).

[16] *Cf.* 28 U.S.C. § 1350, conferring jurisdiction over suits "by an alien for a tort only, committed in violation of the law of Nations." Section 1350 permits suits between aliens through the federal question grant of Article III. *Filartiga* v. *Pena-Irla*, 630 F.2d 876 (2d Cir. 1980). So do, *inter alia*, the securities laws and antitrust laws, again operating through the federal question grant. *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) (securities laws); *Joseph Muller Corp. Zurich* v. *Societe Anonyme de Gerance*

[Footnote continued on following page]

supra, 9 U.S. at 303; *Montalet* v. *Murray*, 8 U.S. (4 Cranch) 46 (1807),[17] and Verlinden must look elsewhere in Article III for language to support its suit.

B.

A more colorable—but still unsuccessful—constitutional grounding for Verlinden's FSIA suit is the very first phrase of the relevant clause of Article III. That phrase extends the judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ." The federal courts have had little opportunity to construe the crucial language of the phrase, "arising under . . . the Laws of the United States," mainly because the passage in 1875 of the predecessor to § 1331 made direct resort to the Constitution unnecessary. A huge body of law interprets the statute. It is, therefore, to the almost identical words in § 1331—"arises under the . . . laws . . . of the United States"—to which we first turn in exploring whether Verlinden's suit "arises under" federal law for purposes of Article III.

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et D'Armement, 451 F.2d 727 (2d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) (antitrust laws).

We stated in *Filartiga* that physical torture violates the law of nations, and thereby transgresses the "laws of the United States." 630 F.2d at 888. We have elsewhere held that commercial violations, such as those here alleged, do not constitute breaches of international law. *See Dreyfus* v. *von Finck*, 534 F.2d 24, 30-31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *IIT* v. *Vencap, Ltd.*, *supra*, 519 F.2d at 1015.

[17] At least, Congress is powerless to confer jurisdiction when, as here, the suit contains aliens only. If the case were between an alien and an American on one side and an alien on the other, diversity jurisdiction would not exist under § 1332, *IIT* v. *Vencap, Ltd.*, *supra* note 16, 519 F.2d at 1015, but it might be available to Congress under Article III. *Compare State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523 (1967), *with Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

1.

We had occasion in *T.B. Harms Co.* v. *Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965), a copyright case, to discuss the three species of suit found to exist within the realm of § 1331. The first type finds its source in *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), in which Mr. Justice Holmes stated that "a suit arises under the law that creates the cause of action." Five years later in *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), the Supreme Court found the Holmes test too restrictive, and added a second genus of suit to § 1331: those in which the plaintiff's complaint discloses a need to interpret a federal law.[18] *Accord, Ivy Broadcasting Co.* v. *American Telephone & Telegraph Co.*, 391 F.2d 486, 492 (2d Cir. 1968). The third grouping is typified by *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). It imposes a "federal common law" upon cases in which the court finds a national interest so strong that a judge-made federal rule of decision preempts the state law that would otherwise govern the cause.

Verlinden's suit against Nigeria falls into none of the three categories. Its inclusion in the first group, suits in which federal law "creates the cause of action," is precluded by 28 U.S.C. § 1606. That section provides that, in FSIA suits, "the foreign state shall be liable in the same

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[18] In *Smith*, the cause of action was created by state law; a shareholder sued to enjoin his corporation's purchase of bonds, which purchase the shareholder considered unauthorized by the corporation's charter. State law created the charter. But the ground on which the shareholder alleged the purchase to be improper—that the federal instrumentality which had issued them had done so unconstitutionally—clearly called for the interpretation of a federal law.

Justice Holmes dissented.

manner and to the same extent as a private individual under like circumstances." There is no intent here to create new federal causes of action; the purpose of the Act instead is to provide "*access* to the courts in order to resolve ordinary legal disputes." *House Report* at 6605 (emphasis added). The House Report states flatly: "The bill is not intended to affect the substantive law of liability." *Id.* at 6610.[19] Indeed, the parties agree that the law governing Verlinden's suit for breach of the letter of credit is the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, or the law of New York. At any rate, it is not federal. Congress here intended to "create" no cause of action, and Holmes's test is not satisfied. *Cf. Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Schumacher* v. *Beeler*, 293 U.S. 367 (1934). Nor is the third test, for the progeny of *Clearfield Trust* have required a federal interest strong enough to supplant state rules of decision. *See, e.g., Miree* v. *DeKalb County*, 433 U.S. 25 (1977); *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980).

Appellant's contentions focus on the second, broader test. Its application depends upon the exact language of *Ivy Broadcasting*: whether "the complaint discloses a need for the interpretation of an act of Congress." Undoubtedly the FSIA, an act of Congress, will be construed if Verlinden's suit is permitted beyond the courthouse door. Delicate questions of sovereign immunity, which Congress

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[19] That is, "whether state or federal law is to be applied will depend on the nature of the issue before the court," not the presence of a foreign state. "Under the *Erie* doctrine state substantive law, including choice of law rules, will be applied if the issue before the court is non-federal." *1973 Hearings* at 47 (Dep't of State, Section-by-Section Analysis of 1973 bill). *Accord, House Report* at 6621.

in the Act made wholly federal, *see House Report* at 6610, will be the fulcrum of considerable controversy. If decided adversely to plaintiff, as they were by Judge Weinfeld, they will determine the outcome of the litigation.

Despite all this, the issue of soverign immunity is not disclosed by Verlinden's well-pleaded complaint. That complaint alleges the breach of a letter of credit, *simpliciter*. The Act retains sovereign immunity as a defense, to be raised by the defendant.[20] Defenses that have to be raised affirmatively, no matter how urgent their federal nature, do not confer jurisdiction. *Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U.S. 149 (1908). *See also Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125 (1974) *(per curiam)*; *Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454 (1894). The distinction is perhaps best illustrated by *Gully* v. *First National Bank in Meridian*, 299 U.S. 109 (1936), in which a federal statute removed the national bank's immunity from state taxation. Speaking for a unanimous court, Mr. Justice Cardozo stated: "A suit does not arise under a law renouncing a defense, though the result of the renunciation is an

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[20] *House Report* at 6616 ("sovereign immunity is an affirmative defense which must be specially pleaded"; "the burden will remain on the foreign state"). *Accord, 1976 Hearings* at 74 (statement of Committee on International Law of the Association of the Bar of the City of New York); *id.* at 81 (testimony of Cecil J. Olmstead). *See also 1973 Hearings* at 32 (testimony of Charles N. Brower) ("it is incumbent upon the defendant to raise the defense of sovereign immunity rather than the plaintiff being required to establish lack of immunity").

Some confusion on this point arises from § 1604, which is drafted to create a general principle of immunity, not a presumption of amenability which defendant must overcome. The reasons for this aspect of the Act's structure are historical. *1973 Hearings* at 32 (testimony of Charles N. Brower and Bruno A. Ristau). The above citations establish that the "negative drafting" was not intended to revise the rules of pleading.

extension of the area of legislative power which will cause the suitor to prevail." *Id.* at 116. *See generally* P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 883-90 (2d ed. 1973).

Moreover, the type of statute to be interpreted here is qualitatively different from the statutes involved in *Smith* and its progeny. Federal jurisdiction was present in those cases because the complaint revealed the need to construe a statute conferring substantive rights: in *Smith*, the Federal Farm Loan Act (creating the Federal Land Banks) and Article 1, § 8, cl. 18 of the Constitution (granting to Congress the right to make all laws necessary and proper to execute its powers); in *Ivy Broadcasting*, federal common law regarding the duties of communications carriers. *Accord, Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F.2d 222 (2d Cir. 1962) (statute creating right to petition for labor representation elections), *vacated on other grounds*, 372 U.S. 10 (1963). While in none of those cases did a federal law create the cause of action, each suit required construction of a law which, in another posture, had the power to do so. The laws regulated conduct and created rights outside the courtroom. This suit, *per contra*, requires construction of a federal statute, but only one regulating judicial practice. One cannot sue for violation of the FSIA. Accordingly, this case is closer to decisions like *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950). *Skelly Oil* called squarely for the interpretation of a federal statute (the Declaratory Judgment Act, 28 U.S.C. § 2201), yet the Supreme Court found jurisdiction lacking. Speaking for the Court, Mr. Justice Frankfurter explained that "the right to be vindicated was State-created," 339 U.S. at 673, not a right "arising under" federal law. That the conduit of jurisdiction was a federal statute did not create jurisdiction over the claim

where none existed before. The same is true here. *See also Moore* v. *Chesapeake & Ohio Railway Co.*, 291 U.S. 205 (1934).

2.

Having established that Verlinden's suit does not "arise under" federal law by principles developed in cases construing § 1331, the issue before us is this: is the meaning to be given to the words "arising under" in Article III sufficiently broader in their construction in § 1331 to bring Verlinden's suit within the federal judicial power? We think not, but we refuse to resolve this difficult case on the simple ground of logomachy. "The substantial identity of the words does not . . . require, on that score alone, an identical interpretation. The differences in the functions of the two enactments, in the circumstances surrounding their adoption and in their further provisions justify inquiry as to whether their meaning is different." Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L.J. 393, 405 n.47 (1936). The Supreme Court has implied, but has never held, that § 1331 occupies less than all of the ground staked out by the parallel phrase in Article III. *Shoshone Mining Co.* v. *Rutter*, 177 U.S. 505, 506 (1900).[21] The question before us is whether this case can stand on the narrow strip that remains.

The clearest statement of the Framers' intent concerning Article III of the Constitution comes from Alexander Hamilton, a delegate from New York. In *The Federalist*, No. 83, Hamilton wrote:

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[21] A simpler, but less germane, example of this is the erstwhile presence of a jurisdictional amount requirement in most federal question cases. 28 U.S.C. § 1331(a). *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96-486 (to be codified in 18 U.S.C. § 1331), eliminating the requirement.

> The judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.

A. Hamilton, *The Federalist*, No. 83, at 519 (Putnam ed. 1888). In other words, the Framers emphatically did not intend to grant the legislature power to create jurisdiction over any cases Congress chose. Congressional prerogative in this area is circumscribed.

Th first test of that Congressional power grew out of the Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789). In § 11 of that Act, Congress purported to confer on the district courts jurisdiction over any case "where . . . an alien is a party." In *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12 (1800), however, the Supreme Court found that the judicial power did not extend to a suit between two aliens, even where the statute conferred it.[22] *Accord*, *Hodgson* v. *Bowerbank*, *supra*. The Court in *Mossman* discussed the diversity clause of Article III, and found jurisdiction lacking for the reason set forth in section III-A, *supra*. The Court did not discuss, but by its holding passed upon, the "arising under" clause as well. Since judicial power was found wanting in the constitutional sense, the Court necessarily held that a suit brought under § 11 did not "arise under" a law of the United States for purposes of Article III. That is, the Supreme

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[22] The Court in *Mossman* did not void § 11 insofar as it applied to such suits, since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and the power to strike down statutes, still lay in the future. Instead, the Court construed § 11 to require that a citizen of the state be on at least one side of the dispute.

Court in *Mossman* v. *Higginson* decided that, despite a federal interest in suits involving aliens,[23] Congress by the mere act of passing a statute conferring jurisdiction over a class of suits did not bring those suits within the judicial power. The reason is clear: to allow Congress to do so places no limits on the judicial power at all, and a *sine qua non* of constitutional analysis instructs that this power is limited.

Mossman greatly advances our inquiry. Congress in the FSIA has purported to create jurisdiction over not cases "where an alien is a party," but cases "against a foreign state." In the absence of substantive rules of decision, we are constrained to find that the judicial power does not extend this far. *See Textile Workers Union* v. *Lincoln Mills*, *supra* (Frankfurter, *J.*, *dissenting*).[24]

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[23] That aliens were a subject of predominant—indeed, preemptive—federal concern was assumed by the Framers. *See Filartiga* v. *Pena-Irala*, *supra* note 16, 630 F.2d at 877-78. In fact, early drafts of Article III had included references to "all cases in which foreigners may be interested." *E.g.*, 1 Farrand 244 (notes of James Madison). *See also id.* at 247 (notes of Rufus King).

[24] Beyond *Mossman* and *Hodgson*, the latter case of *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443 (1852), provides support. Congress in the Great Lakes Act of 1845 had purported to create jurisdiction over cases "concerning" vessels on the Great Lakes, without changing the substantive rule of decision in those cases. 53 U.S. at 451-52. The Supreme Court, in an opinion by Chief Justice Taney, upheld the law on maritime grounds, but stated flatly that the jurisdictional provision would be unconstitutional if it were based only on the "arising under" grant and if it were unsupported by substantive regulations. *Id.* at 453. That is, a case brought under the jurisdictional provision would not "arise under" a law of the United States for purposes of Article III.

The conclusion to be gleaned from these canescent cases is this: the *Ivy Broadcasting* rule, requiring as a condition of jurisdiction the interpretation of a federal substantive law, *i.e.*, one

[Footnote continued on following page]

Looking beyond this sort of deailed and mechanical application of old holdings to new facts, it becomes evident that our decision here is compelled by broader principles. The Framers created federal courts to protect, first, rights secured by the Constitution, and, second, rights created by federal law. They were concerned with the enforcement of uniformity in the interpretation of federal laws, but only insofar as those federal laws regulated conduct. We turn once more to Hamilton, writing in *The Federalist*, No. 80, *supra*, at 495. He stated: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." Significantly, his concern for uniformity extended only to "causes," not to all federal laws. Accordingly, when *Mossman* was *sub judice*, the Supreme Court did not hold that the need for a uniform standard under which aliens might be sued in federal court created, *ipso facto*, federal jurisdiction. The need to develop such a uniform standard (through, perhaps, construction of the term "alien") did not implicate a federal "cause," and was therefore insufficient. Here, the asserted need for a uniform standard under which foreign states might be sued in American courts must fail for the same reason.

Thinking even more broadly, our result is required by the very structure of Article III, § 2, cl. 1. That clause lists, in sequence, nine types of cases to which the judicial power extends. *See* note 14, *supra*. If we accepted the interpretation of the first phrase necessary to find juris-

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which regulates conduct outside the courtroom, is of constitutional moment. We need not here hold whether the other aspect of the rule under § 1331 (that the necessity to interpret the federal law be disclosed by the complaint) is constitutionally required. *Louisville & Nashville Railroad Co.* v. *Motley* (*Motley II*), 219 U.S. 467 (1911), implies it is not.

diction here—that a case can "arise under" a jurisdictional statute—then we could eliminate the other eight phrases from the clause. For example, if we decided that Verlinden's suit was one "arising under a law of the United States" because it was brought under § 1330, then we could similarly hold that a suit "arose under a law of the United States" because it was brought under § 1332. The constitutional diversity grant would then be surplusage. If we are not to read the other phrases out of the clause, we must restrict the first phrase to cases arising under a substantive law.

Granted the above, we cannot be deterred by *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). *Osborn* contains dictum, made holding in *Bank of the United States* v. *Planters' Bank of Georgia*, *id.* at 904 (1824), that a suit brought by the Bank of the United States could "arise under" the statute creating the Bank and giving it the right to sue and be sued. The facts of the case merit examination, for it has been suggested,[25] and we believe, that the case should be limited to them. Shortly before *Osborn*, the Bank of the United States had won with great difficulty, the right to exist and to be free of state taxes. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Ohio continued to tax the Bank, and forcibly removed money from the Bank's vaults to satisfy the levy. In *Osborn*, the Bank sued to enjoin collection of the tax. The Supreme Court, faced with the death of the bank and of its holding in *McCulloch* on the one hand and with stretching jurisdictional concepts on the other, saved the Bank. A fair reading of the case depends heavily on the presence of an instrumentality of the United States as a party, and on the national government's desire to protect the Bank and itself from the

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[25] *E.g.*, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 481 (1957) (Frankfurter, *J.*, *dissenting*).

rapacious states. The Court twenty-eight years later did not extend *Osborn's* holding to cases where the United States was not a party, *The Propeller Genessee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443 (1852),[26] and we decline to do so here. *See generally*, Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 160-63, 184-96 (1953).

IV.

In interpreting the Constitution, we discern the Framers' intent only as seen through a glass, darkly, if at all. The delegates to the Constitutional Convention did not agree on all the Constitution's provisions, even as they signed it. Accordingly, a court construing its language must look as much to history, good sense, and sound concepts of judicial administration as to the text itself. Considering, therefore, both the past and the present, we find federal courts to be without power to hear suits such as the one before us.

The judgment is affirmed, on the ground that the court lacks subject matter jurisdiction over the controversy.

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[26] *Osborn* was extended to cases involving federally-chartered corporations, *see The Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), but that holding has been called a "sport," Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 160 n.24 (1953), and has been limited to its facts. *See Textile Workers Union* v. *Lincoln Mills*, *supra* note 25, at 481 (Frankfurter, *J., dissenting*).

No. 79 Civ. 1150.

United States District Court, S.D. New York.

April 21, 1980.

VERLINDEN B.V.,

Plaintiff,

—v.—

CENTRAL BANK OF NIGERIA,

Defendant.

BERTHOLD H. HOENIGER, New York City, for plaintiff. KISSAM, HALPIN & GENOVESE, New York City, for defendant; JAMES G. SIMMS, LEO T. KISSAM, JAMES H. HALPIN, LAURENCE MAY, PETER J. DRANGINIS, New York City, of Counsel.

Opinion

EDWARD WEINFELD, District Judge.

Verlinden B.V. ("Verlinden"), a Dutch corporation with its principal offices in Amsterdam, The Netherlands, commenced this action for anticipatory breach of an irrevocable documentary letter of credit established in its favor by the defendant Central Bank of Nigeria, and advised and payable by its correspondent bank, Morgan Guaranty Trust Company in New York. The defendant Central Bank of Nigeria ("Central Bank") is the central bank of the Federal Republic of Nigeria ("Nigeria") and is an "agency or instrumentality of a foreign state" within the meaning of the Foreign Sovereign Immunities Act ("Immunities Act") of 1976.[1]

[1] 28 U.S.C. § 1603(b) (Supp. 1979).
The Act defines a "foreign state" broadly to include "an agency or instrumentality of a foreign state." *Id.* § 1603(a). We follow that usage here. The substantive provisions

[Footnote continued on following page]

Although the instant action is based upon the alleged breach and repudiation by Central Bank of its obligations with respect to the irrevocable letter of credit, in order to put the matter into proper perspective, it is necessary to refer to events prior and subsequent to its issuance. On April 21, 1975, plaintiff entered into a contract whereby Nigeria agreed to buy from plaintiff, 240,000 metric tons of Portland Cement for the price of $U.S.60 per ton, or a total of $14,400,000.[2] The Nigerian government agreed to establish, within 21 days after the contract was signed, "an Irrevocable, Transferable abroad, Divisible[3] and confirmed Letter of Credit in favour of the seller for the total purchase price through Slavenburg's Bank, Amsterdam, Netherlands." Shipment was to be made at the rate of 20,000 metric tons per month to commence 45 days after Verlinden had received the documentary irrevocable letter of credit in its favor. Demurrage was to be paid at "a rate not exceeding $3,500 *per diem*" per vessel, if and to the extent that discharge of the cargo was not completed at the rate of at least 1,000 tons per day. Demurrage payments were to accrue commencing on the first day after a vessel's arrival in the waters of Lagos Apapa, the port

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of the Act are codified in 28 U.S.C. §§ 1602-11. To acommodate these new provisions, certain changes were made to the language of existing jurisdictional statutes; see 28 U.S.C. §§ 1332(a)(4) (diversity), 1391(f) (venue), 1441 (d) (removal); and an entirely new section was added as well. *See id.* § 1330.

[2] The contract was signed by the "Permanent Secretary, Ministry of Defense, Lagos . . . on behalf of the Federal Military Government of the Federal Republic of Nigeria."

[3] The letter of credit was to be governed by the Uniform Customs and Practice for Documentary Credits (The International Chamber of Commerce Brochure No. 222) (1962 Revision). It provides that a "credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank. Terms such as 'divisible' . . . add nothing to the meaning of the term 'transferable' and shall not be used." *Id.* Art. 46.

of Nigeria. The parties also agreed that the contract was to be governed by the Laws of the Netherlands and that disputes arising thereunder would be resolved by arbitration before the International Chamber of Commerce, Paris, France.

According to the allegations of plaintiff's amended complaint, on June 23, 1975 the defendant established its Documentary Credit No. CBN/BP/75/145 ("the letter of credit" or "the credit") in favor of plaintiff for the full contract price ($14,400,000); the credit included as well an open-ended amount for demurrage, to be paid at the rate of $3,500 per day per vessel. However, contrary to the terms of the cement agreement, the letter of credit was advised by and made payable through Morgan Guaranty Bank in New York, rather than plaintiff's bank (Slavenburg's) in the Netherlands. It was further at variance with the terms of the cement contract in that, as plaintiff alleges, it "was not confirmed, not divisible... internally inconsistent and commercially ineffective and unusable." Moreover, unlike the cement contract, the credit did not indicate when demurrage payments would commence. Plaintiff further alleges that in response to its request defendant, over a period of weeks, issued amendments to said letter of credit to render it internally consistent and commercially available and usable, as to which plaintiff was not advised by Morgan Guaranty until the latter part of September 1975. However, Morgan Guaranty did not confirm the credit as originally issued or amended, although it did advise plaintiff as beneficiary of amendments.[4]

In August 1975, the ports of Nigeria became bottlenecked with hundreds of ships carrying cargoes of cement,

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[4] Morgan Guaranty was prepared to confirm the letter of credit as amended upon payment of its confirmation charges by plaintiff, the beneficiary, but these were not paid.

sent by more than 68 other cement suppliers from whom Nigeria had purchased cement. As a result of the increasing congestion in these ports, Central Bank commencing in mid-September 1975 unilaterally directed its correspondent banks, including Morgan, to adopt a series of amendments to all irrevocable letters of credit issued in connection with the cement contracts. In essence, the advising banks were directed to stop demurrage payments against documents unless those documents had been sent to and certified for payment by Central Bank. Additionally, Central Bank directly notified the suppliers that payment would be accorded only for those shipments cleared and approved by Central Bank two months before their arrival in Nigerian waters. On September 30, 1975 Morgan Guaranty cabled Slavenburg's Bank in Amsterdam to advise plaintiff of these amendments. It can hardly be questioned—and the parties do not seriously dispute the fact—that these unilateral amendments to the irrevocable letter of credit constitute violations of the Uniform Customs and Practice for Documentary Credits the terms of which, by stipulation of the parties, are applicable.[5]

Plaintiff alleges that, in reliance upon the issuance of an irrevocable letter of credit as agreed upon, it contracted with another European concern, Interbuco Anstalt, Vaduz, Liechtenstein ("Interbuco"), for the purchase of cement

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[5] *See id.* Art. 3, which provides:

> An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and bona fide holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with. . . . Such undertakings can neither be modified not cancelled without the agreement of all concerned.

and thereby exposed itself to a potential liability in liquidated damages. It seeks to recover damages for payments already made or owing to Interbuco, as well as its own lost profits, counsel fees and expenses in the sum of $4,660,000 as compensatory damages and punitive damages in a like amount.

Presently before the Court are the defendant's motions to dismiss the action for (1) lack of subject matter jurisdiction; (2) lack of in personam jurisdiction over Central Bank based upon sovereign immunity and the act of state doctrine; (3) its motion for summary judgment on the merits; (4) also its motion pursuant to Rule 60(b) to be relieved of an order directing that it instruct Morgan Guaranty to keep funds in a separate account sufficient to satisfy any judgment plaintiff may recover; and (5) plaintiff's renewed motion for the entry of default judgment based upon [illegible]ndant's failure timely to file its answer.

I

Plaintiff alleges jurisdiction under section 2(a) of the Immunities Act, 28 U.S.C., section 1330, which, in pertinent part, provides:

> § 1330. Actions against foreign states
>
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsec-

tion (a) where service has been made under section 1608 of this title.

Defendant's initial challenge is to plaintiff's assertion of jurisdiction under section 2(a) of the Immunities Act, contending that the provision does not empower a federal district court to adjudicate a dispute between foreign entities involving claims based upon a breach of a documentary letter of credit—which defendant contends, if American law applies at all, would be governed by the laws of the State of New York and not by the United States Constitution or any federal statute enacted thereunder.

It is not questioned that if jurisdiction exists it must be because the claim arises under either the Constitution or the laws of the United States. The parties agree that in this instance the framework of reference is a "law of the United States" since neither the Constitution nor any of the other bases for jurisdiction under Article III of the Constitution is applicable.[6] Thus an initial inquiry centers about section 2(a) of the Immunities Act upon which plaintiff in its complaint expressly asserts jurisdiction "is founded." The defendant's basic position is that the Act does not create the claim or right as alleged in plaintiff's complaint; that section 2(a) does not confer subject matter jurisdiction with respect to the Verlinden claim; that it is a procedural statute defining the limits of sovereign immunity and regulating the circumstances under which foreign states, and their agencies or instrumentalities, may be sued in American courts, both state and federal.[7] It contends that, like the Declaratory Judg-

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[6] Plaintiff concedes that the diversity statute is inapplicable.

[7] The argument paraphrases the opening portion of the Act's legislative history. *See* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 *reprinted in* [1976] U.S. Code Cong. & Admin. News, p. 6604 (hereinafter cited as *"House Report"*).

ment Act.[8] the Immunities Act only "enlarged the range of remedies available" [9] to a litigant but did not thereby enlarge federal jurisdiction to include "the kinds of issues which give right of entrance to federal courts." [10] According to this view, when Congress enacted the Immunities Act it did no more than affirm the already existing bases of jurisdiction—such as diversity or federal question—while eliminating the requirement of jurisdictional amount when the defendant is a foreign state. The hard core of defendant's argument is that plaintiff's claim for damages based upon an alleged breach of the letter of credit is one that normally would be adjudicated under state or common law, and unless it appears that the claim is based upon a federal right or a federal question this Court is without jurisdiction; in short, defendant contends that the claim must be grounded upon a federal right authorized by Congress as an essential element under a well-pleaded complaint, "unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose," [11]—such as, in this case, sovereign immunity or the act of state doctrine. This restrictive concept, as Mr. Justice Frankfurter noted, was not "to indulge in formalism or sterile technicality" but reflected a deep concern that federal district courts would be inundated with a vast volume of litigation that normally should be adjudicated in state courts, merely because of an artfully pleaded complaint that anticipated defenses derived from federal law.[12]

Plaintiff responds that the Immunities Act is primarily a substantive federal statute—that Congress' purpose

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[8] 28 U.S.C. § 2201 (Supp. 1979).

[9] *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 671, 70 S.Ct. 876, 879, 94 L. Ed. 1194 (1950).

[10] *Id.*

[11] *Id* at 672, 70 S.Ct. at 879 (quoting *Taylor* v. *Anderson*, 234 U.S. 74, 75-76, 34 S.Ct 724, 725, 58 L. Ed. 1218 (1914)).

[12] *Id.* at 673, 70 S.Ct. at 879.

in passing the Act was to codify a single body of substantive, federal law governing assertions of sovereign immunity;[13] that although section 2(a), the jurisdictional provision of the statute, is cast in part in procedural terms, it incorporates by reference substantive criteria set forth in section 4(a).[14] Plaintiff emphasizes that these substantive criteria govern an area of law—foreign relations—that is uniquely federal in nature. In sum, the argument proceeds that since the Immunities Act is primarily substantive in that it makes fundamental substantive changes in the law of sovereign immunity, the claim asserted is one arising under a "law of the United States" within Article III of the Constitution under which the courts have federal question jurisdiction. Plaintiff emphasizes that, although state courts may continue to entertain suits against foreign states, they must apply federal substantive law, in assessing the validity of the sovereign immunity defense.[15] Thus, plaintiff argues that any complaint wherein jurisdiction is alleged under the Act requires for its correct determination the construction of the Act;[16] accordingly it is within federal jurisdiction. In further support of this, plaintiff points out that Congress obviously considered the likely increase in

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[13] *See House Report, supra* note 7, at 7-8; *reprinted* at 6605-06. *See also id.* at 12; *reprinted* at 6610. *Cf. Behring International, Inc.* v. *Imperial Iranian Air Force*, 475 F. Supp. 383, 394 (D.N.J. 1979).

[14] 28 U.S.C. §§ 1605-1607 (Supp. 1979) (defining sovereign immunity).

[15] 28 U.S.C. § 1602 (Supp. 1979).

[16] *Ivy Broadcasting Co.* v. *American Telephone & Telegraph Co.*, 391 F.2d 486, 492 (2d Cir. 1968). *See Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 379, 5 L.Ed. 257 (1821) (Marshall, C.J.) ("A case . . . may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.") *Cf. Smith* v. *Kansas City Title Co.*, 255 U.S. 180, 199-201, 41 S.Ct. 243, 245, 65 L.Ed. 577 (1921) (citing various tests of federal question jurisdiction).

litigation by virtue of the Immunities Act since it eliminated the requirement of a jurisdictional amount in suits against foreign states in order "to encourage the bringing of actions against foreign states in Federal courts" [17] and also provided for removal of such actions from the state to the federal courts. In essence, then, resolution of the present dispute turns on whether Congress intended to make the issue of soverign immunity a controlling question of federal law, and an essential, substantive element of the plaintiff's proof; or, as plaintiff has termed it, whether Congress intended to "federalize" all disputes in which foreign states are named as defendants. If it did, then, under plaintiff's theory, a foreign state could be sued under the Immunities Act by any plaintiff, regardless of its citizenship.

Plaintiff cites numerous cases and passages from the legislative history of the Immunities Act in support of its contentions. Of the cases cited, only one involved the Immunities Act and none sheds any light on the precise issue before the Court. Principal reliance is placed upon *Pfizer, Inc.* v. *Government of India*,[18] in which a five-member majority of the Supreme Court held that foreign nations could sue domestic corporations to recover damages for violations of the antitrust laws. Essentially, the issue there was whether a foreign sovereign nation was a "person" as that term is used in section 4 of the Clayton Act. Although the majority held that it was, they emphasized that the result reached did "not involve any novel concept of the jurisdiction of the federal courts" [19] since

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[17] Congress rewrote the federal jurisdictional statutes, eliminating the requirement of jurisdictional amount in suits against foreign states, in order "to encourage the bringing of actions against foreign states in Federal courts." *House Report, supra* note 7, at 13; *reprinted* at 6612.

[18] 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

[19] *Id.* at 318, 98 S.Ct. at 591.

Congress had already specifically conferred jurisdiction upon the federal courts to entertain suits brought by foreign nations [20] and that to allow foreign nations to sue under the antitrust acts was "no more than a specific application of a long-settled general rule." [21]

None of the many other lawsuits brought in the aftermath of the Nigerian cement crisis [22] and cited by plaintiff is parallel to this action. In all but one of those brought in United States courts the plaintiff was a domestic corporation allegedly injured by Nigeria's breach of the cement contract. Indeed, of the cases cited by the plaintiff, only two involved aliens on both sides of the dispute and neither is apposite. In *Ipitrade International* v. *Federal Republic of Nigeria* [23]—yet another of the Nigerian cement contract cases—a Swiss corporation sued in the United States District Court for the District of Columbia to enforce a final arbitration award against Nigeria pursuant to Swiss law and based upon the parties' agreement to submit all disputes to arbitration. Federal subject matter jurisdiction in *Ipitrade*, however, existed by virtue of a treaty for the enforcement of foreign arbitration awards to which the United States was a signatory and which had been incorporated into federal law.[24] Finally,

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[20] 28 U.S.C. § 1332(a)(4) (1976).

[21] *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 319, 98 S.Ct. 584, 591, 54 L.Ed.2d 563 (1978).

[22] *See, e.g., National American Corp.* v. *Federal Republic of Nigeria*, 420 F.Supp. 954 (S.D.N.Y. 1976); *id.*, 425 F.Supp. 1365 (S.D.N.Y. 1977); *id.*, 448 F.Supp 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); *East Europe Import-Export, Inc.* v. *Federal Republic of Nigeria and Central Bank of Nigeria*, No. 77 Civ. 2809 (S.D.N.Y.) (consolidating three cases) (decision pending); *Reale International, Inc.* v. *Federal Republic of Nigeria and Central Bank of Nigeria*, No. 78 Civ. 23 (S.D.N.Y.) (decision pending).

[23] 465 F.Supp. 824 (D.D.C. 1978).

[24] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208 (Supp. 1979).

plaintiff cites *Abdul-Rahman Omar Adra* v. *Clift*,[25] a custody dispute between alien parents of a Lebanese child living in the United States involving tortious conduct by one of the parties. In that case, federal jurisdiction explicitly was conferred by a statute [26] permitting aliens to sue in tort; moreover, the Court cited its inherent equitable powers to act on behalf of children found within its jurisdiction. In sum, none of these cases sheds any light on the instant issue.

The legislative history of the Immunities Act invoked by each party on its own behalf likewise provides no clear answer. Although the drafters of the Act proclaimed, among other matters, their intent to codify the restrictive principle of sovereign immunity [27] and to create a single uniform federal standard [28] they also stated that another purpose was to fashion a remedy for "American citizens," "U.S. businessmen" and "American property owner[s]" who "are increasingly coming into contact with foreign states and entities owned by foreign states." [29] The legislators repeatedly emphasized that they did not intend to create an international court of claims, and that the bill was "not designed to open up our courts to all comers to litigate any dispute which any party may have with a foreign state anywhere in the world." [30] Despite this somewhat contradictory and unilluminating legislative history, Professor Moore finds a "plain intention" on the part of Congress "to confer on the district

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[25] 195 F.Supp. 857 (D.Md. 1961).

[26] 28 U.S.C. § 1350 (1976). The paucity of cases brought under this statute is noted by Judge Friendly in *I.T.T.* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

[27] *House Report, supra* note 7, at 7; *reprinted* at 6605

[28] *Id.* at 12; *reprinted* at 6610.

[29] *Id.* at 6-7; *reprinted* at p. 6605.

[30] Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 94th Cong., 2d Sess., on H.R. 11315, June 2 and 4, 1976, p. 31.

court jurisdiction of an action *by an alien* against a foreign state if the action otherwise meets the requirements of that section." [31] However, the single section of legislative history cited to support that view does not, either expressly or impliedly, reflect Congress' "plain intent" on the precise jurisdictional question here at issue—whether subject matter jurisdiction was granted as to a claim asserted, not by a United States citizen, but by a foreign entity against a foreign state. A close study of the legislative history indicates that Congress did not consider or even discuss either vesting or limiting jurisdiction in the district courts where the claimant was a foreign entity.

Nonetheless, the view propounded by Professor Moore and plaintiff is not without support. While Congress' foremost concern was with actions by United States citizens against foreign sovereigns it does not follow that it necessarily intended to deny foreign citizens or entities access to our courts when they asserted claims against a foreign state. In fact, the legislative history reflects a purpose "to provide when and how *parties* can maintain a lawsuit against a foreign state." [32] The Congressional Report further commented that "there are no comprehensive provisions in our law to inform *parties* when they can have recourse to the courts to assert a legal claim against a foreign state." [33] To be sure the all inclusive references to "parties" by themselves hardly carry the day for the plaintiff's contention. But the language of section 1330 is broad and embracing. It confers jurisdiction over "any nonjury civil action" against a foreign state.[34] It neither limits such actions to those brought

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[31] 1 Moore's Federal Practice ¶ 0.66[4] at 700.178-79 (1979) (emphasis supplied) (citation omitted).

[32] *House Report, supra* note 7, at 6; *reprinted* at 6604 (emphasis supplied).

[33] *Id.* at 7; *reprinted* at 6605 (emphasis supplied).

[34] 28 U.S.C. § 1330(a) (Supp. 1979).

only by citizens of the United States nor does it exclude those brought by foreign citizens. The only delimiting test of jurisdiction contained in the express language of the statute is the requirement that the case have sufficient contact with the United States, considered hereafter.[35] Moreover, section 1330(a) must be read in conjunction with the new removal provision;[36] both are part of the "comprehensive jurisdictional scheme" enacted by Congress to foster "uniformity in decision"[37] in cases involving foreign states. The removal provision permits a foreign state named as a defendant in "[*a*]*ny* civil action brought in a State court"[38] to avail itself of a federal forum.

Clearly there are instances in which aliens may sue foreign instrumentalities in the state courts.[39] If the defendant's view of the Immunities Act were adopted, and aliens were barred from suing aliens in the federal courts, the purpose of the removal statute would be thwarted; a foreign state that removed an action might well find that the federal court had no jurisdiction over the case. That result would frustrate the Congressional purpose of concentrating litigation against sovereign states in the federal courts in order to aid the development of a uniform body of federal law governing assertions of sovereign immunity. It could hardly have been within the contemplation of Congress to permit removal in the instance of an action properly commenced in a state court by a foreign citizen against a foreign nation and to deny initial access to the federal courts to the same plaintiff.

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[35] *See* 28 U.S.C. §§ 1603(d) and (e); 1605(a)(2) (Supp. 1979).

[36] *Id.* § 1441(d).

[37] *House Report, supra* note 7, at 13; *reprinted* at 6611.

[38] 28 U.S.C. § 1441(d).

[39] *See, e.g., J. Zeevi & Sons* v. *Grindlays Bank (Uganda)*, 37 N.Y.2d 220, 371 N.Y.2d 892, 333 N.E.2d 168, *cert. denied*, 423 U.S. 866, 96 S.Ct. 126, 46 L.Ed.2d 95 (1975).

In sum, although the Court is unable to discern any precedent or any articulated Congressional intention to grant subject matter jurisdiction in actions of this type in the federal courts, the language of the statute itself is controlling. That language is broad and inclusive. It incorporates into the concept of jurisdiction substantive, federal criteria for determining the validity of assertions of sovereign immunity. It imposes a single, federal standard to be applied uniformly by both state and federal courts hearing claims brought against foreign states. In consequence, even though the plaintiff's claim is one grounded upon common law, the case is one that "arises under" a federal law because the complaint compels the application of the uniform federal standard governing assertions of sovereign immunity.[40] In short, the Immunities Act injects an essential federal element into all suits brought against foreign states. That Congress may not have foreseen the result of its handiwork—that foreigners suing foreigners would be given access to a federal forum to litigate contract disputes—does not undo the broad language it wrote. We hold that the presence of aliens on both sides of this dispute does not deprive the Court of subject matter jurisdiction.

II

That determination, however, does not end inquiry. There remains for consideration the defendant's further motion to dismiss the complaint for lack of in personam jurisdiction. Subdivision (a) of section 1330, already cited, provides that the district court has jurisdiction:

> as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . under sections 1605-1607 . . . .[41]

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[40] *See Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968) (citing cases).

[41] 28 U.S.C. § 1330(a) (Supp. 1979).

Subdivision (b) of section 1330, which the legislative history describes as in effect a federal long-arm statute over foreign states, their agencies and instrumentalities,[42] provides in pertinent part:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) . . . .[43]

Thus, a foreign state is subject to district court in personam jurisdiction only in those instances where it is not entitled to sovereign immunity as specified in sections 1605-1607 of the Act. The enumerated exceptions to sovereign immunity set forth therein for the most part concern commercial activities by a foreign state having a nexus with the United States.[44] These substantive criteria were intended to embody the constitutional requirements of due process, which may only be satisfied if there are sufficient contacts between the litigant and the forum state.[45]

Section 1605(a)(2) defines three "commercial activity" situations in which a foreign state is not entitled to sovereign immunity and consequently in which the

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[42] *House Report, supra* note 7, at 13; *reprinted* at 6612.

[43] 28 U.S.C. § 1330(b) (Supp. 1979).

[44] There are other exceptions as well. For purposes of this motion, the most important of these is the waiver provision, 28 U.S.C. § 1605(a)(1), discussed in Part III, *infra*.

[45] *See House Report, supra* note 7, at 13-14; *reprinted* at 6612. *Cf. Rush* v. *Savchuk*, — U.S. —, 100 S.Ct. 571, 62 L.Ed 2 516 (1980); *World-Wide Volkswagen Corp.* v. *Woodson*, —U.S.—, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Kulko* v. *Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

court has personal jurisdiction over a foreign state. These are when:

> [1] . . . the action is based upon a commercial activity carried on in the United States by the foreign state; [2] or upon an act performed in the United States by the foreign state in connection with a commercial activity of the foreign state elsewhere; [3] or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .[46]

Plaintiff asserts that its action is based upon each specified "commercial activity" and hence that it has satisfied the requirements of in personam jurisdiction.

The terms "commercial activity", and its companion term, "commercial activity carried on in the United States by a foreign state," are explicitly defined by the Act:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.[47]

We turn now to the plaintiff's contention that it comes within each of the three exceptions.

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[46] 28 U.S.C. § 1605(a)(2) (Supp. 1979).

[47] 28 U.S.C. § 1603(d) and (e) (Supp. 1979).

Appendix—District Court Opinion

A. *"Commercial Activity Carried on in the United States"*

Plaintiff's initial contention is that Central Bank subjected itself to the jurisdiction of the United States courts by carrying on commercial activity within this country. To prevail upon this point, the plaintiff must identify a "regular course of commercial conduct" or a "particular commercial transaction or act" carried on here; demonstrate that this activity has "substantial contact[s]" with the United States; and prove that its cause of action is "based upon" the commercial activity.

Plaintiff's task is burdened by the fact that the underlying activity which gave rise to its claim of anticipatory breach of the letter of credit occurred outside the United States. The parties are foreigners. Plaintiff, a Dutch corporation, negotiated and executed the cement contract in Nigeria. Shipment of the cement was to be made from ports in Europe. Delivery was to be made in Nigeria. The work was subcontracted to Interbuco, a European concern. The express terms of both the contract and the credit provide for payment ultimately to be made in the Netherlands through Slavenburg's Bank. The parties agreed to resolve all disputes by applying foreign law in a foreign tribunal.

Like the contract, the credit involved activity carried on or consummated overseas. It was established abroad by a foreign bank; was to be advised abroad, to another foreign bank; and named a foreign beneficiary. It adopted many of the contract's substantive provisions, which were to be performed exclusively in Europe and Nigeria by foreign parties. Although it contained no choice of law or forum provisions, it hardly can be argued that the issuing bank (the defendant) and the beneficiary (the plaintiff) intended to invoke the benefits and privileges of

American laws,[48] or to select an American forum for the resolution of disputes arising out of the credit. Certainly there is no indication, either in the credit as originally issued or in any of the discussions preceding its amendment, that the parties ever contemplated such a result. Indeed, their agreement that Dutch law was to govern disputes under the contract suggests otherwise.

Nevertheless, plaintiff contends that Central Bank carried on "a regular course of commercial conduct" in this district which constituted substantial contact. It points to an entire series of transactions, involving vast sums of money, between Central Bank and Morgan Guaranty. There is no dispute over the fact that Central Bank kept large sums of U.S. dollars on deposit at Morgan, and that Morgan was authorized to draw on the defendant's behalf from accounts kept by Central Bank in the Federal Reserve Bank in New York. Moreover, Central Bank regularly advised letters of credit through Morgan; a number of these were issued in connection with cement contracts between the Federal Republic and suppliers other than Verlinden. Morgan confirmed several of these credits and thereby exposed itself to separate liability for breach of the credit's terms.[49] Furthermore, as part of its ongoing banking relationship with Morgan, the defendant sent several of its employees to Morgan for training in bank management. In short, there is ample evidence that both before and after the transaction at issue here, Morgan had a longstanding banking relationship with Central Bank, for whom it performed multifarious banking services within the United States.

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[48] *See Hanson* v. *Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958); *Carey* v. *National Oil Corp.*, 453 F.Supp. 1097, 1101 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673, 676 n.7 (2d Cir. 1979); *Upton* v. *Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979).

[49] *See* Art. 3, Uniform Customs and Practice for Documentary Credits (The International Chamber of Commerce Brochure No. 222) (1962 Revision).

Plaintiff argues that these actions, considered together, constitute "a regular course of commercial conduct" in the United States, and that that conduct has substantial contact with this country. For purposes of this motion, we assume that these assertions are true. We may even assume that these jurisdictional facts would be sufficient to justify a finding that Central Bank is "present" or "doing business" [50] in New York and thus would be subject to suit here if those traditional tests of jurisdiction applied. But they do not compel the same finding under the Act which here controls.

The Immunities Act rejected the traditional test of "doing business" and adopted instead the approach of the more recent long-arm statutes.[51] Specifically, the Act

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[50] *See* N.Y.C.P.L.R. 301 (McKinney's 1978). *See also Gelfand* v. *Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2d Cir. 1964), *on remand*, 385 F.2d 116 (1967); *Frummer* v. *Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 536, 281 N.Y. S.2d 41, 43, 227 N.E.2d 851 (1967) (citing cases).

The District of Columbia has a provision which dates from a time antecedent to the passage of the long-arm statute and which remains in force today. D.C. Code §§ 13-334 (1973). *See Ramamurti* v. *Rolls-Royce Ltd.*, 454 F.Supp. 407, 409 n.2 (D.D.C. 1978).

The sheer volume of a defendant's business in the forum state is not the decisive factor in determining whether jurisdiction exists, even under the traditional test.

It is the nature and quality of the relationship between the defendant and the forum that determines whether the exercise of jurisdiction is appropriate. *See Hanson* v. *Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 159, 90 L.Ed. 95 (1945). *Cf. East Europe Domestic Intern. Sales Corp.* v. *Terra*, 467 F.Supp. 383, 388-89 (S.D.N.Y. 1979); *National American Corp.* v. *Federal Republic of Nigeria*, 425 F.Supp. 1365, 1369, 1370 (S.D.N.Y. 1977); *Textile Museum* v. *F. Eberstadt & Co., Inc.*, 440 F.Supp. 30, 32 (D.D.C. 1977).

[51] *See, e.g.*, N.Y.C.P.L.R. § 302 (McKinney's 1978); D.C. Code §§ 13-401 to 13-434 (1973).

"is patterned after the long-arm statute Congress enacted for the District of Columbia." [52] Yet even the modern portion of the District's statute is only a guide to interpreting the Act, not a binding directive. There are significant differences in language and effect between the District's statute and the Act, which Congress, the author of both, could not have overlooked. For example, jurisdiction under the District's long-arm statute exists whenever a foreign defendant (1) "*transact*[*s*] *business*," [53] or (2) causes tortious injury within the District of Columbia by an act outside the District, "if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia." [54] The first of these provisions has been interpreted to extend jurisdiction to the farthest reaches permitted by the due process clause; [55] the second, to permit jurisdiction even when the defendant's contacts with the District bear "no relation to the particular tort" that forms the basis of the cause of action.[56] Neither of these provisions has found its way into the Immunities Act. Instead, as to foreign states, Congress provided a much narrower basis for jurisdiction.[57] When jurisdiction is

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[52] *House Report, supra* note 7, at 13; *reprinted* at 6612.

[53] D.C. Code § 13-423(a)(1) (1973) (emphasis supplied).

[54] *Id.* § 13-423(a)(4).

[55] *See Margoles* v. *Johns*, 483 F.2d 1212, 1218 (D.C. Cir. 1973); *Dorothy K. Winston & Co.* v. *Town Heights Develop., Inc.*, 376 F.Supp. 1214, 1216 (D.D.C. 1974).

[56] *Aiken* v. *Lustine Chevrolet, Inc.*, 392 F.Supp. 883, 885 (D.D.C. 1975) (*quoting* Uniform Interstate and International Procedure Act, § 1.03(a)(4), 9B Uniform Laws Ann. 307, 312 (Commissioners' Notes) (1966)).

[57] *See Harris* v. *VAO Intourist, Moscow*, 481 F.Supp. 1056, 1059 (E.D.N.Y. 1979) ("[D]ue to the policy and language of the Immunities Act, the Act's bases of jurisdiction are less comprehensive than those found in the usual jurisdictional statutes of the states and the District of Columbia.")

alleged under any of the Act's three "commercial activities" exceptions, the plaintiff's cause of action must be "*based upon*" the commercial activity specifically enumerated in the exception.[58] At least with respect to the first two exceptions, we take this to mean that there must be a close connection between the cause of action asserted and the jurisdictional facts upon which it is based.[59] Other contacts between a defendant and a forum state unrelated to a particular cause of action but that might justify the assertion of jurisdiction under the theories of "doing business," or even of "transacting business," do not satisfy the requirements of the Immunities Act. Rather, the focus must be on the nexus between the forum and the particular facts giving rise to the cause of action. In the instant case, the only relevant conduct of Central Bank which might support jurisdiction is the establishment of the Verlinden letter of credit and its decision to advise the credit to plaintiff through a New York bank. This action is not "based upon" Central Bank's establishment of other letters of credit issued in payment of other contracts or the other services performed by Morgan on behalf of Central Bank and unrelated to the Verlinden letter of credit.

Whether one denominates the conduct of Central Bank and Morgan in the United States with respect to the Verlinden letter of credit "a regular course of commercial conduct" or "a particular transaction or act," the crucial question is whether it involves "substantial contact" with the United States within the meaning of the Act. We

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[58] 28 U.S.C. § 1605(a)(2) (Supp. 1979) (emphasis supplied). *See Harris* v. *VAO Intourist, Moscow*, 481 F.Supp. 1056, 1060 (E.D.N.Y. 1979) (citing cases and articles); *Paterson, Zochonis (U.K.) Ltd.* v. *Compania United Arrow*, S.A., No. 77 Civ. 4470, slip op. at 3 (S.D.N.Y. January 30, 1980) (Sand, J).

[59] *Accord Harris* v. *VAO Intourist, Moscow*, 481 F.Supp. 1056, 1060-61 (E.D.N.Y. 1979).

hold that it does not. The letter of credit, the breach of which is the basis of plaintiff's claim, does not constitute a commercial activity carried on in the United States by the defendant. The establishment of the letter of credit by the defendant in Nigeria was a single act performed there to provide payment if due under the cement contract. It did not involve substantial contact with the United States within the meaning of the Act.

Although Congress deliberately left to the courts the task of defining the nature and scope of the requisite contacts,[60] it provided some guidance. The legislative history makes plain that Congress intended to bestow jurisdiction in cases in which there is "a degree of contact *beyond* that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." [61] This passage clearly underscores the fact that the "commercial activity carried on in the United States" must be substantial to support jurisdiction. Not only does the plaintiff not meet that test, but the other contacts relied upon between Central Bank and the United States with respect to the Verlinden credit are insufficient to satisfy the required standard. Central Bank engaged Morgan to act as a correspondent and advising bank with respect to the Verlinden credit. All of Morgan's subsequent actions were consistent with that role, which never changed. When Central Bank established the credit, Morgan advised plaintiff and its Dutch bank of that fact. Thereafter, it telexed all correspondence, including notice of amendments to the credit and clarifications of its terms, to the parties.[62] It was prepared to accept appropriate shipping documents tendered

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[60] *House Report, supra* note 7, at 17; *reprinted* at 6616.

[61] *Id.* (emphasis supplied).

[62] The use by a foreign party of an agent within the United States to forward messages by telex between itself and another foreign party is not a sufficient contact upon which the Court may base jurisdiction in the United States. *East Europe Domestic Intern. Sales Corp.* v. *Terra*, 467 F.Supp. 383 (S.D.N.Y. 1979).

by plaintiff or plaintiff's bank and to pay drafts against them on terms specified by Central Bank in the letter of credit and in subsequent amendments. Every piece of correspondence emanating from its office and sent to Verlinden, including a copy of the credit itself, indicated that Morgan acted solely as an advising bank and undertook no independent responsibility for guaranteeing the letter of credit. It functioned in a ministerial capacity, without exercising discretion or independent judgment.

From the beginning it was clear that the parties never regarded New York as a focal or end-point in the transaction. By its terms the letter of credit was to be "advised [by Morgan] through Slavenburg's Bank, Amsterdam." Both parties, by their actions, have diminished the importance of their own New York contacts to the transaction. Plaintiff has maintained throughout that while the parties never agreed to any contacts with the United States and the entire deal was to be performed in Europe and Africa, nonetheless, by unilaterally choosing to establish contacts with the United States, the defendant subjected itself to the jurisdiction of this Court. Defendant, on the other hand, maintains that although it utilized the services of a New York bank, it strictly circumscribed the depth and extent of its New York contacts. For example, it repeatedly instructed Morgan, in both the credit itself and in subsequent correspondence, not to undertake any independent liability for the transaction. During subsequent negotiations, when it changed that instruction and authorized Morgan to confirm the letter at Verlinden's expense, Central Bank acted only upon Verlinden's insistence; when Verlinden declined to accept the offer, the letter remained unconfirmed. Plaintiff's attempt to dissect Morgan's ministerial activities cannot destroy the fact that Morgan's function throughout was solely that of an advising bank. In short, whatever contacts there were with New York with respect to the subject matter of this litigation were transitory and

insubstantial;[63] accordingly, we hold that this Court is without jurisdiction under the first of the three commercial activities exceptions to the Act.

B. *"An Act Performed in the United States in connection with a Commercial Activity of the Foreign State Elsewhere"*

Verlinden next argues that Central Bank is subject to suit under the second exception to the Act. Essentially it contends that the repudiating instruction, which is the basis of its claim of anticipatory breach of the letter of credit, although issued in Nigeria, took effect only when received and acted upon by Morgan in New York. In plaintiff's words, "[t]he repudiating instructions had their effect and found their target in the U.S. not in Nigeria."[64] The fact that Morgan received the repudiating instruction in New York did not constitute an "act performed in the United States"; the repudiating act was performed at the place where the instruction was issued—Nigeria. Plaintiff's argument on this point is more properly addressed to the third commercial exception.

C. *"An Act . . . Outside the United States . . . that Causes a Direct Effect in the United States"*

Plaintiff's final contention is that Central Bank surrendered its immunity under this exception—by committing acts outside the United States that "cause[d] a

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[63] Judge Goettel reached this same conclusion under the New York long-arm statute in another of the Nigerian cement contract cases. *See National American Corp.* v. *Federal Republic of Nigeria*, 425 F.Supp. 1365, 1370 (S.D.N.Y. 1977). In that case, the facts pointed more strongly in favor of jurisdiction than they do here: plaintiff was a New York corporation; the credit was payable to it in New York through a New York bank; plaintiff sued under the New York long-arm statute, which only requires "minimum" rather than "substantial" contacts to support jurisdiction.

[64] Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and for Summary Judgment, at 11 (emphasis supplied).

direct effect in the United States." Although this section has principally been applied to activity causing tortious consequences,[65] the legislative history makes clear that it was intended to have wider application.[66] However, this exception can only be invoked when a "*substantial*" effect within the territory "occurs as a *direct* and *foreseeable* result of the conduct outside the territory." [67] In applying this section courts have uniformly held that the locus of the injury is dispositive of jurisdiction;[68] indeed, that fact takes precedence over the citizenship of the victim. For example, even when the victim of a foreign state's tortious conduct is an American citizen injured abroad, the sovereign is protected by immunity and there is no jurisdiction in the American courts. In such cases the injury to the victim's bereaved relatives living in the United States is not sufficiently "direct" or "substantial" to support the assertion of federal jurisdiction.[69]

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[65] *See, e.g., Harris* v. *VAO Intourist, Moscow*, 481 F.Supp. 1056 (E.D.N.Y. 1979); *Upton* v. *Empire of Iran*, 459 F.Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979).

[66] *House Report, supra* note 7, at 19; *reprinted* at 6618. Congress adopted by reference "the principles set forth in section 18, Restatement of the Law, Foreign Relations Law of the United States (1965)." *Id.* The broad language of that section of the Restatement grants a state the power to "prescribe a rule of law attaching legal consequences" to conduct, whether tortious or otherwise, that occurs outside the jurisdiction and causes substantial, direct, and foreseeable effects within the jurisdiction.

[67] *Id. See Harris* v. *VAO Intourist, Moscow*, 481 F.Supp. 1056, 1062-63 (E.D.N.Y. 1979) (emphasis supplied).

[68] *Carey* v. *National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979); *Harris* v. *VAO Intourist, Moscow*, 481 F.Supp. 1056, 1064-65 (E.D.N.Y. 1979); *Upton* v. *Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979). *Cf. Yessenin-Volpin* v. *Novosti Press Agency, Tass*, 443 F.Supp. 849, 855 (S.D.N.Y. 1978).

[69] *Harris* v. *VAO Intourist, Moscow*, 481 F.Supp. 1056, 1065 (E.D.N.Y. 1979) (citing cases); *Upton* v. *Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979).

In the case at bar, while the "repudiation" was issued in Nigeria (an act outside the United States), its receipt by Morgan caused no "direct effect in the United States." Perhaps recognizing this, plaintiff in its continued effort to come within the exception relies upon *J. Zeevi & Sons* v. *Grindlays Bank (Uganda)* [70] in which the New York State Court of Appeals held that the repudiation by a foreign bank of a letter of credit advised through a New York bank had an injurious effect upon New York's reputation as "financial capital of the world, . . . [and] international clearinghouse and market place for a plethora of international transactions. . . ." [71] This effect visited not upon the plaintiff but upon a constituency of unnamed strangers to this lawsuit, is at most speculative and remote.[72] Indeed, solicitude for New York's "preeminent financial position" [73] should induce the courts to forbear the exercise of jurisdiction in close cases. New York would be detrimentally served by a decision subjecting foreign customers of its banks to the in personam jurisdiction of American courts whenever they advise credits to foreign beneficiaries through American banks. It would not be unrealistic to suggest that foreign states, aware that the designation of American banks as advisors in letters of credit would in consequence subject them to in personam jurisdiction in the event of a claimed breach, would have little hesitancy or difficulty in designating banks in foreign lands. It could hardly have been the purpose of Congress to force the loss of such business upon the American financial community. We hold that the instruction of repudiation received by Mor-

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[70] 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, *cert. denied*, 423 U.S. 866, 96 S.Ct. 126, 46 L.Ed.2d 95 (1975).

[71] *Id.* 37 N.Y.2d at 227, 371 N.Y.S.2d at 898, 333 N.E.2d 168, 172.

[72] *Cf. ITT* v. *Cornfeld*, 619 F.2d 909 (2d Cir. 1980).

[73] *J. Zeevi & Sons* v. *Grindlays Bank (Uganda)*, 37 N.Y.2d 220, 227, 371 N.Y.S.2d 892, 898, 333 N.E.2d 168, 174, *cert. denied*, 423 U.S. 866, 96 S.Ct. 126, 46 L.Ed.2d 95 (1975).

gan did not subject defendant to in personam jurisdiction under the third exception.

In urging jurisdiction under the third commercial exception, plaintiff relies principally upon two decisions, neither of which is dispositive here. First, Verlinden points to Judge Goettel's observation, made in a case with facts quite different from those of the instant action, that "[t]he breach of a letter of credit having a New York beneficiary, advised by and payable through New York banks, would appear to satisfy the last [of the three] criteria of 28 U.S.C. § 1605(a)(2) . . . ." [74] Apart from the fact that this is dictum, recognized as such by Judge Goettel, the plaintiff, the named beneficiary in the letter of credit, was a New York corporation. New York was the final destination for payment under that credit, the locus of the injury occasioned by the alleged breach of the credit, and the home state of the beneficiary. Thus, the act of anticipatory repudiation had a direct effect in New York. None of those factors obtains here. Although Judge Goettel's holding in that case actually was based upon pre-Immunities Act law, his dictum is consistent with those subsequent cases, already discussed, in which courts have held that the locus of the injury is crucial in determining whether jurisdiction exists under the third "commercial activity" exception of the Act.[75]

The second case upon which plaintiff relies is *J. Zeevi & Sons* v. *Grindlays Bank (Uganda)*,[76] which involved the wrongful repudiation by a Ugandan bank of an irrevocable letter of credit advised through a New York bank and in favor of an Israeli corporation. Jurisdiction was

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[74] *National American Corp.* v. *Federal Republ of Nigeria*, 448 F.Supp. 622, 639 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

[75] *See* note 68, *supra*.

[76] 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, *cert. denied*, 423 U.S. 866, 96 S.Ct. 126, 46 L.Ed.2d 95 (1975).

established by the attachment of assets held in New York by the defendant's bank, which was found to be its agent in New York. *Zeevi* is distinguishable from the case at bar in a multitude of respects. It was decided before the passage of the Immunities Act; the decision was based solely on New York law; questions of personal jurisdiction, or of the reach of the long-arm statute, were not decided or even considered by the court in *Zeevi*. The court's precise holding was limited to the narrow conclusion that under section 1314 of the Business Corporation Law of New York, a cause of action for wrongful repudiation of a Ugandan bank's obligation "arose within" the state of New York. This conclusion was premised, at least in part, on the court's rather questionable assumption that the "parties by listing United States dollars as the form of payment, impliedly" accepted the benefits and invoked the protection of New York law.[77]

Here, by contrast, we deal solely with the question of whether personal jurisdiction exists under the standard set by Congress. We find no indication that Morgan acted as Central Bank's agent. Although payment was prescribed in U.S. dollars, the parties never invoked, explicitly or by implication, the protection of New York law.[78]

Finally, even if *Zeevi* were applicable, there is reason to believe that its authority has been limited to its peculiar factual situation. In at least two subsequent decisions, New York courts have held that the establishment of a

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[77] *J. Zeevi & Sons* v. *Grindlays Bank (Uganda)*, 37 N.Y.2d 220, 227, 371 N.Y.S.2d 892, 898, 333 N.E.2d 168, 174, *cert. denied*, 423 U.S. 866, 96 S.Ct. 126, 46 L.Ed.2d 95 (1975).

[78] Judge Goettel also held that *Zeevi* was inapplicable to the question of whether personal jurisdiction exists; he distinguished that case on the same bases as those enumerated here. *See National American Corp.* v. *Federal Republic of Nigeria*, 425 F.Supp. 1365, 1370-71 (S.D.N.Y. 1977).

correspondent banking relationship between a foreign and domestic bank does not subject the foreign bank to the personal jurisdiction of the New York courts under the state's long-arm statute.[79] We reach the same conlusion with respect to federal jurisdiction under the Immunities Act. Defendant's acts with respect to the Verlinden letter of credit caused no direct, substantial, injurious effect in the United States. Thus, the defendant's immunity is not defeated under the third commercial exception to the Act.

III

The Act contains another exception, invoked more rarely than those governing commercial activities, but which plaintiff urges is applicable here. Foreign states are not immune from the jurisdiction of the courts of the United States:

> in any case
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> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver. . . .[80]

There is no assertion in the case at bar that the defendant has explicitly waived its immunity;[81] instead, plaintiff argues that Central Bank has implicitly waived its immunity in two related respects. The cement contract signed by Nigeria and Verlinden contains the following provision:

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[79] *Amigo Foods Corp.* v. *Marine Midland Bank*, 39 N.Y.2d 391, 384 N.Y.S.2d 124, 348 N.E.2d 581 (1976); *Taub* v. *Colonial Coated Textile Corp.*, 54 A.D.2d 660, 387 N.Y.S.2d 869 (1st Dep't 1976).

[80] 28 U.S.C. § 1605(a)(1) (Supp. 1979).

[81] Normally, such a waiver is accomplished by treaty or by the explicit language of a contract entered into with a private party. *See House Report, supra* note 7, at 18; *reprinted* at 6617.

> The construction, validity and performance of *this contract* shall be governed by the Laws of the Netherlands and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to *this contract* shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. [emphasis supplied]

Plaintiff contends that Nigeria's choice of a foreign forum for arbitration and of foreign law precludes it from asserting any immunity, on its own behalf or that of its instrumentalities, with respect to any issue connected with the Verlinden cement contract. Specifically, Verlinden contends that Nigeria's choice of Dutch law and a French tribunal constitutes a waiver of objection to American jurisdiction, and that this waiver is binding as well upon Central Bank, Nigeria's instrumentality charged with the task of making payments under the cement contract.

Some support for this view appears in the cryptic language of the Congressional report, which noted:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.[82]

Moreover, at least one court has held, in one of the other cement contract cases, that Nigeria's choice of European

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[82] *Id.* This single paragraph contains the legislative history's entire discussion of implicit waivers.

laws and a European forum to resolve disputes constituted a waiver of its sovereign immunity in the American courts.[83] Even if that case were correct on the law, it is inapplicable to the facts here.[84]

Here plaintiff, for reasons which are apparent, has decided not to sue upon its cement agreement with Nigeria. Instead it bases its claim upon the Verlinden letter of credit. But that instrument, unlike the contract, is devoid of any provision accepting foreign law for its interpretation, nor does it name any foreign tribunal for arbitration.

Plaintiff seeks to blur the distinctions between two separate obligations binding between different parties. The cement contract was signed by Nigeria's Minister of Defense on behalf of the Nigerian government; Central Bank is not a party to that agreement, which binds only Verlinden and Nigeria. By its very definition, the letter of credit is a separate and distinct obligation;[85] in this

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[83] *Ipitrade International, S. A.* v. *Federal Republic of Nigeria*, 465 F.Supp. 824 (D.D.C. 1978).

[84] *Ipitrade International, S. A.* v. *Federal Republic of Nigeria*, 465 F.Supp. 824 (D.D.C. 1978) did not require a decision on the issue of implicit waiver. The *Ipitrade* action was brought to enforce an arbitration award against Nigeria made by a French tribunal applying Swiss law. The District Court had subject matter jurisdiction of the enforcement action by virtue of a treaty to which the United States, France, Switzerland, and Nigeria all are parties. 9 U.S.C. §§ 201-208 (Supp. 1980). The treaty explicitly federalizes all such enforcement actions, *id.* § 203, and sharply constricts the scope of review of arbitral awards. *Id.* § 207. By signing the treaty Nigeria had explicitly waived its objection to such enforcement actions.

[85] *See* Uniform Customs and Practice for Documentary Credits (1962 Rev.); General Provisions and Definitions § (c) ("Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.")

case, it bound only Central Bank, and not the Nigerian government. Nigeria's obligation under the contract was "*to establish*" the letter of credit in favor of Verlinden within a specified period of time. Central Bank's obligation under the letter of credit matured upon presentation of appropriate documents. Nigeria undertook no obligations under the letter of credit; nor Central Bank, under the contract. This is not a hypertechnical distinction. The contract indicates that to whatever extent, if at all, Nigeria waived its immunity by reason of the arbitration provision, it did so only with respect to the contract, not the credit. Plaintiff can hardly have been unaware of these distinctions when it chose to pursue its remedies against Central Bank under the credit, rather than against Nigeria under the contract.

Even if Nigeria's waiver of immunity under one contract were held to bind its instrumentality under a different obligation, we would nevertheless find no implicit waiver, for Nigeria itself has never implicitly accepted the jurisdiction of American courts. The Congressional history cited by the plaintiff is not dispositive of this issue, indeed, it is at most ambiguous. The comment in the Congressional report, previously mentioned, that the courts had found an implicit waiver "where a foreign state has agreed to arbitration in another country or . . . agreed that the law of a particular country" would apply,[86] does not necessarily constitute an endorsement of that result. More importantly, it is by no means clear that Congress intended, in referring to "*another* country" or "a *particular* country," to include a *third-party* country the adoption of whose law or forum by a foreign state as one of the contracting parties would operate as a

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[86] *House Report, supra* note 7, at 18; *reprinted* at 6617. There is no indication as to which cases the legislators were referring, or even whether they were cases decided under American law by American courts.

waiver thereby subjecting the foreign state to jurisdiction in this country. It may be reasonable to suggest that a sovereign state which agrees to be governed by the laws of the United States—which is both "another country" and "a particular country"—has implicitly waived its ability to assert the defense of sovereign immunity when sued in an American court. But it is quite another matter to suggest, as did the Court in *Ipitrade*,[87] that a soverign state which agrees to be governed by the laws of a *third-party* country—such as the Netherlands—is thereby precluded from asserting its immunity in an American court.

Although both of these interpretations may be consistent with the literal language of the single paragraph of legislative history that addresses implicit waivers, there are strong reasons to reject the latter view. By its peculiar mixture of substantive and procedural provisions, the Immunities Act confers personal jurisdiction over all foreign states not entitled to immunity (assuming that valid service has been effectuated). Proof of an implicit waiver absolutely defeats the assertion of sovereign immunity. If the language of the Act is applied literally, the result is that a foreign sovereign which has waived its immunity can be subjected to the personal jurisdiction of United States courts regardless of the nature or quality of its contracts with this country.[88]

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[87] *Ipitrade International, S. A.* v. *Federal Republic of Nigeria*, 465 F.Supp. 824 (D.D.C. 1978).

[88] There is reason to believe that Congress did not anticipate this problem at all. On the one hand the legislative history indicates that Congress intended the courts to exercise personal jurisdiction only over foreign states having sufficient contacts with the United States. See *House Report*, *supra* note 7, at 13-14; *reprinted* at 6612. On the other hand, the statute it wrote permits the assertion of jurisdiction either when there are sufficient contacts (*i.e.*, when one of the commercial activity exceptions has been met) or when there has been a waiver.

Plaintiff's view, if adopted, would presage a vast increase in the jurisdiction of federal courts in matters involving sensitive foreign relations: whenever a foreign sovereign had contracted with a private party anywhere in the world, and chose to be governed by the laws or answer in the forum of any country other than its own, it would expose itself to personal liability in the courts of the United States. Verlinden and Nigeria could scarcely have foreseen this untoward result when they signed the contract; and it is unlikely that Congress could have intended it.

Because the Act's waiver provision is written as broadly as it is, it is incumbent upon the Court to narrow that provision's scope. We need not now decide whether the Court would have personal jurisdiction over a foreign state whose only contact with this country occurs by virtue of a private agreement in which it adopts American law or an American forum. We only hold that when a foreign state agrees to submit its disputes with another, non-American private party to the laws of a third country, or to answer in the tribunals of such country, it does not implicitly waive its immunity to the jurisdiction of the courts of the United States. Because Nigeria has not waived the defense of sovereign immunity in the American courts, it necessarily follows that Central Bank has not either.

In sum, we find that none of the exceptions to the Act is applicable here. The motion of the defendant to dismiss the complaint for lack of personal jurisdiction under the Foreign Sovereign Immunities Act is granted.

So ordered.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of August, one thousand nine hundred and eighty-one.

No. 80-7413

VERLINDEN B.V.,

Plaintiff-Appellant,

—v.—

CENTRAL BANK OF NIGERIA,

Defendant-Appellee.

United States Court of Appeals
Second Circuit
Filed Aug. 17, 1981
A. Daniel Fusaro, Clerk

Order

Petitions for rehearing containing suggestions that the action and the motion for intervention be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Verlinden B.V., and by counsel for the movant, United States of America,

> Upon consideration by the panel that heard the appeal, it is Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. DANIEL FUSARO,

.....

A. DANIEL FUSARO,
Clerk

By: FRANCIS X. GUIDHART
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of May, one thousand nine hundred and eighty-one.

No. 80-7413

VERLINDEN B.V.

—v.—

CENTRAL BANK OF NIGERIA

United States Court of Appeals
Second Circuit
Filed May 4, 1981
A. Daniel Fusaro, Clerk

Order

It is hereby ordered that the motion made herein by counsel for the Government by notice of motion dated April 29, 1981 for leave to intervene be and it hereby is denied. This Court's letter to the Department of State of January 29, 1981, the contents of which were communicated to the Department of Justice, and supplemented by telephone calls with both Departments by the Clerk of Court, served as sufficient notice of the character of the issues presented by the case. Moreover, the Department of State advised this Court by letter dated February 25, 1981, that it considered the issues to have been adequately briefed by the

parties. Accordingly, any further delay is not warranted. The motion is denied.

s/ IRVING R. KAUFMAN

.....

IRVING R. KAUFMAN

s/ WILLIAM H. TIMBERS

.....

WILLIAM H. TIMBERS
Circuit Judges

s/ ROBERT J. WARD

.....

ROBERT J. WARD
District Judge, sitting by designation

Joint Appendix

1

Office - Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-920

In The

Supreme Court of the United States

October Term, 1981

VERLINDEN B.V.,

Petitioner,

— v. —

CENTRAL BANK OF NIGERIA,

Respondent.

JOINT APPENDICES
Vol. I

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Petition for Certiorari Filed November 13, 1981.
Certiorari Granted January 11, 1982.

Motion to Dispense with Printing of New Appendix, and Permitting This Case to be Heard on the Appendices Used in the Court Below, Granted February 22, 1982.

INDEX

	Page
DOCKET ENTRIES	1a
COMPLAINT	6a
MEMORANDUM ENDORSEMENT CONDITIONALLY DENYING PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT	21a
ORDER CONDITIONALLY DENYING PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT	22a
DEFENDANT'S NOTICE OF MOTION TO DISMISS THE COMPLAINT AND FOR RELIEF FROM ORDER	25a
AFFIDAVIT OF JAMES G. SIMMS, ESQ., FOR DEFENDANT, IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT AND FOR RELIEF FROM ORDER	27a
EXHIBIT 1 TO SIMMS AFFIDAVIT - COMPLAINT (reproduced herein at pages 6a-20a)	58a
EXHIBIT 2 TO SIMMS AFFIDAVIT - VERLINDEN LETTER OF CREDIT	59a
EXHIBIT 3 TO SIMMS AFFIDAVIT - VERLINDEN CEMENT CONTRACT	65a
EXHIBIT 4 TO SIMMS AFFIDAVIT - IMMUNITIES ACT	70a
EXHIBIT 5 TO SIMMS AFFIDAVIT - LEGISLATIVE HISTORY OF IMMUNITIES ACT	81a
EXHIBIT 6 TO SIMMS AFFIDAVIT - UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, 1962 REVISION, INTERNATIONAL CHAMBER OF COMMERCE BROCHURE NO. 222 (U.C.P., 1962 REVISION)	113a
EXHIBIT 7 TO SIMMS AFFIDAVIT - AFFIDAVIT OF HON. O. JOLAOSO, AMBASSADOR TO THE UNITED STATES FROM NIGERIA SWORN TO OCTOBER 25, 1977	118a

INDEX

	Page
EXHIBIT 8 TO SIMMS AFFIDAVIT - PORTS (EMERGENCY PROVISIONS) DECREE 1975, DECREE NO. 40, DATED DECEMBER 19, 1975	123a
EXHIBIT 9 TO SIMMS AFFIDAVIT - MESSAGE FROM CENTRAL BANK TO VERLINDEN, SENT FROM LAGOS ON SEPTEMBER 30, 1975	126a
EXHIBIT 10 TO SIMMS AFFIDAVIT - LETTER FROM MORGAN GUARANTY TO VERLINDEN DATED SEPTEMBER 30, 1975	127a
EXHIBIT 11 TO SIMMS AFFIDAVIT - OPINION OF MAGISTRATE SCHREIBER DATED SEPTEMBER 19, 1978	129a
EXHIBIT 12 TO SIMMS AFFIDAVIT - AFFIDAVIT OF ALFRED KOEBEL, ASSISTANT VICE-PRESIDENT AND SENIOR TECHNICAL OFFICER IN LETTER OF CREDIT DEPARTMENT OF MORGAN GUARANTY SWORN TO NOVEMBER 12, 1979	146a
EXHIBIT 1 TO KOEBEL AFFIDAVIT - VERLINDEN LETTER OF CREDIT (reproduced herein at pages 59a-64a)	152a
EXHIBIT 2 TO KOEBEL AFFIDAVIT - LETTER FROM MORGAN GUARANTY TO N.V. SLAVENBURG'S BANK DATED JULY 7, 1975	153a
EXHIBIT 3 TO KOEBEL AFFIDAVIT - TELEX FROM MORGAN GUARANTY TO N.V. SLAVENBURG'S BANK DATED JULY 9, 1975	154a
EXHIBIT 4 TO KOEBEL AFFIDAVIT - TELEX FROM VERLINDEN TO MORGAN GUARANTY DATED JULY 11, 1975	155a
EXHIBIT 5 TO KOEBEL AFFIDAVIT - UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, 1962 REVISION, INTERNATIONAL CHAMBER OF COMMERCE BROCHURE NO. 222 (U.C.P., 1962 REVISION) (reproduced herein at pages 113a-117a)	157a

INDEX

	Page
EXHIBIT 6 TO KOEBEL AFFIDAVIT - SLAVENBURG'S BANK TELEX AND LETTER OF SEPTEMBER 29, 1975	158a
EXHIBIT 7 TO KOEBEL AFFIDAVIT - LETTER FROM MORGAN GUARANTY TO VERLINDEN DATED SEPTEMBER 30, 1975	161a
EXHIBIT 13 TO SIMMS AFFIDAVIT - ORDER OF WEINFELD, D. J. DATED OCTOBER 12, 1979 (reproduced herein at pages 22a-24a)	163a
EXHIBIT 14 TO SIMMS AFFIDAVIT - TELEX FROM CENTRAL BANK TO MORGAN GUARANTY DATED OCTOBER 22, 1979	164a
EXHIBIT 15 TO SIMMS AFFIDAVIT - TELEX FROM CENTRAL BANK TO MORGAN GUARANTY DATED OCTOBER 26, 1977	165a
AFFIDAVIT OF BERTHOLD H. HOENIGER, ESQ., FOR PLAINTIFF, IN OPPOSITION TO MOTION TO DISMISS THE COMPLAINT AND FOR RELIEF FROM ORDER	166a
EXHIBIT A TO HOENICER AFFIDAVIT - LETTER FROM CENTRAL BANK TO CHENAX MAJESTY DATED MAY 27, 1975	177a
EXHIBIT B TO HOENIGER AFFIDAVIT - LETTER FROM CENTRAL BANK TO EAST EUROPE IMPORT INC. DATED JULY 14, 1975	178a
EXHIBIT C TO HOENIGER AFFIDAVIT - LETTER FROM CENTRAL BANK TO MORGAN GUARANTY DATED FEBRUARY 12, 1975	179a
EXHIBIT D TO HOENIGER AFFIDAVIT - EXCERPTS FROM CONFIDENTAL INFORMATION MEMORANDUM PREPARED BY THE FEDERAL REPUBLIC OF NIGERIA	180a
EXHIBIT E TO HOENIGER AFFIDAVIT - ORDERS OF JUDGE HAIGHT IN REALE INTERNATIONAL, INC. v. FEDERAL REPUBLIC OF NIGERIA AND CENTRAL BANK OF NIGERIA (S.D.N.Y., 78 Civ. 0023-CSH)	192a

INDEX

	Page
EXHIBIT F TO HOENIGER AFFIDAVIT - DECISION IN TRENDTEX TRADING CORP. v. CENTRAL BANK OF NIGERIA, [1977] W. L. R. 356 (CT. OF APPEAL, GREAT BRITAIN 1977)	196a
EXHIBIT G TO HOENIGER AFFIDAVIT - DECISION IN NADA v. CENTRAL BANK OF NIGERIA, DISTRICT COURT (LANDGERICHT) OF FRANKFURT/MAIN, WEST GERMANY, DATED AUGUST 25, 1976	230a
EXHIBIT H TO HOENIGER AFFIDAVIT - AWARD OF ARBITRATOR IN IPITRADE INTERNATIONAL v. NIGERIA DATED APRIL 25, 1978	256a
EXHIBIT I TO HOENIGER AFFIDAVIT - ARTICLE IN NOVEMBER 1978 ISSUE OF EUROMONEY ENTITLED "THE EXTRAORDINARY NIGERIAN JUMBO"	274a
EXHIBIT J TO HOENIGER AFFIDAVIT - EXCERPTS FROM TESTIMONY OF GEORGE W. RYAN IN NATIONAL AMERICA CORP. v. FEDERAL REPUBLIC OF NIGERIA AND CENTRAL BANK OF NIGERIA, 420 F. Supp. 954, 956-57 (S. D. N. Y. 1976)	283a
EXHIBIT K TO HOENIGER AFFIDAVIT - LETTER FROM WARSHAVSKY & HOFFMAN TO BERTHOLD H. HOENIGER, ESQ. DATED NOVEMBER 1, 1979	285a
EXHIBIT L TO HOENIGER AFFIDAVIT - MORGAN GUARANTY OFFICE MEMORANDUM DATED OCTOBER 27, 1975	286a
EXHIBIT M TO HOENIGER AFFIDAVIT - MORGAN GUARANTY MEMORANDUM FOR CREDIT FILES DATED 10/11/78	289a
EXHIBIT N TO HOENIGER AFFIDAVIT - TELEXES FROM CENTRAL BANK TO MORGAN GUARANTY	291a
EXHIBIT O TO HOENIGER AFFIDAVIT - LETTER FROM MORGAN GUARANTY TO JAMES G. SIMMS, ESQ. DATED NOVEMBER 16, 1979	294a

INDEX

	Page
AFFIDAVIT OF BERTHOLD H. HOENIGER, ESQ., FOR PLAINTIFF, IN OPPOSITION TO MOTION TO DISMISS THE COMPLAINT AND FOR RELIEF FROM ORDER	295a
AFFIDAVIT OF FRANS VERLINDEN, FOR PLAINTIFF, IN OPPOSITION TO MOTION TO DISMISS THE COMPLAINT AND FOR RELIEF FROM ORDER	310a
EXHIBIT P TO HOENIGER AND VERLINDEN AFFIDAVITS - PAGES 36, 39, 46-47 OF MORGAN DEPOSITION IN REALE INTERNATIONAL, INC. v. FEDERAL REPUBLIC OF NIGERIA AND CENTRAL BANK OF NIGERIA (S.D.N.Y., 78 Civ. 0023-CSH)	315a
EXHIBIT Q TO HOENIGER AND VERLINDEN AFFIDAVITS - JUDGE PIERCE'S ORDER DATED NOVEMBER 6, 1978 IN THE EAST EUROPE/NIKKEI/CHENAX ACTIONS, ADOPTING AND SO ORDERING MAGISTRATE SCHREIBER'S REPORT AND RECOMMENDATIONS	319a
EXHIBIT R TO HOENIGER AND VERLINDEN AFFIDAVITS - JUDGE PIERCE'S ORDER DATED JUNE 18, 1979 IN THE EAST EUROPE/NIKKEI/CHENAX ACTIONS	321a
EXHIBIT S TO HOENIGER AND VERLINDEN AFFIDAVITS - TELEX OR CABLE FROM MORGAN TO VERLINDEN'S BANK DATED SEPTEMBER 2, 1979	322a
EXHIBIT T TO HOENIGER AND VERLINDEN AFFIDAVITS - CABLE DATED SEPTEMBER 1, 1975 FROM NIGERIA'S MINISTRY OF DEFENCE TO VERLINDEN	323a
LETTER FROM BERTHOLD H. HOENIGER TO JAMES G. SIMMS, ESQ. DATED FEBRUARY 27, 1980	324a
AMENDED COMPLAINT	325a
OPINION OF WEINFELD, D.J.	339a
JUDGMENT APPEALED FROM	384a
NOTICE OF APPEAL	385a

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

Docket No. 80-7413

- -x

VERLINDEN B.V.,

Plaintiff-Appellant,

-against-

CENTRAL BANK OF NIGERIA,

Defendant-Appellee.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

- x

DOCKET ENTRIES.

3-5-79	1	Fld Complt. issued summons.
3-7-79	2	Fld Certificate of Mailing of summons and complaint by registered mail, addressed to: Central Bank of Nigera Tinubu Squre Lagos Nigera Receipt # 215550 Served:
3-22-79	--	CASE REASSIGNED TO JUDGE WEINFELD,J. ATTORNEYS NOTIFIED
7-11-79	3.	Filed Order of substitution of attys for pltff of Berthold H. Hoeninger.
7-11-79	4.	Filed pltffs notice to take deposition of Morgan Guaranty Co. by Arthur Brown, etc.
9-11-79	5.	Filed pltffs affdvt & notice of motion for an order for entry of default judgment against deft. Ret.9-18-79
9-11-79	6.	Filed pltffs memo of law in support of motion.
9-17-79	7.	Filed Stip & Order adj. to 10-2-79 pltffs motion for entry of a default judgment. WEINFELD,J.
10-9-79	8.	Filed Memo-End. on motion dtd 9-11-79. Motion of pltff for entry of default judgment is denied on condition that deft maintain fundsin its N.Y. acc't to satisf any judgment that might be rendered, unless security is posted in the am't requeste pltffs complt. Submit order on consent.....WEINFELD,J. n/m

DOCKET ENTRIES

10-15-79	9.	Filed Order that pltffs motion is granted, & defts cross-motion denied unless, by 10-25-79 defts shall furnish to pltff either defts irrevocable instructions to (Morgan) to keep in defts name & acc't at Morgan, free & unencumbered, the am't indicated, & further conditions as stated.....WEINFELD,J. n/m
10-31-79	10.	Filed Stip & Order adj. to 11-6-79 for deft to move or answer complt...WEINFELD,J.
11-8-79	11.	Filed pltffs affdvt & notice of motion for entry of default judgment against deft Central Bank of Nigeria, etc. Ret. 11-13-79
11-15-79	12.	Filed Stip & Order adj. to 11-9-79 for deft to move or answer the complt..... WEINFELD,J.
11-19-79	13.	Filed defts notice of motion & affdvts to dismiss the complt pursuant to Rule 12(b), etc. Ret. 11-127-79
11-19-79	14.	Filed defts memo in support of motion for relief of order pursuant to Rule 60(b).
11-15-79	15.	Filed Stip & Order adj. pltffs motion for entry of default judgment to 11-20-79. WEINFELD,J.
11-23-79	16.	Filed pltffs demand for production of documents.
11-26-79	17.	Filed Stip & Order that pltff motion dtd 11-7-79 directing entry of default judgment is withdrawn.....WEINFELD,J.
11-26-79	18.	Filed memo-end. on motion dtd 11-8-79. Within motion is withdrawn as per stip signed this day.....WEINFELD,J. n/m
11-28-79	19.	Filed deft memo in support of motion to dismiss.
11-29-79	20.	Filed defts amended notice of motion for relief from order pursuant to Rule 60(b) Ret. 12-11-79.
12-7-79	21.	Filed pltffs affdvt in opposition to defts motion pursuant to Rule 60 (b).
12-7-79	22.	Filed pltffs memo of law in opposition to defts motion to vacate Court's order dtd 10-15-79.
12-7-79	23.	Filed defts notice of motion for a protective order, (affdvt included) Ret. 12-18-79
12-7-79	24.	Filed defts memo in support of motion for a protective order pursuant to Rule 26(c).
12-18-79	25.	Filed Memo-End. on motion dtd 11-29-79. Defts motion for relief under Rule 60(b) from the order of 10-12-79 is denied w/o prejudice to renewal at such time as deft presents its motion to dismiss under Rule 12(b)....WEINFELD,J. n/m
12-18-79	26	Filed Stip & Order that defts motion to dismiss & for summary judgment, is adj. to 1-22-80. .....WEINFELD,J.

DOCKET ENTRIES

12-20-79	27.	Filed pltffs memo in opposition to defts motion for a protective order, etc.
12-26-79	28.	Filed Memo-End. on motion dtd 12-7-79. Defts motion for a protective order pursuant to Rule 26(c) is denied. So Ordered, WEINFELD,J. n/m
12-20-79	29.	Filed pltffs first request to admit to deft.
12-21-79	30.	Filed defts objections to pltffs demand for prod. of documents.
1-16-80	31.	Filed pltffs affdvt & notice of motion for an order granting pltffs motion dtd 11-7-79 for entry of default judgment for defts failure to time;y respond to the complt, etc. Ret. 1-22-80.
1-16-80	32.	Filed pltffs memo of law in support of renewed motion for entry of default judgment & compelling discovery.
1-17-80	33.	Filed pltffs affdvt in opposition to defts motion for summary judgment & to dismiss.
1-17-80	34	Filed pltffs memo of law in opposition to defts motions to dismiss & for summary judgment.
1-17-80	35.	Filed defts response to pltffs first requests to admit.
1-17-80	36.	Filed defts supplemental memo of law in support of motion to dismiss the complt.
1-22-80	37.	Filed pltffs notice to take deposition of defts.
1-25-80	38.	Filed pltffs notice to take deposition of pltff & request for documents.
1-25-80	39.	Filed defts second notice to take deposition of all fact witnesses.
1-25-80	40	Filed defts first interrogs & requests for prod. of documents.
2-13-80	41.	Filed defts second notice of deposition of pltff.
2-14-80	42.	Filed pltffs affdvt & norice of motion for an order pursuant to Rule 26 ordering deft to produce for pre-trial deposition by pltff, etc. Ret.2-19-80
2-14-80	43.	Filed pltffs memo in support of motion.
2-2 1-80	44.	Filed defts affdvt in opposition to pltffs discovery motion.
2/22/80	45	Fld memo end on entry # 42 re: pltffs motion is denied discovery to be complet by 3/28/80 'WEINFELD J m.n
02-27-80	(46)	Filed deft's notice of examination of William P. Bloc on 2-28-80
02-29-80	(47)	FILED AMENDED COMPLAINT.
03-14-80	(48)	Filed deft's affidavit and notice of motion for an order pursuant to Rule 26(c) FRCP extending pretrial deadlines. RET: March 18, 1980

DOCKET ENTRIES

03-17-80	(49)	Filed deft's supplemental affidavit in opposition to pltff's Rule 37 motion to compel production of documents. by: JAMES G. SIMMS.
03-13-80	- -	PRE TRIAL CONFERENCE HELD BY WASHINGTON, US MAG.
03-14-80	(50)	Filed deft's second interrogs and requests for production of documents.
03-17-80	(51)	Filed Pltff's interrogs
03-24-80	(52)	Filed Pltff's response to deft's first interrogs and document requests.
*03-21-80	- -	Filed Memo Endorsed on document No. 48 - - - - - -the within motion to extend time for completion of discovery is granted, as indicated. So Ordered. WEINFELD,J _ m-n
03-31-80	(53)	Filed deft's affidavit pursuant to General Rule 9(f) ,affidavit in support and notice of motion for an order pursuant to Rule 37(a) and(b) FRCP compelling discovery and for sanctions, RE: April 8th, 1980
03-31-80	(54)	Filed Deft's Memorandum of law in support of motion re: compelling discovery,etc.
04-01-80	(55)	Filed deft's notice of examination of DANIEL G. McINTOSH on April 10,1980
04-01-80	(56)	Filed pltff's supplemental responses to deft's first interrogs and document reques
04-04-80	(57)	FILED TRANSCRIPT OF RECORD OF PROCEEDINGS DATED: JANUARY 22,1980
04-07-80	(58)	Filed Pltff's Memorandum in support of its application for an order under FRCP 26(c) and Local Civil Rule 5(a)
04-07-80	(59)	Filed Pltff's Pretrial Memorandum.
04-08-80	(60)	Filed deft's supplemental affidavit in support of their motion for an order compelling discovery and for sanctions by: JAMES G. SIMMS.
*04-03-80	(61)	Filed deft's amended notice of examination of DANIEL G. McINTOSH on April 10,1980
04-10-80	(62)	Filed deft's Pretrial Memorandum and Order. (UNSIGNED)
04-10-80	(63)	Filed Pltff's affidavit in response to deft's motion for a rule 37 order by: BERTHOLD H. HOENIGER
04-11-80	(64)	Filed deft's memorandum in opposition to pltff's motion to vacate notice of deposition.
04-11-80	(65)	Filed deft's affidavit in opposition to pltff's motion to vacate notice of deposition by: JAMES G. SIMMS.
04-11-80	(66)	Filed Pltff's ORDER TO SHOW CAUSE WITH A STAY at Room 25 on April 8th,1980 at 2:15PM - that deft show cause why an order should not be made pursuant to Local Civ Rule 5(a) vacating deft's notice to take deposition of Daniel G. McIntosh etc. Personal service of OSC upon attys for deft on or before April 2,1980,as indicated, WEINFELD,J DATED APRIL 2,1980
04-15-80	- -	Filed Memo Endorsed on document No. 66 - - - - -the motion to vacate deft's notice to take the deposition of Mr. Daniel McIntosh,a non-party witness is granted,unless deft pays to pltff in advance of deposition sum of $2,500.00 as indicated.So Ordered, WEINFELD,J m-n
04-15-80	(67)	Filed MEMORANDUM AND ORDER that all documents re: conference of April 8,1980 be identified including those received from Mr. William Block, as indicated. So Ordered. WASHINGTON, US MAG m-n (CSC)
04-21-80	(68)	Filed Pltff's response to deft's second interrogs and requests for production of documents.

DOCKET ENTRIES

04-21-80	(69)	Filed OPINION NO. 49957 - for all the foregoing reasons - the motion of the deft to dismiss the complaint for lack of personal jurisdiction under the Foreign Sovereign Immunities Act is granted.So Ordered. WEINFELD,J m-n (CSC)
*04-17-80	(70)	Filed deft's responses to pltff's interrog.
04-24-80	- -	Filed Memo Endorsed on document No. 13- - - - -to dismiss complaint etc- - - - - the within motion is disposed of as per the Court's opinion of 4-21-80 So Ordered. WEINFELD,J m-n
04-24-80	- -	Filed Memo Endorsed on document No. 31- = re: pltff's motion for default judg- - - - the within motion is moot as per Court's opinion of April 21,1980 So Ordered. WEINFELD,J m-n
04-24-80	-(71)	Filed Pltff's objections to and exceptions from the memorandum and order of Mag. Washington dated:4-11-80.
04-24-80	- -	Filed Memo Endorsed on document No. 71- re: objections to Mag. Washington's report.- - - -The within motion is moot as per the Court's opinion of April 21,1980. So Ordered. WEINFELD,J m-n
04-30-80	(72)	Filed JUDGMENT that the complaint be and it is hereby dismissed. CLERK ent. 4-30-80 m-n
5-12-80	*(73)*	*Filed Plaintiff's NOTICE OF APPEAL to the USCA from the Judgment of 4-30-80 purs: to Opinion #49957. Mailed Notices to Kissam Halpin & Genovese 120 B'way, NYC 10005 - Attys for deft & Berthold Hoeniger, 505 Park Ave, NYC 10022 - atty for the deft.*
05-23-80	(74)	Filed letter to Weinfeld J dated: May 6, 1980 re: demurrage,etc.- -
05-23-80	- -	Filed Memo Endorsed on document No.74 in view of the foregoing - the opinion is amended to quote the clause specifically as it appears in the parties' agreement, to wit, "Demurrage was to be paid at a rate not exceeding $3,500 per diem per vessel, if an to the extent that..." So Ordered. WEINFELD,J m-n (CSC)
*05-20-80	(75)	Filed FORM D (TRANSCRIPT INFORMATION CIVIL APPEALO that attys for appellant -not ordering transcript (other)

COMPLAINT (Pages 6a to 20a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

VERLINDEN B.V., : 79 Civ. [illegible] ([illegible])

Plaintiff, :

-against- : COMPLAINT

CENTRAL BANK OF NIGERIA, :

Defendant. :

----------x

Plaintiff, complaining of the defendant by its attorneys, Bailey, Marshall, Hoeniger & Freitag, respectfully shows to this Court and alleges:

FEDERAL JURISDICTION; VENUE

1. Federal jurisdiction is founded upon the provisions of §2(a) of the Foreign Sovereign Immunities Act of 1976 (Pub.L. 94-583, 90 Stat. 2891, 27 U.S.C. §§1330, 1391(f), 1441(d), and 1602 through 1611), and specifically 28 U.S.C. §1330(a) and (b).

2. Venue is properly laid in this District under §3 of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1391(f), because a substantial part of the events giving rise to the claim occurred within this District, a substantial part of the moneys that are the subject of this action are located within this District, and also because, upon information and belief, the defendant is doing business in this District.

PARTIES TO THE ACTION

3. Plaintiff is, and at all times relevant hereto has been, a Netherlands corporation engaged, among other activities, in the building and construction business. Plaintiff's principal office at the times here relevant, was at Lomanstraat 1, Amsterdam, The Netherlands.

4. Defendant Central Bank of Nigeria ("CBN") was and is the central bank of the Federal Republic of Nigeria ("Nigeria"), and an agency or instrumentality of Nigeria for purposes of the Act and as defined in §4.(a) thereof, 28 U.S.C. §1603(b). Throughout the relevant period, Morgan Guaranty Trust Company of New York ("Morgan Guaranty"), headquartered in this District, was the sole United States commercial correspondent bank for CBN, and acted as and was defendant's agent in the United States.

FACTS CONSTITUTING THE CLAIM FOR RELIEF

5. On or about June 23, 1975, defendant established its Documentary Credit No. CBN/BO/75/145 in favor of plaintiff for $14,400,000, plus an open-ended amount for demurrage at the rate of $3,500 per day per vessel, and subject to the Uniform Customs and Practice for Documentary Credits, 1962 revision, International Chamber of Commerce Brochure No. 222 (hereafter "Uniform Customs").

6. Said Uniform Customs provide in relevant part:

"General provisions and definitions

c. Credits by their nature are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.

* * *

A. Form and notification of credits

Article 3. - An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and bona fide holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.

* * *

Such undertakings can neither be modified nor cancelled without the agreement of all concerned."

7. Defendant, for its own purposes and convenience, and at its own election, caused the aforesaid irrevocable letter of credit established by it in favor of plaintiff to be advised and to be made payable in U. S. dollars through and at Morgan Guaranty in New York, N. Y., despite the fact that the contract between plaintiff and Nigeria in connection with which said irrevocable letter of credit was established called for the same to be advised and payable through and at plaintiff's bank in The Netherlands.

8. The aforesaid letter of credit so established by defendant was irrevocable, transferable abroad, and divisible.

9. On or about July 7, 1975, Morgan Guaranty advised both plaintiff and plaintiff's Netherlands bank of the establishment of said irrevocable letter of credit by defendant in favor of plaintiff, and sent plaintiff and plaintiff's Netherlands bank copies thereof.

10. Amendments to said letter of credit were thereafter requested by plaintiff through Morgan Guaranty, were assented to by defendant, and said amendments were advised and confirmed to plaintiff on behalf of defendant by Morgan Guaranty.

11. After said letter of credit had been so amended at plaintiff's request, plaintiff duly performed all the terms and conditions of said letter of credit (and of its contract with Nigeria) on its part, until prevented and excused from further performance by reason of defendant's repudiation and anticipatory breach of said irrevocable letter of credit (and Nigeria's breach of its contract with plaintiff), as hereinafter alleged. Specifically, plaintiff entered into a contract with Interbuco A.G. Vaduz, Liechtenstein (hereinafter "Interbuco"), dated August 21, 1975, for the fulfillment by Interbuco of the aforesaid contract between plaintiff and Nigeria, at a price of $51 per ton of cement, C.I.F. Lagos/Apapa, on each of the 240,000 tons covered by said contract, as compared to the price of $60 per ton for each of said 240,000 tons stipulated in plaintiff's contract with Nigeria; and said contract between plaintiff and Interbuco further provided for the payment by plaintiff of liquidated

damages of $5 per ton in the event of plaintiff's nonperformance. Interbuco, as plaintiff's subcontractor, thereupon duly set about to perform all the terms and conditions on plaintiff's part of the contract between plaintiff and Nigeria, and duly performed the same, until prevented and excused from further performance by defendant's repudiation and anticipatory breach of the aforesaid irrevocable letter of credit and Nigeria's breach of the aforesaid contract. But for said breach and repudiation, plaintiff would have realized a profit of 240,000 x $9, or $2,160,000.

12. The aforesaid acts of defendant in establishing said irrevocable letter of credit in plaintiff's favor through Morgan Guaranty, causing the same to be advised and made payable by Morgan Guaranty, and making the same payable to plaintiff in New York in U.S. Dollars, were part of the large-scale commercial activity carried on in the United States by said defendant, and specifically were part of the commercial activity of contracting for the purchase of and of establishing irrevocable letters of credit in payment for some 16 to 20 million tons of cement from U.S. and European suppliers. Alternatively, said acts constituted acts performed in the United States by defendant in connection with a commercial activity of said defendant elsewhere.

13. Since 1966, Nigeria had been ruled by a military government headed by Col. Yakubu Gowon. On July 29, 1975, the Gowon government was overthrown by a military coup d'etat headed by Brig. Muritala Rufai Mohammed (who in turn was assassinated on February 13, 1976, and succeeded by Lieut. Gen. Olusegun Obasanjo).

14. In October 1975, after Interbuco had loaded several vessels and said vessels were about to depart for Nigeria, Morgan Guaranty, as CBN's agent, and at the instructions of its principal, CBN, advised plaintiff that, because of congestion at Lagos and other Nigerian ports, the (new) Nigerian government had suspended all importation of cement for three months, and that plaintiff was required to defer all further chartering and loading of vessels as scheduled under the terms of plaintiff's cement contract with Nigeria, and further advised plaintiff that, pursuant to instructions received by Morgan Guaranty from its principal, defendant CBN, Morgan Guaranty would refuse any and all payments under the aforesaid irrevocable letter of credit to plaintiff or plaintiff's assignee unless plaintiff agreed to give, and did give, two months' advance notice to the Nigerian Ports Authority prior to the departure of each vessel engaged to transport cement to Nigeria pursuant to the terms of plaintiff's contract and unless plaintiff further agreed not to, and did not, ship any further cement to Nigeria under plaintiff's contract unless prior clearance for each proposed shipment had been obtained from defendant, or the Nigerian Ports Authority, and unless plaintiff agreed to other material changes in the terms of the aforesaid cement contract and letter of credit.

15. Said advice by defendant to plaintiff through its agent, Morgan Guaranty, that it was unilaterally and in material respects purporting to alter and to modify the aforesaid letter

of credit, and said instructions by defendant CBN to Morgan Guaranty not to honor said irrevocable letter of credit in accordance with its terms, were wholly unilateral, unauthorized, and unlawful, and were done wholly without plaintiff's authorization, agreement or consent, and constituted a repudiation and anticipatory breach of said irrevocable letter of credit, and were acts performed either in the United States in connection with commercial activities of said defendant in the United States and elsewhere, or were acts outside the territory of the United States in connection with commercial activities of said defendant elsewhere whose foreseeable consequence was to cause, and which did cause, a direct effect -- non-payment and repudiation -- in the United States, to plaintiff's injury and detriment.

16. Pursuant to said instruction from defendant, its principal, Morgan Guaranty also advised plaintiff's bank that the latter could not pay, or would not be reimbursed by Morgan Guaranty if it paid, sight drafts drawn under the aforesaid letter of credit for cement loaded pursuant to plaintiff's contract with Nigeria and said letter of credit, even though such sight drafts were duly accompanied by all documents required by said letter of credit. Subsequently, Nigeria placed a total embargo on cement shipments to Nigeria, and defendant CBN caused its agent, Morgan Guaranty, to advise both plaintiff and plaintiff's bank thereof.

17. By letter dated on or about November 14, 1975, Morgan Guaranty further advised plaintiff that at the request of defendant, it was forwarding to plaintiff therewith a copy of the text of a press conference held on October 29, 1975, by the Commissioner for Transport of Nigeria. In said text of his press conference, said official was reported as stating at the conclusion:

> "However, I wish to warn those suppliers who are threatening to obtain their pound of flesh, that Nigeria is not here today and gone tomorrow. This is a battle for economic survival and we shall not hesitate to declare all detractors as enemies of the people of Nigeria and to deal with them ruthlessly. I would like to assure the Nigerian public that this Administration is doing, and will continue to do everything possible to safeguard and protect our national interest."
>
> [Emphasis added.]

18. Towards the end of 1975, defendant, through Morgan Guaranty, invited plaintiff and the other 68 cement suppliers to Nigeria to attend meetings with CBN and other Nigerian officials (the so-called "Cement Contracts Negotiating Committee") in Lagos, which invitation plaintiff accepted.

19. At said meetings in Lagos, Nigeria, in or about January 1976, the representatives of defendant and of other Nigerian departments and agencies constituting the Cement Contracts Negotiating Committee (hereinafter "Committee"), represented to plaintiff that:

(a) Any holder of a cement contract with Nigeria and a CBN irrevocable letter of credit who did not agree

to the cancellation of the unperformed portion of said contract and the unused portion of said letter of credit -- in plaintiff's case, 100% of said contract and said letter of credit -- would be regarded as an enemy of the Nigerian people and dealt with accordingly. Mr. F. Verlinden, plaintiff's president and principal, who attended said meetings on behalf of plaintiff, understood said statements to convey a threat that his passport might be seized, that he might be imprisoned, or that he might be physically injured unless he agreed to said demands by the Committee; and said understanding and belief were reasonable, since Nigerian officials have in fact seized the passports of foreign nationals (including at least one U. S. citizen) and imprisoned the same, in order to obtain and coerce economic concessions from the foreign corporation for which such foreign national was acting.

(b) If plaintiff did not agree to the cancellation of said letter of credit and contract, plaintiff would be blacklisted and forever barred from doing any business with Nigeria in the future.

(c) If plaintiff agreed to such cancellation, and executed a discharge agreement and releases to defendant CBN and to Nigeria, plaintiff would be awarded new cement contracts (in larger quantities and carrying a higher profit margin than the existing contract) as soon as Nigeria resumed the importation of cement, that plaintiff would also be awarded

contracts to supply other goods to Nigeria, and that plaintiff would become one of Nigeria's major and most-favored suppliers.

20. The representations set forth in paragraph 19(c) above, were false when made, and were known by defendant CBN and the other departments and agencies of Nigeria by whose representatives said representations were also made to be false when made, or if not known to be false, were made with reckless disregard for the truth and for facts which were readily ascertainable by defendant, said other departments and agencies, at that time. The respects in which said representations were false, as far as presently known to plaintiff, are the following:

i. The Committee had no power or authority to cause new contracts to be awarded in the future to plaintiff or to other cement contract holders, and knew that its recommendations for the award of new contracts carried, and would carry, no weight whatever.

ii. The Committee knew that its sole mandate was to obtain discharge agreements and releases from plaintiff and the other 68 holders of cement contracts and CBN irrevocable letters of credit, by whatever means and representations might prove useful for that end.

iii. The Committee knew that even a recommendation by it that plaintiff should be invited to bid for new cement contracts, if and when Nigeria resumed the importation of cement, carried, or would carry, no weight whatever, and was unlikely to be acted upon.

iv. The Committee knew, or if it did not know, recklessly failed to ascertain the readily ascertainable fact that Nigeria intended in the future to obtain all or most of its cement requirements through direct negotiations with and purchases from Eastern European countries or state trading organizations of such countries.

v. The Committee knew, or if it did not know, recklessly failed to ascertain the readily ascertainable fact that plaintiff's execution of a discharge agreement and releases, as demanded by the Committee, would not result in plaintiff's becoming a major or favored supplier of cement or other goods to Nigeria.

21. The representations alleged in paragraph 19(c) above were material.

22. As a result of the coercion and duress upon plaintiff, the fears reasonably engendered in plaintiff by the aforesaid threats, and in reliance upon the representations above set forth, plaintiff, in or about January 1976, executed a document with the Committee, pursuant to which plaintiff purported to cancel its cement contract with Nigeria and CBN's irrevocable letter of credit in favor of plaintiff for $14,400,000, plus an open-ended amount for demurrage, and which document further provided that plaintiff would be invited to supply cement to Nigeria if and when the latter resumed the importation of cement.

At the same time, plaintiff executed and delivered to the Committee, the Committee's prepared forms of release to defendant CBN and to Nigeria.

23. No consideration whatever flowed to plaintiff from defendant, or from Nigeria, for the execution and delivery of said documents, for the cancellation of plaintiff's $14,400,000 (plus demurrage) cement contract, or for plaintiff's cancellation of the irrevocable CBN letter of credit in its favor for $14,400,000, plus an open-ended amount for demurrage.

24. Upon information and belief, various members of the Committee attempted to, and did, extort large sums of money from various holders of Nigerian cement contracts and CBN letters of credit in return for recommending substantial settlements of the claims by such holders of contracts and letters of credit; various members of the Committee have been arrested and charged with such conduct; and the Committee was ultimately disbanded, and its functions taken over by the Nigerian Ministry of Justice.

25. Plaintiff's execution of said documents of discharge and release was induced and obtained by coercion and duress, and by fraud, as previously alleged, and are therefore void or voidable; and plaintiff elects to void the same. Additionally, said documents are void for lack of consideration. Further, if and to the extent that this Court determines that the undertaking therein to invite plaintiff to supply, or to bid for the supply, of cement to Nigeria in the future, constituted a

legally binding obligation, said documents or agreements are void or voidable because of the breach of such obligation by defendant CBN and by Nigeria, in that plaintiff was never invited to supply, or to bid for the supply, of cement or any other goods to Nigeria.

26. By reason of the premises, plaintiff has been and will be injured as follows:

(a) Liquidated loss of profit as a result of defendant's repudiation and anticipatory breach	$2,160,000.
(b) Costs and expenses of defending action brought in The Netherlands by Interbuco against plaintiff, and of satisfying Interbuco's claims and suit	1,250,000.
(c) Incidental costs and expenses incurred by plaintiff as a result of defendant's repudiation and anticipatory breach	200,000.
(d) Costs, expenses and reasonable attorneys fees of the instant action	750,000.
TOTAL...	$4,360,000.

27. The repudiation by defendant CBN of its irrevocable letter of credit established in favor of plaintiff was willful,

intentional and deliberate, evinced a high degree of moral turpitude, and demonstrated such wanton dishonesty and wanton disregard of internationally recognized basic principles of commercial conduct and honor, as to imply a criminal indifference to civil obligations. Indeed, upon information and belief, Banque Nationale de Paris, CBN's correspondent bank in and for France during the relevant period, found CBN's instructions to repudiate and not to pay the irrevocable letters of credit which CBN had established and had caused to be advised and to be made payable through Banque Nationale de Paris to be so grossly offensive to said internationally recognized basic principles of commercial conduct and honor, that it refused to honor or to comply with said instructions.

Accordingly, plaintiff is entitled to, and demands, punitive or exemplary damages of $4,000,000 against defendant CBN.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against defendant Central Bank of Nigeria for $4,360,000 in compensatory damages, with interest from October 1, 1975; for exemplary or punitive damages of $4,360,000; for plaintiff's reasonable attorneys' fees; for the costs and disbursements of this action; and for such

other, further and different relief as may be just and proper upon the facts proven.

Dated: New York, New York
March 5, 1979.

Yours, etc.

BAILEY, MARSHALL, HOENIGER & FREITAG
Attorneys for Plaintiff

By: Berthold H. Hoeniger

Berthold H. Hoeniger
345 Park Avenue
New York, New York 10022
(212) 826-2305

MEMORANDUM ENDORSEMENT CONDITIONALLY DENYING PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT (Page 21a)

(8)

Verlinden B.V. v. Central Bank of Nigeria

S. DISTRICT COURT
FILED
OCT 9 1979
S. D. OF N. Y.

Rec'd by Hand 10/17/79

79 Civ. 1150

10/9/79

DOCKET 10/17/79

DIARY

The motion of the plaintiff for entry of default judgment is denied, upon the condition that the defendant maintain funds in its New York account sufficient to satisfy any judgment that might be rendered against it in this action; and that those funds shall remain in the defendant's New York account, unless ~~it discharge~~ post security in the amount requested in the plaintiff's complaint.

Submit order on consent.

Dated: New York, New York
October 9, 1979

United States District Judge

ORDER CONDITIONALLY DENYING PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT (Pages 22a to 24a)

79 Civ. 1150 (EW)

ORDER

By notice of motion dated September 7, 1979, plaintiff moved for the entry of default judgment against defendant, pursuant to F.R.Civ.P. 55, based upon defendant's failure to timely answer or otherwise move with respect to the complaint herein. In support thereof, plaintiff submitted the certificate of Raymond F. Burghardt, Clerk of the Court, dated September 10, 1979, the affidavit of Berthold H. Hoeniger duly sworn to September 7, 1979, and exhibits annexed thereto. In opposition to that motion, defendant submitted the answering affidavit of James G. Simms, duly sworn to September 24, 1979. The Court has treated said answering affidavit as a cross-motion by defendant to open its default and to permit it to respond to the complaint at this time.

After hearing Berthold H. Hoeniger, Esq., attorney for plaintiff, in support of plaintiff's motion, and Messrs. Kissam, Halpin & Genovese, attorneys for defendant, by James G. Simms, Esq., in opposition to plaintiff's motion and in support of defendant's cross-motion, and due deliberation having been had thereon, it is

ORDERED, that plaintiff's motion be and hereby is granted, and defendant's cross-motion denied, unless, on or before October

25, 1979, defendant shall furnish to plaintiff either

(a) defendant's written irrevocable instructions to Morgan Guaranty Trust Company of New York ("Morgan") to keep in defendant's name and account at Morgan, free and unencumbered, the sum of $4,360,000, together with interest on $3,610,000 at 6% per annum from October 1, 1975, and not subject to withdrawal, transfer into any other name or account, hypothecation, liening, or encumbrancing, pending the final determination of this action and for a period of 30 days thereafter, so that such funds shall be available for the satisfaction of the judgment, if any, which plaintiff may ultimately recover herein; together with defendant's request and instruction to Morgan that Morgan promptly confirm to plaintiff's attorney the receipt of said instructions and Morgan's acknowledgment that Morgan will abide thereby; or

(b) a guaranty by Morgan to plaintiff of defendant's payment of the amount of the final judgment herein, if any, in favor of plaintiff, up to the sum of $4,360,000 with continuing interest thereon from October 1, 1975; and it is further

ORDERED, that upon defendant's full and timely compliance with the foregoing provisions, plaintiff's motion shall be denied and defendant's cross-motion granted, and defendant given leave to serve its answer or motion in response to the complaint on or before October 29, 1979; but if the conditions of subparagraphs (a) or (b) of the first decretal paragraph hereof are not duly and timely performed by defendant, then, upon the affidavit of

plaintiff's attorney showing such failure by defendant, the plaintiff upon ~~this~~ at least five days ~~and~~ delivered notice to defendant Clerk of this Court, without further notice may move for entry of judgment of default against defendant, which shall provide for this Court's taking the assessment of plaintiff's damages and the proof required under U.S.C. §1608(e) at a date and time to be fixed by the Court.

Dated: New York, New York
October 11, 1979

Edward Weinfeld, U.S.D.J.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

DEFENDANT'S NOTICE OF MOTION TO DISMISS THE COMPLAINT AND FOR RELIEF FROM ORDER (Pages 25a to 26a)

S I R S :

PLEASE TAKE NOTICE that upon the affidavits of James G. Simms, sworn to November 12, 1979, and of Alfred Koebel, sworn to November 12, 1979, the exhibits appended to those affidavits, and all pleadings, papers and proceedings had heretofore herein, defendant Central Bank of Nigeriá, will move this Court at a hearing before the Hon. E. Weinfeld, United States District Judge, in Room 1105 of the United States Courthouse, Foley Square, New York, N.Y., on the 27th day of November 1979, at 2:15 P.M. or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint herein on the grounds that this Court is without jurisdiction of the subject matter of the claim or of the defendant, and on the grounds that plaintiff has failed to state a claim upon which relief can be granted; and for an order, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, granting defendant relief from the order of this Court, dated October 12, 1979, on the grounds that the Court was without jurisdiction to enter the order, and therefore the order is void, and on the grounds that it is no longer equitable that the order of October 12, 1979 should have prospective application;

and for such other and further relief as the Court may deem appropriate.

New York, New York
November 12, 1979

KISSAM, HALPIN & GENOVESE

By _____
A Member of the Firm
Attorneys for Defendant
Central Bank of Nigeria
120 Broadway
New York, New York 10005
(212) 962-2000

TO: B. H. HOENIGER, ESQ.
Attorney for Plaintiff
505 Park Avenue
New York, New York 10022

AFFIDAVIT OF JAMES G. SIMMS, ESQ., FOR DEFENDANT, IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT AND FOR RELIEF FROM ORDER

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES G. SIMMS, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court, and of Kissam, Halpin & Genovese, attorneys for defendant, Central Bank of Nigeria (Central Bank). I make this affidavit in support of Central Bank's motion to dismiss the complaint of plaintiff, Verlinden B.V. (Verlinden), pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the grounds that this Court is without jurisdiction of the subject matter of the claim or of the defendant, and on the grounds that plaintiff has failed to state a claim upon which relief can be granted. In addition, I make this affidavit in support of Central Bank's motion for an order, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, granting Central Bank relief from the order of this Court, dated October 12, 1979, on the grounds that the Court was without jurisdiction to enter the order, and, therefore, the order is void, and on the grounds that it is no longer equitable that the order of October 12, 1979 should have prospective application.

CLAIM ALLEGED BY VERLINDEN

2. A copy of Verlinden's complaint, dated March 5, 1979, is Exhibit 1 hereto. This action relates to Central Bank's documentary letter of credit No. CBN/BO/75/145, established in June 1975, in favor of Verlinden (the Verlinden letter of credit); the Verlinden letter of credit was the means of payment for cement to be delivered to Nigeria by Verlinden, pursuant to Verlinden's cement agreement with the Federal Ministry of Defence of Nigeria, dated April 21, 1975 (the Verlinden cement contract). The Verlinden letter of credit and cement contract also provided for payment by Nigeria of demurrage with respect to vessels carrying cement and detained in Nigerian ports. The Verlinden letter of credit and the Verlinden cement contract are Exhibits 2 and 3 hereto, respectively.

3. Verlinden alleges that Central Bank breached its letter of credit anticipatorily, and Verlinden seeks to recover as compensatory damages herein alleged lost profits, costs and expenses resulting from the anticipatory breach. Verlinden alleges that it intended to perform its entire obligation to deliver cement to Nigeria through a third party subcontractor, Interbuco A.G. of Vaduz, Liechtenstein (Interbuco), (Verlinden complaint, paragraph 11); that in October 1975, before Verlinden or Interbuco had commenced delivery of any cement to Nigeria, the Federal Republic of Nigeria (Nigeria) and Central Bank per-

formed acts which constituted a repudiation and anticipatory breach of the Verlinden letter of credit (and presumably of the Verlinden cement contract as well), (Verlinden complaint, paragraphs 14-15).

4. Verlinden alleges that toward the end of 1975, Nigeria and Central Bank invited it and 68 other cement suppliers to Nigeria to meet with Nigeria's Cement Contracts Negotiating Committee (Negotiating Committee); that Verlinden met with the Negotiating Committee in Lagos, Nigeria in January 1976; and that as a result of such meetings, Verlinden entered into agreements of release with respect to the Verlinden cement contract and letter of credit, (Verlinden complaint, paragraphs 18-22). Verlinden contends, however, that the agreements of release were void or voidable on various grounds. Verlinden elects to void the release agreements; and it brings its claim only with respect to the anticipatory breach of its letter of credit (Verlinden complaint, paragraphs 23-25).

Basis of Jurisdiction Herein

5. Verlinden alleges jurisdiction pursuant to the Foreign Sovereign Immunities Act of 1976, Public Law 94-583, 90 Stat. 2891, 28 U.S.C. Sections 1330, 1391(f), 1441(d), and 1602-1611 (Immunities Act); copy of which is Exhibit 4 hereto.

6. The Immunities Act became effective in January 1977; the Legislative History of the Immunities Act appears in 1976 U.S. Code Congressional and Administrative News, page 6604, et seq. (Legislative History); a copy of which is Exhibit 5 hereto.

7. Verlinden admits at paragraph 4 of its complaint that Central Bank is "an agency or instrumentality" of Nigeria as that term is defined in the Immunities Act, 28 U.S.C., Section 1603(b).

8. The memorandum submitted by Central Bank in support of this motion discusses the jurisdictional provisions of the Immunities Act in detail. Pursuant to the allegations in the Verlinden complaint, the provision of the Immunities Act relevant to the issue of whether this Court has jurisdiction of the subject matter of Verlinden's claim, is 28 U.S.C., Section 1605(a)(2), which provides:

> "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> "(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

9. At paragraph 12 of its complaint, Verlinden alleges that the contracting by Nigeria for the purchase of 16 to 20 million tons of cement from U.S. and European suppliers and the establishment by Central Bank of the Verlinden letter of credit as one to be advised and made payable through Morgan Guaranty Trust Company of New York (Morgan Guaranty) constituted commercial activity by Nigeria and Central Bank either in the United States or elsewhere. It is respectfully submitted that Verlinden is most equivocal in its allegations as to where this commercial activity is to have been taking place.

10. At paragraphs 14 and 15 of its complaint, Verlinden alleges that Central Bank's instructions in October 1975 concerning the requirement that Verlinden obtain from the Nigerian Ports Authority two months' advance permission for sailings of cement vessels to Nigeria constituted "acts performed either in the United States in connection with commercial activities of said defendant in the United States and elsewhere, or were acts outside the territory of the United States in connection with commercial activities of said defendant elsewhere whose foreseeable consequence was to cause, and which did cause, a direct effect -- non-payment and repudiation -- in the United States, to plaintiff's injury and detriment."

11. By its liberal but inconsistent pleading, Verlinden requires this Court to review jurisdiction of the subject matter of its claim pursuant to each of the three bases defined in

Section 1605(a)(2) of the Immunities Act. One issue, however, is clear: the acts which Verlinden contends constituted an anticipatory breach of its letter of credit were the notices by Central Bank to Verlinden of the action by Nigeria to suspend cement importation by virtue of the congestion in Nigerian ports and of the requirement to obtain from the Nigerian Ports Authority two months' advance permission for sailings of cement vessels to Nigeria (Verlinden complaint, paragraph 14).

a. Verlinden's action is not based upon a commercial activity carried on by Central Bank in the United States

12. The Verlinden letter of credit was the means for payment by Nigeria of Nigeria's obligations pursuant to the Verlinden cement contract; see, paragraphs 1(v) and 1(ix) of the Verlinden cement contract, Exhibit 3 hereto. The Verlinden letter of credit (Exhibit 2 hereto) makes specific reference to the Verlinden cement contract at the bottom of the first page thereof, and the specifications in the letter of credit as to cement, shipment, time of performance, ports of loading, etc. are the same as those defined in the Verlinden cement contract.

13. The Verlinden cement contract was negotiated and executed in Nigeria and was to be performed outside the United States: at the request of Verlinden the following European ports of loading were designated in the cement contract in paragraph 1(vii) as the ports from which Verlinden was to insure the cement cargoes to Lagos, Nigeria - Constanza (Rumania), Barcelona,

Bilbao, Santander, Alicante, Cadiz, Valencia, Tarragona and/or Malaga (all in Spain); consequently, Verlinden's intended source of supply of cement was Rumania and/or Spain; Verlinden alleges it is a Netherlands corporation, with its principal place of business in Amsterdam (Verlinden complaint, paragraph 3); Verlinden alleges that its intended third-party subcontractor, Interbuco, is located in Liechtenstein (Verlinden complaint, paragraph 11); and the cement contract, at paragraph 2, designates the laws of the Netherlands as governing the construction, validity and performance of the agreement.

14. The Verlinden letter of credit (Exhibit 2 hereto) required documents to be presented evidencing shipments of cement to Nigeria from European ports (page two, first sentence), and repeats the Rumanian and Spanish ports designated in the cement contract for the purpose of the insurance to be provided by Verlinden (Appendix, paragraph (3)). The Verlinden letter of credit was advised through and made payable at Morgan Guaranty; it was also advised through Verlinden's bank, Slavenburg's Bank, Amsterdam, Netherlands (see, "Additional Instructions" at page 2 of the letter of credit). The Verlinden letter of credit was made subject to the Uniform Customs and Practice for Documentary Credits, 1962 Revision, International Chamber of Commerce Brochure No. 222 (U.C.P., 1962 Revision), a copy of which is Exhibit 6 hereto.

15. Verlinden does not contend that Nigeria or Central Bank are themselves present or doing business in the United

States. In its complaint at paragraph 4, Verlinden alleges that Morgan Guaranty "was the sole United States commercial correspondent bank for [Central Bank], and acted as and was defendant's agent in the United States." Thereafter in its complaint, Verlinden continues to allege a principal/agent relationship between Central Bank and Morgan Guaranty, and alleges or implies that Morgan Guaranty's transmission of advices to Verlinden pursuant to the letter of credit constituted acts by Central Bank in the United States, through its agent.

16. It is respectfully submitted that Morgan Guaranty is not and never was an agent of Central Bank. Morgan Guaranty is an indpendent entity; it acts as a New York correspondent bank for Central Bank, for the central banks of other foreign states and for other banks; and it performs the same types of activities as a correspondent bank for Central Bank as it does for each of its other customers for which it is a correspondent bank.

17. Morgan Guaranty did not confirm the Verlinden letter of credit; it acted solely as an advising and paying bank; and with respect to the Verlinden letter of credit, Morgan Guaranty owed to Central Bank and Verlinden only those duties and responsibilities defined in U.C.P.,1962 Revision, for advising and paying banks as owing to the issuing bank and the beneficiary.

18. In the Verlinden letter of credit (Exhibit 2 hereto), Central Bank requested Morgan Guaranty "to advise" the terms of the credit, and (at page 2 of the credit) stated: "Please advise beneficiary (without adding your confirmation) of our authority given to you to pay on sight of documents." U.C.P., 1962 Revision (Exhibit 6 hereto), defines the obligations of an advising bank in Articles 3 and 12.

19. The relationship between Central Bank and Morgan Guaranty during the time period relevant to Verlinden's claim has been explored in detail in other litigation in this Court brought by cement contractors against Nigeria and Central Bank with respect to cement contracts and letters of credit similar to those of Verlinden. The Court herein is respectfully referred to the opinions in National American Corp. v. Federal Republic of Nigeria, et al.: at 425 F.Supp. 1365, 1369-1372 (S.D.N.Y. 1977) wherein Judge Goettel found that "[Central Bank] does not have an office here nor are its employees present within the state. The isolated act of maintaining bank accounts here has been held not to constitute doing business. The applicants denominate Morgan Guaranty as [Central Bank's] agent . . . Clearly, Morgan Guaranty is an entity independent of [Central Bank]" (At page 1369). Judge Goettel noted that the letters of credit before him were advised and made payable at Morgan Guaranty, but that the letters of credit had also been advised through the beneficiaries' banks as they had requested, just as the Verlinden

letter of credit was advised through its bank, Slavenburg's Bank, in Amsterdam. At pages 1371-1372, Judge Goettel found that: "The correspondence among the banks and the beneficiaries is replete with references that Morgan Guaranty did not independently undertake to pay the letters of credit . . . In light of the limited nature of [Morgan Guaranty's] participation, i.e., advising the beneficiary of the issuance of the credit and its authorization to pay upon the presentation of appropriate documents, its transactions in this state on behalf of [Central Bank] cannot form a basis for long-arm jurisdiction . . . As an advising bank, Morgan Guaranty had no obligation, beyond transmitting accurate information, to the beneficiaries of the letters of credit. U.C.P., art. 12."

20. The relationship between Central Bank and Morgan Guaranty was reviewed again at the trial of the National American action. In his opinion rendered in favor of Nigeria and Central Bank, Judge Goettel discussed the correspondent banking relationship between the two banks and concluded that Central Bank was not "doing business" in New York; 448 F.Supp. 622, 637 (S.D.N.Y. 1978).

21. Actions were commenced in this Court against Nigeria and Central Bank by East Europe Import-Export, Inc., Nikkei International, Inc. and Chenax Majesty, Inc. with respect to their cement contracts and letters of credit. These were the first such actions brought against Nigeria or Central Bank

after the effective date of the Immunities Act. The actions were consolidated before Judge Pierce; Verlinden's attorney herein, B. H. Hoeniger, was also the attorney for East Europe Import-Export, Inc. Nigeria and Central Bank moved to dismiss these actions for lack of jurisdiction. Judge Pierce referred the matter to U.S. Magistrate S. Schreiber for hearing and recommendation. Plaintiffs therein requested and obtained extensive discovery of Morgan Guaranty prior to submission on the motion, to explore Morgan Guaranty's relationship with Central Bank. It is respectfully submitted that this discovery confirmed the previous findings made by Judge Goettel in the National American action with respect to the relationship. The motion to dismiss was before Magistrate Schreiber for many months. Significantly, Magistrate Schreiber's recommendation, which was adopted by Judge Pierce, did not sustain jurisdiction on the grounds that Nigeria or Central Bank were conducting a commercial activity in the United States. Magistrate Schreiber's recommendation is discussed further below and in detail in Central Bank's accompanying memorandum.

22. The East Europe, Nikkei and Chenax actions were tried before Judge Pierce in September 1979; no decision has been rendered therein as yet; and the jurisdictional issues have been renewed by the parties in their post-trial submissions to

Judge Pierce. Judge Pierce's pretrial adoption of Magistrate Schreiber's recommendation on jurisdiction pursuant to the Immunities Act is the only such ruling made to date in the many actions commenced against Nigeria and Central Bank relating to cement contracts and letters of credit similar to those of Verlinden herein. The only other such action litigated through trial in the United States was National American, and the jurisdictional basis in National American was quasi-in-rem; the result of an attachment of property of Nigeria and Central Bank. Judge Goettel so held (448 F.Supp. at page 639) after expressing a dictum with respect to the Immunities Act.

23. It is respectfully submitted that Verlinden's claim is not based on a commercial activity carried on in the United States by Central Bank within the meaning of the Immunities Act.

b. Verlinden's claim is not based upon an act performed by Central Bank in the United States in connection with a commercial activity of Nigeria or Central Bank elsewhere

24. The acts of breach of which Verlinden complains are the issuance by Central Bank of directives and instructions to Verlinden and other cement suppliers (Verlinden complaint, paragraphs 14-15).

25. These instructions were issued by Central Bank in Nigeria, not the United States. The instructions related to Verlinden's letter of credit and therefore were advised through Morgan Guaranty as were all other advices and instructions concerning Verlinden's letter of credit.

c. Verlinden's claim is not based upon an act by Central Bank outside the United States in connection with a commercial activity of Central Bank elsewhere, which act caused a direct effect in the United States.

26. The Legislative History of the Immunities Act (Exhibit 5 hereto), at page 6618, discusses this basis for jurisdiction and is explicit that the situations to which it applies "would embrace commercial conduct abroad having direct effects within the United States . . ." (emphasis added). Pursuant to the Immunities Act, the courts of the United States and of the States have no jurisdiction with respect to actions arising out of governmental activity of a foreign state or agency thereof.

27. It is respectfully submitted that Verlinden's action is based upon the governmental activity of Nigeria and Central Bank with respect to the imposition of a ports embargo in August 1975 and the implementation of the embargo thereafter.

28. Central Bank submits the affidavit of the Honorable O. Jolaoso, Ambassador to the United States from Nigeria, sworn to on October 25, 1977, (Jolaoso's affidavit); Exhibit 7 hereto. The Jolaoso affidavit asserts the defense of sovereign immunity with respect to any claim brought against Nigeria or Central Bank

relating to cement contracts with Nigeria or letters of credit established by Central Bank pursuant thereto. The Jolaoso affidavit confirms the status of Central Bank as the financial arm of the Government of Nigeria. With respect to the ports embargo imposed by Nigeria in August 1975, the Jolaoso affidavit explains that the announcement of the embargo was one of the first acts of the new Government of Nigeria which took office on July 29, 1975. The Government enacted and published Government Notice No. 1434, dated August 9, 1975, a copy of which is appended to the Jolaoso affidavit. Government Notice No. 1434 regulated the sailing and arrival of all vessels into Nigerian ports and granted authority to the Nigerian Ports Authority to coordinate sailings, to allocate berths, etc. so as to alleviate and resolve the congestion. Ambassador Jolaoso explains that this action by Nigeria was required because the ports congestion in Lagos Harbor was causing severe and dire disruption of vital commerce in essential consumer goods and had become a threat to the economic and social survival of Nigeria; the congestion was preventing the importation of goods, such as milk, sugar, salt and flour.

29. Ambassador Jolaoso states that Nigeria notified each cement supplier of the ports congestion and of the provisions of Government Notice No. 1434, and that Nigeria invited each cement supplier to meet with the Negotiating Committee, which had been established by the Government for the purpose of resolving disputes relating to the cement contracts and letters of credit.

The Ambassador notes that the Negotiating Committee was successful in renegotiating many of the cement contracts.

30. In December 1975, the Government of Nigeria found it necessary to enact Ports (Emergency Provisions) Decree 1975, Decree No. 40, dated December 19, 1975 (Decree No. 40); Exhibit 8 hereto. Decree No. 40 repeats substantially the same regulations enacted in Government Notice No. 1434 in August 1975 with respect to advance permission for sailings to Nigeria and the authority of the Nigerian Ports Authority with respect to resolving the ports congestion. Decree No. 40, however, imposed for the first time criminal penalties for the failure by shippers to observe the embargo regulations.

31. At paragraph 14 of its complaint, Verlinden describes the substance of the communications received in October 1975, which communications it alleges constituted the anticipatory breach of its letter of credit.

32. It is respectfully submitted that the communications referred to at paragraph 14 of the Verlinden complaint are the following: (1) a message from Central Bank to Verlinden, sent from Lagos on September 30, 1975 (Exhibit 9 hereto), informing Verlinden of the ports congestion and the creation of the Negotiating Committee, and inviting Verlinden to meet with the Negotiating Committee on October 16, 1975; and (2) the letter from Morgan Guaranty to Verlinden, dated September 30, 1975 (Exhibit 10 hereto), which quotes the text of Central Bank's

cables advising of the embargo regulations with respect to the requirement of two months' advance permission for sailings to Nigeria and of certain documentation necessary with respect to payment of demurrage. The instructions with respect to demurrage did not affect Verlinden, since Verlinden had not shipped any cement to Nigeria.

33. The imposition of an embargo by a foreign state is recognized in international law as permissible governmental activity of the foreign state.

34. In the actions commenced by East Europe, Nikkei and Chenax, referred to above, plaintiffs cited as the acts of anticipatory breach by Nigeria and Central Bank the same instructions and notices which Verlinden cites at paragraph 14 of its complaint herein.

35. As noted above, Nigeria and Central Bank's motion to dismiss these actions was referred to U.S. Magistrate S. Schreiber for hearing and recommendation. Magistrate Schreiber rendered his recommendation in the form of a written opinion, dated September 19, 1978, copy of which is Exhibit 11 hereto. At page 17 of his recommendation, Magistrate Schreiber acknowledged that the embargo by Nigeria in August 1975 was a legitimate governmental act of state. At page 8 of his recommendation, in the last paragraph, Magistrate Schreiber acknowledged that jurisdiction pursuant to the Immunities Act, Section 1605(a)(2), on the basis of an act performed by the foreign state outside

the United States and having an effect in the United States, embraced only commercial conduct of the foreign state or agency thereof, as provided in the Legislative History of the Immunities Act (Exhibit 5 hereto), at page 6618.

36. Magistrate Schreiber recommended that jurisdiction in the East Europe, Nikkei and Chenax actions be sustained pursuant to the third situation defined in Section 1605(a)(2) of the Immunities Act, on the grounds that the instructions from Central Bank, which the plaintiffs complained amended the payment terms of their irrevocable letters of credit, constituted solely commercial activity (pages 9-10 of the Magistrate's recommendation).

37. It is respectfully submitted that Magistrate Schreiber's recommendation, and the order of Judge Pierce adopting the recommendation, are erroneous. The instructions of Central Bank which Verlinden, East Europe, Nikkei and Chenax all contend constitute acts of anticipatory breach, are clearly implementations of the ports embargo imposed by Nigeria and, as such, are part of the governmental activity of Nigeria with respect to the embargo. The embargo could have had no effect unless those entities dealing with Nigeria were informed of the embargo regulations and instructed to comply therewith. The announcement of the embargo by Nigeria cannot be distinguished from the implementation and enforcement of the embargo; the embargo in its entirety was governmental action.

38. It is respectfully submitted that Verlinden's claim herein is based solely on governmental acts by Nigeria and Central Bank, and that jurisdiction with respect to the claim does not exist pursuant to the Immunities Act.

The Act of State Doctrine Precludes Adjudication of Verlinden's Claim

39. Even if jurisdiction of Verlinden's claim existed pursuant to the Immunities Act, to adjudicate the claim, this Court would be required to review and pass upon the motive for or validity of the governmental action by Nigeria in imposing and implementing the ports embargo in 1975. The act of state doctrine prohibits the courts of the United States and of the States from making such a review or determination with respect to governmental activity of a foreign state; and, therefore, the act of state doctrine precludes an adjudication of Verlinden's claim herein.

40. The acts of anticipatory breach alleged by Verlinden were implementations of the embargo regulations and clearly governmental activity. To impose liability against Central Bank pursuant to Verlinden's claim, this Court of necessity must pass upon the motive for or validity of the activity of Central Bank and Nigeria in implementing the embargo and the embargo regulations.

41. Magistrate Schreiber in his recommendation, referred to above (Exhibit 11 hereto), discussed the act of state doctrine which had been asserted by Nigeria and Central Bank as a bar to the adjudication of the claims alleged by East Europe, Nikkei and Chenax (pages 11-18 of Magistrate Schreiber's recommendation). The Magistrate recognized that the act of state doctrine is separate and distinct from the doctrine of sovereign immunity (pages 12-13 of Magistrate Schreiber's recommendation). It is respectfully submitted that Magistrate Schreiber's conclusion that the act of state doctrine did not apply, was erroneous. The Magistrate, at page 16 of his recommendation, stated that: "Defendant Nigeria has alleged two acts of state: (1) the embargo of its ports and (2) the amendment of the letters of credit to require evidence of two months' notice and prior approval of shipment before payment." This statement is incorrect. On the motion before Magistrate Schreiber, Nigeria and Central Bank asserted, as Central Bank asserts herein, that the imposition and implementation of the ports embargo were a part of the same act of state. As noted above, the announcement of the embargo alone would have had no effect unless the embargo regulations were promulgated and enforced.

42. It is respectfully submitted that Magistrate Schreiber's misinterpretation of Nigeria and Central Bank's position enabled him to conclude, at page 17 of his recommendation that: "There is no direct casual link between the embargo and the alleged damages, for plaintiffs have alleged that their damages resulted not from the embargo, but rather from the amendment of

the irrevocable letters of credit."

43. Central Bank also disputes the conclusion of Magistrate Schreiber, at page 18 of his recommendation, that the U.S. Supreme Court opinion in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976), announced a commercial acts exception to the act of state doctrine. Central Bank's position on this issue is set forth in detail in its memorandum in support of the instant motion.

44. Central Bank respectfully submits that the act of state doctrine is applicable to the claim of anticipatory breach alleged by Verlinden, and therefore, renders the claim non-justiciable.

Verlinden has failed to state a claim upon which relief can be granted

45. Verlinden's claim of anticipatory breach of its letter of credit is premised entirely upon acts by Central Bank which occurred in October 1975 and thereafter. It is respectfully submitted that well prior to October 1975, the Verlinden letter of credit had ceased to exist because of Verlinden's failure to commence shipments of cement to Nigeria in accordance with the terms of the letter of credit.

46. Exhibit 12 hereto is the affidavit of Alfred Koebel, Assistant Vice-President and Senior Technical Officer

in the Letter of Credit Department of Morgan Guaranty, sworn to November 12, 1979 (Koebel affidavit). The Koebel affidavit identifies seven documents which are appended as exhibits thereto. Mr. Koebel states that he is fully familiar with Morgan Guaranty's file on the Verlinden letter of credit.

47. The Koebel affidavit demonstrates that:

a. Verlinden had received Morgan Guaranty's advice of the terms of the Verlinden letter of credit by July 11, 1975;

b. Pursuant to paragraph (2) of the Appendix to the Verlinden letter of credit, shipments of cement to Nigeria were to be made in installments, and Verlinden was required to commence such shipments not later than August 25, 1975;

c. Paragraph (2) of the Appendix to the Verlinden letter of credit was never amended to extend or postpone the time for commencement of shipments;

d. At the end of September 1975, well after the deadline for commencement of shipments, Slavenburg's Bank advised Morgan Guaranty that Verlinden was aware that the provisions of paragraph (2) of the Appendix as to time for commencement of shipments had not been extended and that Verlinden was "intensively trying" to resolve this problem;

e. Article 34 of U.C.P., 1962 Revision, provides that where shipments are to be by installments within given periods, and where any installment is not shipped within the

period allowed for that installment, the letter of credit ceases to be available for that or any subsequent installment, unless otherwise specified in the credit.

f. Pursuant to the Verlinden letter of credit and Article 41 of U.C.P., 1962 Revision, documents evidencing the loading of a vessel with cement for Nigeria were required to be presented for payment at Morgan Guaranty within a reasonable time after issuance of the documents, which Morgan Guaranty construed to be not more than 30 days after such issuance.

g. Verlinden made no presentment of documents at Morgan Guaranty with respect to a shipment of cement made either on or before August 25, 1975, or at any time thereafter.

h. Since documents evidencing a shipment on or before August 25, 1975 were not presented within a reasonable time (30 days) after August 25, 1975, Morgan Guaranty would not have honored any presentation of documents made under the Verlinden letter of credit thereafter, unless authorized to do so by Central Bank.

i. Morgan Guaranty received no such authorization from Central Bank.

j. The communications sent by Morgan Guaranty to Verlinden at the end of September 1975 and thereafter, conveying instructions from Central Bank with respect to documentation for payments under the letter of credit required by directives of Nigeria concerning the ports congestion, were made by Morgan

Guaranty at the request of Central Bank to convey such instructions to all beneficiaries of the cement related letters of credit advised through Morgan Guaranty.

48. Verlinden admits that on or about July 7, 1975, Morgan Guaranty advised Verlinden and Slavenburg's Bank of the Verlinden letter of credit and forwarded copies thereof (Verlinden complaint, paragraph 9).

49. Verlinden admits that it had delegated its entire obligation to deliver cement to Nigeria to a third-party subcontractor, Interbuco of Liechtenstein; and that it did not enter into a subcontract with Interbuco until August 21, 1975 (Verlinden complaint, paragraph 11). Verlinden also admits that by October 1975, no vessels carrying cement had ever sailed for Nigeria (Verlinden complaint, paragraph 14); and that Verlinden performed no part of its cement contract and used no part of its letter of credit (Verlinden complaint, paragraph 19(a)).

50. The Verlinden cement contract (Exhibit 3 hereto), at paragraph 1(vi), contains the identical provision with respect to the commencement of shipments as appears in paragraph (2) of the Appendix to the Verlinden letter of credit.

51. Verlinden's failure to commence shipments of cement to Nigeria on or before the final shipping date of August 25, 1975 caused the entire Verlinden letter of credit to become unavailable to it as of August 25, 1975; the Verlinden letter of credit ceased to exist as of that date, and was never revived by Central Bank.

52. It is respectfully submitted that Verlinden's claim is without merit since it is with respect to an alleged anticipatory breach of its letter of credit by Central Bank which occurred after the letter of credit had ceased to exist by virtue of Verlinden's own failure to comply with the terms of the letter of credit.

The Order of October 12, 1979

a. Central Bank has complied fully with the order of October 12, 1979

53. A copy of this Court's order dated October 12, 1979 is Exhibit 13 hereto. The order denied Verlinden's motion for default judgment on condition that Central Bank furnish to Verlinden:

> "(a) defendant's written irrevocable instructions to Morgan Guaranty Trust Company of New York ("Morgan") to keep in defendant's name and account at Morgan, free and unencumbered, the sum of $4,360,000, together with interest on $3,610,000 at 6% per annum from October 1, 1975, and not subject to withdrawal, transfer into any other name or account, hypothecation, liening, or encumbrancing, pending the final determination of this action and for a period of 30 days thereafter, so that such funds shall be available for the satisfaction of the judgment, if any, which plaintiff may ultimately recover herein; together with defendant's request and instruction to Morgan that Morgan promptly confirm to plaintiff's attorney the receipt of said instructions and Morgan's acknowledgment that Morgan will abide thereby; or
>
> "(b) a guaranty by Morgan to plaintiff of defendant's payment of the amount of the final judgment herein, if any, in favor of plaintiff, up to the sum of $4,360,000 with continuing interest thereon from October 1, 1975."

54. By telex dated October 22, 1979 (Exhibit 14 hereto), Central Bank instructed Morgan Guaranty to maintain in its account at Morgan Guaranty a minimum balance of $4,360,000, stating that "the purpose of this transfer is to comply with a court order . . . pending the determination of a suit".

55. By telex dated October 26, 1979 (Exhibit 15 hereto), Central Bank modified its previous instructions to Morgan Guaranty to request that an additional $870,000 be held in its account at Morgan Guaranty. This amount of $870,000 represents interest at 6% per annum on $3,610,000 from October 1, 1975, as defined in paragraph (a) of the order of October 12, 1979. Central Bank had requested clarification from our firm as to whether the interest amount defined in the order was included in the sum of $4,360,000, or was to be added to that sum. We advised that the interest amount was an additional amount to be retained, and Central Bank acted promptly to reserve the additional amount representing interest. The telex of Central Bank dated October 26, 1979 states: "This is in addition to dollars 4,360,000.00 in same account to meet Judge Weinfeld's order of October 12, 1979."

56. Central Bank's telex instructions to Morgan Guaranty demonstrate that it was required to fund its account at Morgan Guaranty by transferring amounts from the Federal Reserve Bank so as to create a balance sufficient in amount to comply with the Court's order.

57. Central Bank's prompt compliance with the order of October 12, 1979 is evidence that Central Bank would honor and pay any final judgment ultimately obtained by Verlinden herein.

b. The Court was without jurisdiction to impose the restriction on funds of Central Bank

58. The order of October 12, 1979 was the result of this Court's ruling at a hearing conducted on October 2, 1979 with respect to Verlinden's motion for an order of default judgment brought on September 10, 1979. In its papers on that motion, Verlinden did not request a restriction on property of Central Bank as alternative relief to the default judgment it sought, and Mr. Hoeniger, attorney for Verlinden, suggested this alternate relief for the first time at the hearing on October 2, 1979. Therefore, the issue of this Court's jurisdiction to impose such a restriction was not addressed by Central Bank in the papers filed in opposition to the September 10, 1979 motion. Further, Mr. Hoeniger stated at the hearing that his only purpose for bringing the motion was to obtain some assurance or commitment that Central Bank would pay any judgment that might ultimately be rendered against it herein.

59. It is respectfully submitted that the restriction on Central Bank's property required by the order of October 12, 1979 is in the nature of an attachment; as such, it is in violation of the Immunities Act, and further it imposes conditions

more onerous than those permitted by the New York law of attachment. Even if the attachment were authorized by the Immunities Act, Verlinden is not entitled to such relief until it meets the preconditions imposed by New York law for the granting of an attachment.

60. The Immunities Act, 28 U.S.C., Section 1610(d), permits an attachment prior to the entry of judgment with respect to property of a foreign state or agency thereof used for a commercial activity in the United States only if the foreign state or agency has explicitly waived its immunity from attachment prior to judgment and the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state or agency.

61. These requirements of the Immunities Act have not been met with respect to the order of October 12, 1979: Central Bank has made no explicit waiver of its immunity from attachment prior to judgment; Central Bank was required to fund its account at Morgan Guaranty with property that is not used for a commercial activity in the United States; and no basis has been demonstrated for requiring Central Bank to secure prior to judgment the satisfaction of any judgment Verlinden may ultimately obtain herein. To the contrary, Central Bank's prompt and full compliance with the order of October 12, 1979, is evidence that it would satisfy any judgment ultimately obtained by Verlinden.

62. It is respectfully submitted that even if the Immunities Act were not a complete barrier to the relief awarded by the order of October 12, 1979, Verlinden is not entitled to such relief pursuant to the applicable New York order of attachment, since Verlinden has not fulfilled the preconditions for such an attachment.

63. The New York law of attachment is defined in McKinney's New York Civil Practice Law and Rules (C.P.L.R.), Article 62, and, by virtue of Rule 64 of the Federal Rules of Civil Procedure, is applicable with respect to attachments ordered by this Court. To sustain an attachment pending the final determination of its claim, Verlinden would be required to give an undertaking to secure the expenses and damages to Central Bank should it be decided ultimately that Verlinden was not entitled to the attachment (C.P.L.R., Rule 6212(b)); promptly upon levy, Verlinden would be required to move on notice to Central Bank and any garnishee for an order to confirm the attachment, which could not be granted absent proof by Verlinden that it has a cause of action and that it is probable that Verlinden would succeed on the merits of its claim; (C.P.L.R., Section 6211(b), 6212(a); see, National American Corp. v. Federal Republic of Nigeria, et al., 420 F.Supp. 954 (S.D.N.Y. 1976), opinion by Judge Weinfeld).

64. It is respectfully submitted that the restriction imposed by the order of October 12, 1979 goes beyond what is

authorized by the New York law of attachment. An order of attachment cannot require the funding of an account so as to create an asset to be levied against; a levy pursuant to an order of attachment is successful only if the property first exists. The order of October 12, 1979 requires Central Bank to retain the funds described free of all encumbrances until final disposition of this lawsuit. New York law permits multiple levies by different creditors against the same property and defines a priority of rights and interests among creditors.

c. It is inequitable to continue the restriction on Central Bank's property

65. The restriction on property of a foreign state or agency thereof in the nature of that imposed by the order of October 12, 1979 clearly circumvents the provisions of the Immunities Act. Even if there were justification for such action by the Court, it is respectfully submitted that the facts of the instant case do not support creating such a precedent.

66. Central Bank complied with the order of October 12, 1979, promptly and completely; there is nothing to suggest that Central Bank would fail to so comply with any other order of the Court or would fail to pay in full any judgment ultimately obtained by Verlinden herein.

67. Our firm has been retained by Nigeria and Central Bank since the Fall of 1975 to defend at least ten actions on claims relating to cement contracts and letters of credit. Our

instructions from Nigeria and Central Bank have been to litigate these actions so as to require plaintiffs to prove their claims. There has been no judgment taken against Nigeria or Central Bank with respect to any of the actions brought in the United States: some of the actions have been settled amicably and dismissed; one was dismissed for failure of plaintiff to prosecute; another was fully litigated, with judgment rendered in favor of Nigeria and Central Bank, National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. 622 (S.D.N.Y. 1978), aff'd 597 F.2d 314 (2d Cir. 1979); three actions were consolidated and have just been tried before Judge Pierce of this Court; Judge Pierce has not rendered his decision in these actions. In addition, our firm is aware of no legal proceeding abroad relating to similar cement contracts or letters of credit in which Nigeria or Central Bank has failed to satisfy any judgment or award taken against it.

68. It was explained at the hearing on October 2, 1979 that Central Bank's technical default herein was inadvertent; Mr. Hoeniger acknowledged that Verlinden's motion for default judgment was brought not with the intention of securing such a judgment, but to procure some lesser sanction. It is respectfully submitted that no basis for the imposition of any such sanction remains.

WHEREFORE, Central Bank respectfully requests the Court to grant its motion for an order dismissing Verlinden's complaint on the grounds that the Court lacks jurisdiction of the claim and of Central Bank, that the act of state doctrine precludes an adjudication of Verlinden's claim, and that Verlinden has failed to state a claim upon which relief can be granted. Further, Central Bank respectfully requests the Court to grant its motion for an order granting Central Bank relief from the order dated October 12, 1979, on the grounds that the order is in violation of the Immunities Act and on the grounds that it is no longer equitable that the order of October 12, 1979 should have prospective application.

James G. Simms

Sworn to before me this
12th day of November 1979.

Notary Public

PETER J. BRUNDAGE, JR.
NOTARY PUBLIC, State of New York
No. 2[illegible]1979
Qualified in Kings County
Commission Expires March 30, 19[illegible]80

EXHIBIT 1 TO SIMMS AFFIDAVIT - COMPLAINT
(reproduced herein at pages 6a-20a)

EXHIBIT 2 TO SIMMS AFFIDAVIT - VERLINDEN
LETTER OF CREDIT

CENTRAL BANK OF NIGERIA

Tinubu Square
Lagos

PJ EXH. 4

AUG 2 1978 IDENT.

PRIVATE MAIL BAG 12194: CABLES: CENBANK

TELEPHONE

23 JUN 1975

Our Ref: CBN/BO/75/145

The Commercial Credit Department,
Morgan Guaranty Trust Co.,
23, Wall Street,
New York,
U. S. A.

Dear Sirs,

Letter of credit for U.S.$14,400,000.00 i.f.o.
Verlinden B.V. of Lomanstraat 1, Amsterdam,
Netherlands.

We confirm our cable of today and forward herewith our irrevocable documentary credit No. CBN/BO/75/145 opened in favour of the above named beneficiary.

In consideration of your advising the credit, please debit our account and advise us accordingly with the amounts of payments effected thereunder together with your commissions and charges on receipt of relevant shipping documents.

Please attach the original of our letter of credit to your advice to the beneficiary.

Yours faithfully,

Signature Verified

Bi[illegible] Manager.

Countersigned:

Asst. Chief of Banking Operations.

CENTRAL BANK OF NIGERIA
Tinubu Square,
Lagos
PRIVATE MAIL BAG 12124: CABLES: CENBANK:
TELEPHONE

Date: 23 JUN 1975

DOCUMENTARY CREDIT

Confirmation of Telex of: 23 JUN 1975

The Commercial Credit Department,
Morgan Guaranty Trust Co.,
23, Wall Street,
New York.

(Correspondent Bank)

CREDIT NO.
CBN/BO/75/145

Dear Sirs,

We hereby request you to advise our irrevocable/transferable abroad/~~revocable~~ Documentary Credit in favour of Verlinden B.V. of Lomanstraat 1, Amsterdam, Netherlands.

for U.S.$14,400,000.00

Fourteen million, four hundred thousand U. S. Dollars
(Amount in words)

available by their draft(s) at SIGHT (No. of days) for 100 %

of the CIF/~~FOB~~ Invoice drawn on yourselves
accompanied by the following documents (at least in duplicate unless otherwise indicated).

—— Commercial Invoice in quadruplicate

—— [illegible]

—— Insurance [illegible] Certificate [illegible]

—— Full set clean on Board Bills of Lading made out to order and endorsed in blank, marked "Freight Prepaid/[illegible]" dated latest 15th July, 1976 claused "notify The Permanent Secretary, Ministry of Defence, Lagos".

Covering Shipment(s) of C.I.F. LAGOS/APAPA value of 240,000 metric tons, plus or minus 10% at seller's option, of Portland Cement conforming to B.S.S.12/1958 or B.S.S.12/1971 at U.S.$60.00 per [illegible] metric ton Free Out (Incoterms 1953), to be purchased by Ministry of Defence Aq per Agreement signed on 21st April, 1975.

From: Any European Ports to Lagos/Apapa Ports

Part shipment is [illegible]/Permitted

Transhipment is Prohibited/[illegible]

This credit is valid in New York until 31st July, 1976 (date) for presentation for payment in accordance with the conditions endorsed hereon.

Draft(s) presented must be drawn under this letter of credit (stating its number and date) and the amount(s) entered thereon must be endorsed by the correspondent bank.

We undertake that all drafts drawn in compliance with the terms of this credit will be honoured on receipt of the agreed shipping documents. The correspondent bank is required to send the original documents to us by Express Registered Airmail (duplicate by following airmail).

Please advise beneficiary (without adding your confirmation) of our authority given to you to pay on sight of documents.

Additional Instructions:

Part payments allowed. Payment against documents.

Credit to be advised through Slavenburg's Bank, Amsterdam, Netherlands.

All documents to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos.

Special Instructions:

Please see attached Appendix.

Except otherwise stated this credit is subject to uniform customs and Practice Documentary Credits(1962 Revision) Chamber of Commerce Brochure No. 222.

Yours faithfully,

Signature Verified

Bills Manager.

Countersigned:

17/6/75

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos
PRIVATE MAIL BAG 12194, CABLES, CENBANK
TELEPHONE

APPENDIX

In respect of Letter of Credit No. CBN/BO/75/145

Special Instructions:

(1) Packing: Packing shall be in 6-ply kraft paper bags each containing 50 kgs G/N. Also 4-ply empty spare bags to be supplied free of cost equal to 3% of total number of filled bags comprising each consignment.

(2) Shipment: Shipment to commence within 45 days after receipt of the letter of credit in Amsterdam by the seller. Delivery shall be at the rate of 20,000 metric tons per mensem minus 10% at seller's option or plus such additional quantity as the seller may be able to deliver.

(3) Insurance: Insurance (F.P.A.) by the seller shall be from Constanza, Barcelona, Bilbao, Santander, Alicante Goliz, Valencia Tarragona and/or Malaga to the Lagos/Apapa Ports. The buyer shall insure the goods against all risks during discharge at the Lagos/Apapa Ports and therefrom to his Ware-house.

(4) Demurrage: Unloading of each consignment of cement (which shall be entirely the responsibility of the buyer) shall be completed within ten days where such consignment is of 10,000 metric tons or pro-rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the master has reported his readiness to discharge to the Chief Harbour Master whether the vessel is berthed or not), demurrage not exceeding U.S.$3,500.00 per diem shall be for the account of the buyer provided the seller shall have given due

notice to the buyer by cable of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the letter of credit on presentation at the Beneficiary's Banker of time-sheets and statements of facts duly certified as correct by the ship's agent in Lagos.

(5) All bank and transfer charges are for the account of the buyer.

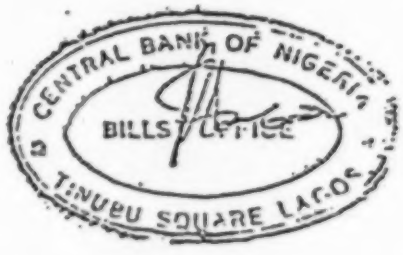


EXHIBIT 3 TO SIMMS AFFIDAVIT - VERLINDEN CEMENT CONTRACT

THIS AGREEMENT is made the 21st day of APRIL, 1975, BETWEEN IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria (hereinafter called "the buyer") of the one part

AND VERLINDEN B.V. of Lomanstraat 1, Amsterdam, Netherlands,

represented in Nigeria by
E. J. EMONIORO

whose registered place of business is
No. 33, Modupe Johnson Crescent, Surulere, Nigeria

(hereinafter called "the seller")

of the other part.

WITNESSETH AS FOLLOWS:

1. The Buyer agrees to buy from the seller and the seller agrees to sell to the buyer cement on the terms and conditions hereinafter expressed.

(i) DESCRIPTION: The cement shall be Portland Cement conforming to B.S.S.12/1958 or B.S.S. 12/1971.

(ii) QUANTITY: 240,000 metric tons, plus or minus 10% at seller's option.

(iii) PRICE: The price shall be $ U.S. 60.00 per metric ton C.I.F. Lagos/Apapa Free Out (Incoterms 1953), making a total sum of $.U.S. 14,400,000.00, plus or minus 10%.

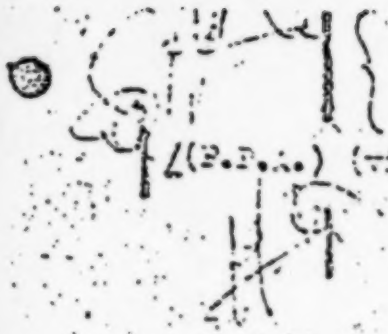
(iv) PACKING: In 6 ...-Ply kraft paper bags each containing 50 kgs G/W. Also 4 ....-Ply empty spare bags, to be supplied free of cost, equal to 3 per cent of total number of filled bags comprising each consignment.

(v) TERMS OF PAYMENT: By virtue of a revolving Performance Bond, in the sum of $ U.S. 36,000.00 ..... (representing one-twelfth of 3% of the total purchase price) already deposited by the seller with the Central Bank of Nigeria, Lagos, the buyer undertakes to establish, within ~~fourteen (14)~~ twenty-one (21) days from the date hereinbefore mentioned, an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Slavenburg's Bank, Amsterdam, ... Netherlands. .....

.....

Drafts drawn under the Letter of Credit shall be payable at sight, on presentation to the bank designated above of Invoices, Clean on Board Bills of Lading and Insurance Certificates.

(vi) SHIPMENT: GENCON Charter Party terms are acceptable. Shipment to commence within 30 45 days after receipt of the Letter of Credit in Amsterdamby the seller. Delivery shall be at the rate of 20,000 .....



metric tons per monsem, plus/minus 10% at seller's option., or plus such additional quantity as t seller may be able to deliver.

(vii) INSURANCE: Insurance by the seller shall be from Constanza, Barcelona, Bilbao, Santander, Alicante, Cadiz, Valencia, Tarragona and/or Malaga ..... to the Lagos/Apapa Quays.

The buyer shall insure the goods against all risks during discharge at the Lagos/Apapa Quays, and therefrom to his warehouse.

(viii) UNLOADING: The buyer shall arrange the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from Customs and complying with all necessary formalities, and shall pay all clearance charges, Customs duties, and harbour and anchorage dues.

(ix) DEMURRAGE: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons, or pro-rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Har-

bourmaster, whether the vessel is berthed or not), demurrage not exceeding $ U.S. 3,500.00... per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer by cable of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the bank designated in sub-clause (v) above of time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's agents in Lagos.

2. The construction, validity and performance of this contract shall be governed by the Laws of .....Netherlands..... and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient.

IN WITNESS WHEREOF IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria has hereunto set his hand and seal, and F. VERLINDEN

for and on behalf of VERLINDEN B.V.

has set his hand and seal the day and year first above appearing.

SIGNED SEALED AND DELIVERED by the said IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria.

In the presence of C. G. LAKIN-SMITH

SIGNED SEALED AND DELIVERED

by F. VERLINDEN

for and on behalf of VERLINDEN B.V.

in the presence of E. J. IMONIORO

EXHIBIT 4 TO SIMMS AFFIDAVIT - IMMUNITIES ACT

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE—Continued

CHAPTER 85—DISTRICT COURTS; JURISDICTION—Continued

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

[See main volume for text of (b) to (d)]

As amended Oct. 21, 1976, Pub.L. 94–583, § 3, 90 Stat. 2891.

1976 Amendment. Subsec. (a)(2). Pub. L. 94–583 substituted "and citizens or subjects of a foreign state;" for ", and foreign states or citizens or subjects thereof; and".

Subsec. (a)(3). Pub.L. 94–583 substituted "citizens or subjects of a foreign state are additional parties; and" for "foreign states or citizens or subjects thereof are additional parties".

Subsec. (a)(4). Pub.L. 94–583 added subsec. (a)(4).

Effective Date of 1976 Amendment. Amendment by Pub.L. 94–583 effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6904.

Supplementary Index to Notes

Borrowing statutes, rearrangement of parties 435a
Business trusts 218a
Citizen of two countries 215a
Citizenship
  Associations 219b
  Hospitalized inmates 216b
  Personal representative 218a
  Prisoners 216a
  Refugees or fugitives 216c
  Students 236a
  Union members 219a
Civil rights 235a
Collateral attack 822a
Construction
  1984 Amendment 3b
  With federal rules 3a
Costs 793a
Depositions to determine 569
Discovery 835a
Evidence
  Examination of witnesses 795a
  Privilege 795b
Examination of witnesses 795a
Extent 728
Form of action as determinative 13a
Hospitalized inmates, citizenship 216b
Indians, necessity of diversity between all opposing parties 207a
Joint or several actions 702
Law governing 836
Malicious prosecution 136a
Malpractice 138b
Necessity of diversity between all opposing parties
  Civil rights 235a
  Indians 207a
1984 Amendment
  Construction of 3b
  Purpose of 10a
Nominal or formal parties
  Partnership actions 461a
Partnership actions, nominal or formal parties 461a
Pendent jurisdiction 28a
Personal representative, citizenship 218a
Pleading
  Counterclaims 316a
Power of Congress 533a
Prisoners, citizenship of 216a
Purpose
  1984 Amendment 10a
Question of law 317
Rearrangement of parties
  Borrowing statutes 435a
Refugees or fugitives, citizenship 216c
Students, citizenship 236a
Trade secrets 611a
Transfer of actions 81
Union members, citizenship 219a

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1. Constitutionality

Eldridge v. Richfield Oil Corp., 247 F. Supp. 407, main volume, affirmed 364 F. 2d 909, certiorari denied 87 S.Ct. 750, 385 U.S. 1020, 17 L.Ed.2d 556.

Americana of Puerto Rico, Inc. v. Kaplus, 240 F.Supp. 854, main volume, affirmed 368 F.2d 431, certiorari denied 87 S.Ct. 937, 386 U.S. 943, 17 L.Ed.2d 874.

2. Construction

To same effect as fourth paragraph in main volume, see Wolgin v. Atlas United Financial Corp., D.C.Pa.1955, 397 F.Supp. 1093, affirmed 530 F.2d 963, 966.

To same effect as eighth paragraph in main volume, see Ciobcki v. Presbyterian-University Hospital, D.C.Pa.1971, 333 F.Supp. 415.

state a cause of action or because the plaintiff might be unable to prove his case; such failures call for dismissal on the merits, not on jurisdictional grounds. Spector v. L. Q. Motor Inns, Inc., C.A.Tex.1975, 517 F.2d 278, rehearing denied 521 F.2d 815, certiorari denied 96 S.Ct. 386, 423 U.S. 1055, 46 L.Ed.2d 644.

Where, in exercise of its discretion, federal district court has determined it proper to withhold federal jurisdiction and abstain, it may dismiss action entirely or retain jurisdiction pending litigation in state courts. Tomiyasu v. Golden, C.A.Nev.1960, 358 F.2d 651.

Where there was no showing of a breakdown in operation of state courts or that state courts were unable to function timely or with propriety, and parties bringing action involving operation of county school system had not exercised invitation of state reviewing court to return if disposition of matter at trial level was not timely made, federal court would dismiss action by such parties seeking to interject federal court into such controversy. Hyden v. Clark, D.C.Ky.1973, 354 F.Supp. 207.

Where court does not have personal jurisdiction over party defendant, action must generally be dismissed against it. Phillip Call and Son v. Garcia Corp., D.C.Ky.1972, 340 F.Supp. 1225.

Federal court on its own motion may dismiss a suit for lack of jurisdiction. Kane v. Cameron, D.C.Pa.1971, 329 F.Supp. 933.

330. Remand

Until the Court of Appeals issues its mandate and remands cases to the district court, the district court lacks jurisdiction of the cases. Reserve Mining Co. v. Environmental Protection Agency, C.A.Minn.1975, 514 F.2d 492.

Where arguments raised to support contentions of want of district court's jurisdiction appeared to be forceful and to have considerable case support, district court on remand should consider explicitly the jurisdictional issues and state specifically on record its conclusions so as to make meaningful appellate review possible. R. P. Adams General Contractors, Inc. v. Department of Housing and Urban Development, C.A.Tex.1973, 501 F.2d 170.

Where cause based on check in amount of about $4,000 and a money order issued upon presentment of check to bank was removed from state court to federal court on petition of United States named as third-party defendant, but federal court had no jurisdiction over the United States, federal court, in exercise of its discretion, would remand case to the state court. Stewart Sand & Material Co. v. Southeast State Bank, D.C.Mo.1970, 318 F.Supp. 870.

On motion to remand to state court, federal court is limited solely to question of jurisdiction, and case will be remanded if jurisdiction is doubtful. Oil Well Service Co. v. Underwriters at Lloyd's London, D.C.Cal.1969, 302 F.Supp. 384.

Federal district court would not remand case to state court on ground that federal district court did not have original jurisdiction of case commenced by attachment and could not thereafter acquire jurisdiction or on ground that federal district court should not intervene where res is in possession of state court officers. Arvin Industries, Inc. v. Hampden Specialty Products Corp., D.C.Tenn. 1968, 290 F.Supp. 15.

A federal district court must remand suits requesting injunctive relief beyond federal court's original jurisdiction. Carroll Const. Co. v. Reneau, D.C.Fla. 1968, 270 F.Supp. 715.

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

Added Pub.L. 94–583, § 2(a), Oct. 21, 1976, 90 Stat. 2891.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE—Continued

CHAPTER 87—DISTRICT COURTS; VENUE

§ 1391. Venue generally

[See main volume for text of (a) to (d)]

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

As amended Oct. 21, 1976, Pub.L. 94-574, § 3, 90 Stat. 2721; Oct. 21, 1976, Pub.L. 94-583, § 5, 90 Stat. 2897.

1976 *Amendments.* Subsec. (e). Pub.L. 94-574 provided that, in actions against the United States, its agencies, or officers or employees in their official capacities, additional persons may be joined in accordance with the Federal Rules of Civil Procedure and with other venue requirements which would be applicable if the United States, its agencies or one of its officers or employees were not a party.

Subsec. (f). Pub.L. 94-583 added subsec. (f).

Effective Date of 1976 Amendment. Amendment by Pub.L. 94-583 effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94-574, see 1976 U.S.Code Cong. and Adm.News, p. 6121. See also, Pub.L. 94-583, 1976 U.S. Code Cong. and Adm.News, p. 6604.

Supplementary Index to Notes

Property rights 150

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2. Purpose

Purpose of subsec. (b) of this section is to place venue in the district which, in a normal suit, would be most convenient to the defendant. Jones v. U. S., D.C.Tex.1976, 407 F.Supp. 873.

21. —— State law

Where claim arises for purposes of venue in diversity action is a question of substantive law requiring federal court to

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE—Continued

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

[See main volume for text of (a) to (c)]

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

As amended Oct. 21, 1976, Pub.L. 94-583, § 6, 90 Stat. 2898.

1976 Amendment. Subsec. (d). Pub.L. 94-583 added subsec. (d).

Effective Date of 1976 Amendment. Amendment by Pub.L. 94-583 effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94-583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

Supplementary Index to Notes

Banking 72a
Interstate or foreign commerce laws
Employee Retirement Income Security Act of 1974 265a
Petition
Effect of filing 812a

3. Construction—Generally

While this section should be liberally construed to effect its purpose of maintaining the supremacy of federal law, it should be interpreted with the highest regard for the right of the states to make and enforce their own laws in the field belonging to them under the Constitution. Dixon v. Georgia Indigent Legal Services, Inc., D.C.Ga.1975, 398 F.Supp. 1159, affirmed 532 F.2d 1373.

This section must be strictly construed. State Tax Commission v. Union Carbide Corp., D.C.Idaho 1974, 386 F.Supp. 250.

4. —— Strict construction

This chapter should be given strict construction in compliance with congressional policy to limit removal out of regard for rightful independence of state governments. Ashley v. Southwestern Bell Tel. Co., D.C.Tex.1976, 419 F.Supp. 1340.

This section will be strictly construed in favor of state court jurisdiction. Jennings v. Cantrell, D.C.Tenn.1974, 392 F.Supp. 563.

This chapter pertaining to removal of cases from state to federal court must be strictly construed. Perrin v. Walker, D.C.Ill.1974, 385 F.Supp. 915.

This section must be strictly construed since federal courts should not extend their jurisdiction beyond the confines delineated by its provisions. Cabe v. Pennwalt Corp., D.C.S.C.1974, 372 F.Supp. 780.

This chapter is to be strictly construed in light of congressional purpose generally to restrict jurisdiction of federal district courts on removal. Rivera v. Federacion de Musicos de Puerto Rico, Inc., D.C.Puerto Rico 1974, 369 F.Supp. 1169.

8. —— Restriction of federal jurisdiction

This section was aimed at abridging removal. Van Slambrouck v. Employers Mut. Liability Ins. Co. of Wisconsin, D.C.Mich.1973, 354 F.Supp. 366.

9. —— Doubts resolved against removal

If right to remove is doubtful, case should be remanded. Wilhelm v. U. S. Dept. of Air Force Accounting and Finance Center, D.C.Tex.1978, 415 F.Supp. 362.

Burden is on party seeking to remove state action to federal court to establish his right to do so and case should be remanded if there is doubt as to right of removal in first instance. Turner v. U. S. Industries, Inc., D.C.Ill.1974, 379 F. Supp. 803.

11. Construction with other laws—Generally

Section 1442 of this title governing removal of civil action commenced in a state court against an officer of the United States or any agency thereof creates a jurisdictional right to removal quite separate from that of this section; generally, the limitations on removal under the latter are not applicable to removal under the former. Swan v. Community Relations-Social Development Commission, D.C.Wis.1974, 374 F.Supp. 9.

13. Purpose

Purpose of Congress in changing provision of this section relating to removal of cases so as to use the language "separate and independent claim or cause of action" rather than using the test of "separability" was both to simplify the considerations to be made in determining the propriety of removal and also to help reduce the number of cases actually removed to federal court. Simon v. Gulf Coast Rental Tool Service, Inc., D.C.Tex. 1976, 409 F.Supp. 911.

37. Imported goods, determination
Jurisdiction of the customs court is not limited to questions relating to the rates and amounts of duties chargeable on articles which are conceded to be imported but rather extends to the question of whether the goods are in fact imported. Akins v. Saxbe, D.C.Me.1974, 380 F.Supp. 1210.

Determination whether the Jay treaty exempted from any customs duty goods purchased in Canada and brought into the United States by members of Indian tribe for their personal use and not for resale was within the exclusive jurisdiction of the customs court, as against Indians' contention that customs court's jurisdiction did not extend to question of whether the goods were in fact imported. Id.

38. Protests by importers
This section granting customs court exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to Tariff Act of 1930 has been denied relates to protests filed by importers, not American manufacturers. Timken Co. v. Simon, C.A.D.C.1976, 539 F.2d 221.

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Sec.
1602. Findings and declaration of purpose.
1603. Definitions.
1604. Immunity of a foreign state from jurisdiction.
1605. General exceptions to the jurisdictional immunity of a foreign state.
1606. Extent of liability.
[a] Does not conform to section catchline.

Sec.
1607. Counterclaims.
1608. Service; time to answer default.
1609. Immunity from attachment and execution of property of a foreign state.
1610. Exceptions to the immunity from attachment or execution.
1611. Certain types of property immune from execution.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

Effective Date. Section 8 of Pub.L. 94–583 provided that: "This Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section] shall take effect ninety days after the date of its enactment [Oct. 21, 1976]."

Short Title. Authorization to cite Pub. L. 94–583, which enacted this chapter, as the "Foreign Sovereign Immunities Act of 1976", see section 1 of Pub.L. 94–583, set out as a note under section 1 of this title.

Separability of Provisions. Section 7 of Pub.L. 94–583 provided that: "If any provision of this Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section] or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable."

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6091.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

References in Text. The time of enactment of this Act, referred to in text, probably means the time of enactment of Pub.L. 94–583, which was approved on Oct. 21, 1976.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94-583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1606. Extent of Liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94-583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2895.

References in Text. The time of enactment of this Act, referred to in text, probably means the time of enactment of Pub.L. 94–583, which was approved on Oct. 21, 1976.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or

which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2896.

References in Text. For the effective date of this Act, referred to in subsecs. (a) and (b), see Effective Date note under this section.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2897.

References in Text. The International Organizations Immunities Act, referred to in subsec. (a), is Act Dec. 29, 1945, c. 652, Title 1, 59 Stat. 669, which is classified to section 288 et seq. of Title 22, Foreign Relations and Intercourse.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

INDEX

CONSULT GENERAL INDEX

EXHIBIT 5 TO SIMMS AFFIDAVIT - LEGISLATIVE HISTORY OF IMMUNITIES ACT

LEGISLATIVE HISTORY
P.L. 94-582

HERMAN E. TALMADGE,
GEORGE MCGOVERN,
HUBERT HUMPHREY,
WALTER D. HUDDLESTON,
ROBERT DOLE,
MILTON R. YOUNG,
HENRY BELLMON,
Managers on the Part of the Senate.

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

P.L. 94-583, see page 90 Stat. 2891

House Report (Judiciary Committee) No. 94-1487,
Sept. 9, 1976 [To accompany H.R. 11315]

Senate Report (Judiciary Committee) No. 94-1310,
Sept. 27, 1976 [To accompany S. 3553]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

House September 29, 1976

Senate October 1, 1976

The House bill was passed in lieu of the Senate bill.

The House Report is set out.

HOUSE REPORT NO. 94-1487

[page 1]

The Committee on the Judiciary, to whom was referred the bill (H.R. 11315) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

* * * * * * * * * *

[page 6]

PURPOSE

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

STATEMENT

The bill H.R. 11315 was introduced in accordance with the recommendations of an executive communication transmitted to the Congress by the Departments of State and Justice, and both Departments recommend its enactment with the amendments recommended in this report. The bill was the subject of hearings on June 2, 1976 and June 4, 1976 before this Committee's Subcommittee on Administrative Law and Governmental Relations. The amendments recommended to the bill are the result of matters discussed at those hearings and further developed in consultation with representatives of the Departments of State and Justice.

At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a

[page 7]

foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity; and, in the event a plaintiff should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the plaintiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

In a modern world where foreign state enterprises are every day participants in commercial activities, H.R. 11315 is urgently needed legislation. The bill, which has been drafted over many years and which has involved extensive consultations within the administration, among bar associations and in the academic community, would accomplish four objectives:

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is

not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

[page 8]

Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

Background

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943)[1] and *Mexico* v. *Hoffman*, 324 U.S. 30 (1945).[2]

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952. 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

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1. 63 S.Ct. 793, 87 L.Ed. 1014.
2. 65 S.Ct. 530, 89 L.Ed. 729.

[page 9]

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

The United States in Foreign Courts

Since World War II, the United States has increasingly become involved in litigation in foreign courts. This litigation has involved such diverse activities as the purchase of goods and services by our embassies, employment of local personnel by our military bases, the construction or lease of buildings for our foreign missions, and traffic accidents involving U.S. Government-owned vehicles.

In the mid-1950's, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the Department of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contacts with the forum were present. Thus, in the 1960's, it became the practice of the Department of Justice to avoid claiming immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the De-

partment would not recognize a foreign state's immunity in this country.

In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts. The United States cannot take recourse to a foreign affairs agency abroad as other states have done in this country when they seek a suggestion of immunity from the Department of State.

History of the Bill

H.R. 11315 is the product of many years of work by the Departments of State and Justice, in consultation with members of the bar and the academic community. Study of possible legislation began in the mid-1960's. In the early 1970's, a number of draft bills were prepared and submitted for comment to many authorities and practitioners in the international law field. On January 31, 1973, a bill (H.R. 3493) was introduced in the 93d Congress, and referred to the Committee on the Judiciary. The bill H.R. 3493 was the subject of a subcommittee hearing on June 7, 1973. Although extensive advice had already been obtained from the private sector, in the course of the subcommittee's consideration it became apparent that a few segments of the private bar had not been fully consulted. It was pointed out that the 93d Congress bill contained some technical deficiencies which could be remedied—particularly with respect to maritime cases and the jurisdictional provisions. The American Bar Association at

[page 10]

the August 1976 meeting of its House of Delegates adopted a resolution urging approval of H.R. 11315. The letter of that association indicating its support is set out at the end of this report.

The current bill, H.R. 11315, contains revised language. It is essentially the same bill as was introduced in 1973, except for the technical improvements that have been made in the interim.

Committee Amendments

The committee, after careful consideration of the bill, made the following amendments:

1. In sections 1604 and 1609 of the bill, the committee has preserved the reference to "existing international agreements" but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement. Moreover, it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement. However, the reference to existing international agreements is essential to make it clear that this bill would not supersede the special procedures provided in existing international agreements, such as the North Atlantic Treaty—Status of Forces Agreement.

2. Section 1605, relating to public debt obligations, has been deleted and the former section 1605(c) has been renumbered as section 1606. The public debt provision was, at best, very limited. It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific government projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would be subject to U.S. regulation, such as that provided by the securities laws. Thus, on reconsideration of all of the factors, the committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.

3. Former section 1605(c), renumbered as section 1606, has also been revised in two other respects. First, it makes clear that the exception for punitive damages applies to political subdivisions of foreign states, as well as to the foreign state itself. This accords with current international practice. Second, it would eliminate the exception for interest prior to judgment. Such an exception is not supported by international practice. If a foreign state is not immune from suit, it should be liable for interest to the same extent as a private party.

[page 11]

4. Section 1608 has been substantially revised, with the principal revisions being in subsection (a). A number of bar association studies which otherwise expressed full support for the bill, pointed out that subsection (a), as previously drafted, created a significant gap in its provisions concerning service upon a foreign state through diplomatic channels. The Departments of Justice and State have reconsidered this provision and have indicated their preference for the revised language in the committee amendment. The committee has revised subsection (a) to fill the prior gap, and, at the same time, to minimize potential irritants to relations with foreign states. Subsection (a), as revised, would provide that service of a summons and complaint also be accompanied by a new document, called a notice of suit. The notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.

The revised paragraphs (a)(2) and (b)(2) of section 1608 give emphasis to service under an "applicable international convention on service of judicial documents." At present, there is such an applicable international convention—the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, 20 UST 361—to which the Senate gave its advice and consent to ratification, and which entered into force for the United States in 1969. At present 18 nations are parties to this convention. In the committee's view, if a country has entered into such an international convention, priority should be given to this method for service.

LEGISLATIVE HISTORY

P.L. 94-583

Subsection (d) has been revised to delete the references to cross-claims and counterclaims. The existence of a counterclaim against a foreign state indicates that the foreign state has already entered an appearance in the lawsuit; thus, there is no necessity for affording the foreign state with a special time period in which to respond to a counterclaim. When a cross-claim is filed against a foreign state, rules 19 and 20, of the Federal Rules of Civil Procedure, require that original service be made. Under rules the bill, this would mean service under section 1608 (a) or (b).

5. Finally, your committee has made a few perfecting amendments in the bill's provisions involving maritime jurisdiction. These include changes in section 1605(b) to make it clear that the delivery of notice to a master of a vessel under paragraph (1) does not itself constitute "service"; and to make clear, in cases where the plaintiff is unaware that he has arrested a foreign state-owned vessel, that the 10-day period in paragraph (2) does not begin to run until the plaintiff has determined that a foreign state owns the vessel. Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

Conclusion

On the basis of the facts outlined in the executive communication and the testimony at the hearings on the bill, the committee finds that there is a clearly defined need for the enactment of these provisions into law. It is recommended that the amended bill be approved.

[page 12]

Section-by-Section Analysis

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588–589 (1943)[3].)

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

Aside from setting forth comprehensive rules governing sovereign immunity, the bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained

against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.

Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. I, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested * * * in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof, and foreign States * * *." (art. I, sec. 8, cl. 18; art. III, sec. 2, cl. 1). See *National Bank* v. *Republic of China*, 348 U.S. 356, 370–71 (1955)[4] (Reed J., dissenting); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964)[5].

The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93d Cong., 1st sess.); the prior analysis should not be consulted in interpreting the current bill and its provisions, and no inferences should be drawn from differences between the two.

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330

3. 63 S.Ct. 793, 87 L.Ed. 1014.
4. 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 652, 349 U.S. 913, 99 L.Ed. 1247.
5. 84 S.Ct. 923, 11 L.Ed.2d 804.

[page 13]

provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) *Subject Matter Jurisdiction.*—Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605–1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to

promote a uniformity in decision where foreign governments are involved.

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a)(2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)[6] and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957)[7]. For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605–1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be

6. 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057.
7. 78 S.Ct. 199, 2 L.Ed.2d 223.

[page 14]

made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605–1607 are all carefully interconnected.

(c) *Effect of an Appearance.*—Section 1330(c) states that a mere apperance by a foreign state in an action does not confer personal jurisdiction with respect to claims which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term "transaction or occurrence" includes each basis set forth in sections 1605–1607 for not granting immunity, including waivers.

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

SEC. 3. DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). See analysis to section 1603(b).

SEC. 4. NEW CHAPTER 97: SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

Section 1602. Findings and declaration of purpose

Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform. This restrictive theory has been adhered to by the Department of State since the "Tate Letter" of May 19, 1952. (26 Dept. of State Bull. 984 (1952).)

[page 15]

Section 1603. Definitions

Section 1603 defines five terms that are used in the bill:

(a) *Foreign state.*—Subsection (a) defines the term foreign state as used in all provisions of chapter 97, except section 1608. In section 1608, the term "foreign state" refers only to the sovereign state itself.

As the definition indicates, the term "foreign state" as used in every other section of chapter 97 includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term "political subdivisions" includes all governmental units beneath the central government, including local governments.

(b) *Agency or instrumentality of a foreign state.*—Subsection (b) defines an "agency or instrumentality of a foreign state" as any entity

(1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 1332(c) and (d) nor created under the laws of any third country.

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

The second criterion requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

The third criterion excludes entities which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d)—for example a corporation organized and incorporated under the laws of the State of New York but owned by a foreign state. (See *Amtorg Trading Corp.* v. *United States*, 71 F. 2d 524 (C.C.P.A. 1934).) Also excluded are entities which are created under the laws of third countries. The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature.

An entity which does not fall within the definitions of sections 1603 (a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court. On the other hand, the fact that an entity is an "agency or instrumentality of a foreign state" does not in itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions contained in the bill (see sections 1605–1607 and 1610–1611) was applicable.

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms,

including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

(c) *United States.*—Paragraph (c) of section 1603 defines "United States" as including all territory and waters subject to the jurisdiction of the United States.

(d) *Commercial activity.*—Paragraph (c) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral

extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity. By the same token, a foreign state's activities in and "contacts" with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction (see sec. 1330) or to assets which could be subjected to attachment or execution with respect to unrelated commercial transactions (see sec. 1610(b)). However, a transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an AID program. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

[page 17]

(c) *Commercial activity carried on in the United States by a foreign state.*—As paragraph (d) of section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public

lending institution located in the United States—for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Section 1604. Immunity of foreign states from jurisdiction

New chapter 97 of title 28, United States Code, starts from a premise of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605–1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

The immunity from jurisdiction provided in section 1604 applies to proceedings in both Federal and State courts. Section 1604 would be the only basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State court in the United States.

All immunity provisions in sections 1604 through 1607 are made subject to "existing" treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes.

Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity

[page 18]

of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

(a)(1) *Waivers.*—Section 1605(a)(1) treats explicit and implied waivers by foreign states of sovereign immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a foreign state may waive its immunity in a contract with a private party. Since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities.

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

The language, "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver," is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver. In other words, if the foreign state agrees to a waiver of sovereign immmunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

(a)(2) *Commercial activities having a nexus with the United States.*—Section 1605(a)(2) treats what is probably the most important instance in which foreign states are denied immunity, t[illegible]n which the foreign state engages in a commercial activity. The d[illegible]tion of a "commercial activity" is set forth in section 1603(d) of the bill, and is discussed in the analysis to that section.

Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the "commercial activity [is] carried on in the United States by the for-

[page 19]

eign state." This phrase is defined in section 1603(e) of the bill. See the analysis to that section.

The second situation, an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere," looks to conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere. Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the foreign state who

has been employed in connection with a commercial activity carried on in some third country.

Although some or all of these acts might also be considered to be a "commercial activity carried on in the United States," as broadly defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

The third situation—"an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"—would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

Neither the term "direct effect" nor the concept of "substantial contacts" embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913)[8], or *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F. 2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969)[9].

(a)(3) *Expropriation claims.*—Section 1605(a)(3) would, in two categories of cases, deny immunity where "rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the

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8. 33 S.Ct. 443, 57 L.Ed. 742.
9. 89 S.Ct. 872, 21 L.Ed.2d 781.

[page 20]

prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).[1]

(a)(4) *Immovable, inherited, and gift property.*— Section 1605(a)(4) denies immunity in litigation relating to rights in real estate and in inherited or gift property located in the United States. It is estab-

lished that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted. 26 Department of State Bulletin 984 (1952). It does not matter whether a particular piece of property is used for commercial or public purposes.

It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, 23UST 3227, TIAS 7502 (1972), provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

(a)(5) *Noncommercial torts.*—Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms

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[1] The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be improperly asserted in an effort to block litigation. Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts, committed and effective within their own territory. For example, in the Supreme Court's recent decision in *Dunhill v. Republic of Cuba*, 44 U.S.L.W. 4665, No. 73-1258 (May 24, 1976), the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted to assert that a refusal to pay a commercial obligation was not reviewable because it was an "act of state".

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country. The conclusions of the committee are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

"[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." (Amicus Brief of United States, p. 41.)

as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

As used in section 1605(a)(5), the phrase "tortious act or omission" is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680 (a) and (h).

Like other provisions in the bill, section 1605 is subject to existing international agreements (see section 1604), including Status of Forces Agreements; if a remedy is available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).

Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section 1605(a)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state. It is noteworthy in this regard that while article 43 of the Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS 6820 (1970), expressly abolishes the immunity of consular officers with respect to civil actions brought by a third party for "damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft," there is no such provision in the Vienna Convention on Diplomatic Relations of 1961, *supra*. Consequently, no case relating to a traffic accident can be brought against a member of a diplomatic mission.

The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law. See, however, section 1605(c).

(b) *Maritime liens.*—Section 1605(b) denies immunity to a foreign state in cases where (i) a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign state, (ii) the maritime lien is based upon a commercial activity of the foreign state, and (iii) the conditions in paragraphs (1) and (2) of section 1605(b) have been complied with.

The purpose of this subsection is the permit a plaintiff to bring suit in a U.S. district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an in personam action against the foreign state in a manner analogous to bringing such a suit against the United States. Cf. 46 U.S.C. 741, *et seq.* In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit. Instead, as provided in paragraph (1), a copy of the summons and complaint must be delivered to the master or other person having possession of the vessel or cargo (such as the second in command of the ship).

If, however, the vessel or its cargo is arrested or attached, the plaintiff will lose his in personam remedy and the foreign state will

[page 22]

be entitled to immunity—except in the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. By contrast, evidence that a party had relied on a standard registry

of ships, which did not reveal a foreign state's interest in a vessel, would be prima facie evidence of the party's unawareness that a vessel of a foreign state was involved. More generally, a party could seek to establish its lack of awareness of the foreign state's ownership by submitting affidavits from itself and from its counsel. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, its right to immunity from arrest.

Under paragraph (2), the plaintiff must also be able to prove that the procedures for service under section 1608(a) or (b) have commenced—for example, that the clerk of the court has mailed the requisite copies of the summons and complaint. The plaintiff need not show that service has actually been made under section 1608(c). The reason for this second requirement is to help make certain that the foreign state concerned receives prompt and actual notice of the institution of a suit in admiralty in the United States, even if the copies served on the master of the vessel should fail to reach the foreign state.

Section 1605(b) would not preclude a suit in accordance with other provisions of the bill—e.g., section 1605(a)(2). Nor would it preclude a second action, otherwise permissible, to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.

Section 1606. Extent of liability

Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages. Under current international practice, punitive damages are usually not assessed against foreign states. See 5 Hackwork, Digest of International Law, 723-26 (1943); Garcia-Amador, State Reesponsibility, 94 Hague Recueil des Cours 365, 476-81 (1958). Interest prior to judgment and costs may be assessed against a foreign state just as against a private party Cf. 46 U.S.C. 743, 745.

Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609-1610.

[page 23]

The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply.? Or if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. However, appropriate remedies would be

available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Section 1607. Counterclaims

Section 1607 applies to counterclaims against a foreign state which brings an action or intervenes in an action in a Federal or State court. It would deny immunity in three situations. First, immunity would be denied as to any counterclaim for which the foreign state would not be entitled to immunity under section 1605, if the counterclaim had been brought as a direct claim in a separate action against the foreign state. This provision is based upon article I of the European Convention on State Immunity 11 Int'l Legal Materials 470 (1972).

Second, even if a foreign state would otherwise be entitled to immunity under sections 1604–1606, it would not be immune from a counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." This is the same terminology as that used in rule 13(a) of the Federal Rules of Civil Procedure and is consistent with section 70(2)(b), Restatement of the Law, Second, Foreign Relations Law of the United States (1965). Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence. See, *Alfred Dunhill of London, Inc.*, v. *Cuba*, —— U.S. —— No. 75-1288, decided May 24, 1976).[10]

Third, notwithstanding that the foreign state may be immune under subsections (a) and (b), the foreign state nevertheless would not be immune from a setoff. Subsection (c) codifies the rule enunciated in *National Bank* v. *Republic of China*, 348 U.S. 356 (1955).[11]

Section 1608. Service; time to answer; default

Section 1608 sets forth the exclusive procedures with respect to service on, the filing of an answer or other responsive pleading by, and obtaining a default judgment against a foreign state or its political subdivisions, agencies or instrumentalities. These procedural provisions are intended to fill a void in existing Federal and State law, and to insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts.

Provisions in section 1608 are closely interconnected with other parts of the bill—particularly the proposed section 1330 and sections 1605–1607. If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605–1607 are satisfied, personal jurisdiction over a foreign state would exist under section 1330(b). In addition to its integral role in the bill, section 1608 follows on the

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[9] e.g. 5 U.S.C. 552 concerning public information.
10. 96 S.Ct. 1854, 48 L.Ed.2d 301.
11. 75 S.Ct. 423, 99 L.Ed. 382, rehearing denied 75 S.Ct. 558, 349 U.S. 913, 99 L. Ed. 1247.

[page 24]

precedents of other statutory service provisions in areas of unusual Federal interest. See, for example, 8 U.S.C. 1105a(3) and 15 U.S.C. 21(f) and 77v.

(a) *Service on Foreign States and Political Subdivisions.*—Subsection (a) of section 1608 sets forth the exclusive procedures for service on a foreign state, or political subdivision thereof, but not on an agency or instrumentality of a foreign state which is covered in subsection (b). There is a hierarchy in the methods of service. Paragraph (1) provides for service in accordance with any special arrangement which may have been agreed upon between a plaintiff and the foreign state or political subdivision. If such an arrangement exists, service must be made under this method. The purpose of subsection (a)(1) is to encourage potential plaintiffs and foreign states to agree to a procedure on service.

If no special arrangement exists, paragraph (2) would permit service in accordance with an applicable international convention on service of judicial documents. The only such convention to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS 6638 (1969). In order for an international convention to be "applicable", both the United States and the foreign state concerned must be a party to the convention.

If neither an applicable international convention nor a special arrangement exists, paragraph (3) would provide for service by mail. The clerk of the court would send a copy of a "notice of suit" as prescribed by the Secretary of State by regulation, together with a copy of the summons and complaint, by mail to the head of the foreign state's ministry of foreign affairs or its equivalent. This procedure is based on rule 4(i)(1)(D), F.R. Civ. P.

Finally, as a method of last resort, paragraph (4) would provide for service through diplomatic channels if service could not be made by mail within 30 days. The clerk of the court would send two copies of the notice of suit, summons and complaint to the Secretary of State for transmittal through diplomatic channels. Transmittal through diplomatic channels would mean that the Office of Special Consular Services in the Department of State will pouch a copy of these papers to the U.S. Embassy in the foreign state in question. The U.S. Embassy, in turn, would prepare a diplomatic note of transmittal and deliver the diplomatic note with the other papers to the appropriate official in the ministry of foreign affairs of the foreign state. Use of diplomatic channels could also include transmittal of the papers by the Department of State to the foreign state's embassy in Washington, D.C. "Transmittal" of the notice of suit, summons and complaint does not require that the foreign state formally accept these papers. It only requires that these papers be transmitted in such a way that the foreign state has actual notice of the suit. All papers to be served would be accompanied by translations into an official language of the foreign state. Finally, the Secretary of State would be required to send back to the court the diplomatic note used in transmitting the papers to the foreign state.

A "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what

steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures.

LEGISLATIVE HISTORY
P.L. 94-583

Service through diplomatic channels is widely used in international practice. It is provided for in the European Convention on State Immunity, *supra*, which was negotiated by 18 European nations. It is accepted and indeed preferred by the United States in suits brought against the United States Government in foreign courts. See Department of State's circular instruction No. CA-10922, June 16, 1961, 56 Am. J. Int'l L. 523-33 (1962).

(b) *Service on Agencies or Instrumentalities.*—Subsection (b) of section 1608 provides the methods under which service shall be made upon an agency or instrumentality of a foreign state, as defined in section 1603(b). Again, service must always be made in accordance with any special arrangement for service between a plaintiff and the agency or instrumentality. If no such arrangement exists, then service must be made under subsection (b)(2) which provides for service upon officers, or managing, general or appointed agents in the United States of the agency or instrumentality—or in the alternative, in accordance with an applicable international convention such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, *supra*.

If there is no special arrangement and if the agency or instrumentality has no representative in the United States, service may be made under one of the three methods provided in subsection (b)(3). The first two methods provide for service by letter rogatory or request or by mail. The third method, subparagraph (C), authoizes a court to fashion a method of service, for example under rule 83, F.R. Civ. P., provided the method is "consistent with the law of the place where service is to be made." This latter language takes into account the fact that the laws of foreign countries may prohibit the service in their country of judicial documents by process servers from the United States. It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted. It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd.* v. *Moore*, 345 F. 2d 978 (D.C. Cir. 1965), or upon consular representatives, *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd*, 238 F. 2d 400 (2d Cir. 1956).

(c) *When Service Is Made.*—Subsection (c) of section 1608 establishes the time when service shall be deemed to have been made under each of the methods provided in subsections (a) and (b).

(d) *Time To Answer or Reply.*—Subsection (d) of section 1608 gives each foreign state, political subdivision thereof or agency or instrumentality of a foreign state or political subdivision up to 60 days from the time service is deemed to have been made in which to answer or file a responsive pleading. This corresponds to similar provisions applicable in suits against the United States or its officers or agencies. Rule 12(a), F.R. Civ. P.

(e) *Default Judgments.*—Subdivision (e) of section 1608 provides that no default judgment may be entered against a foreign state, or

[page 26]

its political subdivisions, agencies or instrumentalities, "unless the claimant establishes his claim or right to relief by evidence satisfactory

to the court." This is the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R. Civ. P. In determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign state.[3] Once the default judgment is entered, notice of such judgment must be sent in the manner prescribed for service in sections 1608(a) or (b).

Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state. First, the current practice of attempting to commence a suit by attachment of a foreign state's property would be prohibited under section 1609 in the bill, because of foreign relations considerations and because such attachments are rendered unnecessary by the liberal service and jurisdictional provisions of the bill. See the analysis to section 1609.

A second means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458–59 (1974).

Section 1609. Immunity from Attachment and Execution of Property of a Foreign State

As in the case of section 1604 of the bill with respect to jurisdiction, section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(a), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611. Here, it should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit.

Attachment of foreign government property for jurisdictional purposes has been recognized "where under international law a foreign government is not immune from suit", and where the property in the United States is commercial in nature. *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct. N.Y. 1959). Even in such cases, however, it has been recognized that property attached for jurisdictional purposes cannot be retained to satisfy a judgment because, under current practice, the property of a foreign sovereign is immune from execution.

Attachments for jurisdictional purposes have been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the jurisdiction. Such cases frequently require the application of foreign law to events which occur entirely abroad.

[3] Cf. Statement in the analysis of section 1606 noting that appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Such attachments can also give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

At the same time, one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States. Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim for which the foreign state is not entitled to immunity. The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department.

Section 1610. Exceptions to Immunity from Attachment or Execution

Section 1610 sets forth circumstances under which the property of a foreign state is not immune from attachment or execution to satisfy a judgment. Though the enforcement or judgments against foreign state property remains a somewhat controversial subject in international law, there is a marked trend toward limiting the immunity from execution.

A number of treaties of friendship, commerce and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2, 1953, art. 18(2), 4 UST 2063, TIAS 2863). The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 196 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial services in the same way as against privately owned vessels. Although not a party to this treaty, the United States follows a policy of not claiming immunity for its publicly-owned merchant vessels, both domestically, 46 U.S.C. 742, 781, and abroad, 46 U.S.C. 747; 2 Hackworth, Digest of International Law, 438–39 (1941). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS 5639, to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used in commercial service.

However, the traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. *Dexter and Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 43 F. 2d 705 (2d Cir. 1930). Even after the "Tate Letter" of 1952, this continued to be the position of the Department of State and of the courts. See, *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1036, 192 N.Y.S. 2d 469, 473 (Sup. Ct. N.Y. 1959). Sections 1610(a) and (b) are intended to modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill.

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583
[page 28]

(a) *Execution Against Property of Foreign States.* Section 1610(a) relates to execution against property of a foreign state, including a political subdivision, agency, or instrumentality of a foreign state. The term "attachment in aid of execution" is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. See rule 69, F.R. Civ. P. The property in question must be used for a commercial activity in the United States. If so, attachment in aid of execution, and execution, upon judgments entered by Federal or State courts against the foreign state would be permitted in any of the circumstances set forth in paragraphs (1)-(5) of section 1610(a).

Paragraph (1) relates to explicit and implied waivers, and is governed by the same principles that apply to waivers of immunity from jurisdiction under section 1605(a)(1) of the bill. A foreign state may have waived its immunity from execution, *inter alia*, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution. As in section 1605(a)(1), a waiver on behalf of an agency or instrumentality of a foreign state may be made either by the agency or instrumentality or by the foreign state itself.

Paragraph (2) of section 1610(a) denies immunity from execution against property used by a foreign state for a commercial activity in the United States, provided that the commercial activity gave rise to the claim upon which the judgment is based. Included would be commercial activities encompassed by section 1605(a)(2). The provision also includes a commercial activity giving rise to a claim with respect to which the foreign state has waived immunity under section 1605(a)(1). In addition, it includes a commercial activity which gave rise to a maritime lien with respect to which an admiralty suit was brought under section 1605(b). One could, of course, execute against commercial property other than a vessel or cargo which is the subject of a suit under section 1605(b), provided that the property was used in the same commercial activity upon which the maritime lien was based.

The language "is or was used" in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971 A.M.C. 2651 (N.D. Calif.); *American Hawaiian Ventures* v. *M.V. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

Paragraph (3) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and which has been taken in violation of international law or has been exchanged for property taken in violation of international law. See the analysis to section 1605(a)(3).

LEGISLATIVE HISTORY
P.L. 94-583

[page 29]

Paragraph (4) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residences of the chiefs of such missions. This exemption applies to all of the situations encompassed by sections 1610 (a) and (b); embassies and related buildings could not be deemed to be property used for a "commercial" activity as required by section 1610(a); also, since such buildings are those of the foreign state itself, they could not be property of an agency or instrumentality engaged in a commercial activity in the United States within the meaning of section 1610(b).

Paragraph (5) of section 1610(a) would deny immunity with respect to obligations owed to a foreign state under a policy of liability insurance. Such obligations would after judgment be treated as property of the foreign state subject to garnishment or related remedies in aid or in place of execution. The availability of such remedies would, of course, be governed by applicable State or Federal law. Paragraph (5) is intended to facilitate recovery by individuals who may be injured in accidents, including those involving vehicles operated by a foreign state or by its officials, or employees acting within the scope of their authority.

(b) *Additional Execution Against Agencies and Instrumentalities Engaged in Commercial Activity in the United States.*—Section 1610 (b) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in section 1610(a). However, the agency or instrumentality must be engaged in a commercial activity in the United States. If so, the plaintiff may obtain an attachment in aid of execution or execution against *any* property, commercial and noncommercial, of the agency or instrumentality, but only in the circumstances set forth in paragraphs (1) and (2).

Paragraph (1) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States, where the agency or instrumentality has waived its immunity from execution. See the analysis to paragraph (1) of section 1610(a).

Paragraph (2) of section 1610(b) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States in order to satisfy a judgment relating to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3) or (5), or 1605(b). Property will be subject to execution irrespective of whether the property was used for the same commercial or other activity upon which the claim giving rise to the judgment was based.

Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971 A.M.C. 2651 (N.D. Calif.). There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between differ-

ent U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. See the analysis to section 1610(a) (2).

(c) *Necessity of court order following reasonable notice.*—Section 1610(c) prohibits attachment or execution under sections 1610(a) and (b) unless the court has issued an order for such attachment and execution. In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(e). In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.

(d) *Attachments upon explicit waiver to secure satisfaction of a judgment.*—Section 1610(d) relates to attachment against the property of a foreign state, or of a political subdivision, agency or instrumentality of a foreign state, prior to the entry of judgment or prior to the lapse of the "reasonable period of time" required under section 1610(c). Immunity from attachment will be denied only if the foreign state, political subdivision, agency or instrumentality has explicitly waived its immunity from attachment prior to judgment, and only if the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to secure jurisdiction. This subsection provides, in cases where there has been an explicit waiver, a provisional remedy, for example to prevent assets from being dissipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment.

Section 1611. Certain types of property immune from execution

Section 1611 exempts certain types of property from the immunity provisions of section 1610 relating to attachment and exectuion.

(a) *Property held by international organizations.*—Section 1611 (a) precludes attachment and execution against funds and other property of certain international organizations. The purpose of this subsection is to permit international organizations designated by the President pursuant to the International Organizations Immunities Act, 22 U.S.C. 288, *et seq.*, to carry out their functions from their offices located in the United States without hindrance by private claimants seeking to attach the payment of funds to a foreign state; such attachments would also violate the immunities accorded to such international institutions. See also article 9, section 3 of the Articles of Agreement of the International Monetary Fund, TIAS 1501, 60 Stat. 1401. International organizations covered by this provision would include,

[page 31]

inter alia, the International Monetary Fund and the World Bank. The reference to "international organizations" in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.

(b) *Central bank funds and military property.*—Section 1611(b)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

Section 1611(b)(2) provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of two conditions: the property is either (A) of a military character or (B) under the control of a military authority or defense agency. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, warships, tanks, communications equipment. Both the character and the function of the property must be military. The purpose of this condition is to avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments.

The second condition is intended to protect other military property, such as food, clothing, fuel and office equipment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control, and a "defense agency" is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military (e.g., surplus military equipment withdrawn from military use would not be immune). Both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act.

SEC. 6. VENUE

This section amends 28 U.S.C. § 1391, which deals with venue generally. Under the new subsection (f), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred." This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which

does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(b) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(b)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. § 1391(c).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (f) would, of course, not apply to entities that are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(b).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(h), F.R. Civ. P.)

SEC. 6. REMOVAL OF CASES FROM STATE COURTS

The bill adds a new provision to 28 U.S.C. 1441 to provide for removal to a Federal district court of civil actions brought in the courts of the States against a foreign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446.) However, in view of the 60-day period provided in section 1608(c) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition of removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

LEGISLATIVE HISTORY
P.L. 94-583

[page 33]

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (*Cf.* 28 U.S.C. 2402, precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court. (*Cf.* rule 81(c), F.R. Civ. P.) Because the judicial power of the United States specifically encompasses actions "between a State, or the Citizens thereof, and foreign States" (U.S. Constitution, art. III, sec. 2, cl. 1), this preemption of State court procedures in cases involving foreign sovereigns is clearly constitutional.

This section, again, would not apply to entities owned by a foreign state which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d), or created under the laws of a third country.

SEC. 7. SEVERABILITY OF PROVISIONS

This action provides that if a portion of the act or any application of the act should be found invalid for any reason, such invalidity would not affect any other provision or application of the act.

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.

STATEMENTS UNDER CLAUSE 2(l)(2)(B), CLAUSE 2(l)(3) AND CLAUSE 2(l)(4) OF RULE XI AND CLAUSE 7(a)(1) OF RULE XIII OF THE HOUSE OF REPRESENTATIVES

COMMITTEE VOTE

(Rule XI 2(l)(2)(B))

On September 9, 1976, the Full Committee on the Judiciary approved the bill H.R. 11315 by voice vote.

COST

(Rule XIII 7(a)(1))

The enactment of this bill will not require any new or additional authorization or appropriation of funds. Indeed, the enactment of the bill will result in a net saving, in an undetermined amount, in that the Department of State will no longer have to undertake a consideration of diplomatic requests for sovereign immunity, and the Department of Justice will not be required to appear in the courts in support of the suggestions of immunity that are filed pursuant to the Department of State's sovereign immunity determinations.

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

OVERSIGHT STATEMENT

(Rule XI 2(l)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsi-

[page 34]

bility with reference matters involving the immunity of foreign states, in accordance with Rule VI(b) of the Rules of the Committee on the Judiciary. The favorable consideration of this bill was recommended by that subcommittee and the committee has determined that legislation should be enacted as set forth in this bill.

BUDGET STATEMENT

(Rule XI 2(l)(3)(B))

As has been indicated in the committee statement as to cost made pursuant to Rule XIII (7)(a)(1), the bill will not require any new or additional authorization or appropriation of funds. The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by Clause 2(l)(3)(B) of Rule XI.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

(Rule XI 2(l)(3)(C))

The estimate received from the Director of the Congressional Budget Office is as follows:

CONGRESS OF THE UNITED STATES,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 6, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of June 10, 1976 and pursuant to section 403 of the Congressional Budget Act, the Congressional Budget Office has analyzed the costs associated with H.R. 11315, the "Foreign Sovereign Immunities Act of 1976." This legislation is estimated to have no budgetary impact.

Should the committee so desire, we would be pleased to provide additional assistance on this and future legislation.

Sincerely,

ALICE M. RIVLIN,
Director.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI 2(l)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(l)(3) of House Rule XI.

INFLATIONARY IMPACT

(Rule XI 2(l)(3))

In compliance with clause 2(l)(4) of House Rule XI it is stated that this legislation will have no inflationary impact on prices and costs in the operation of the national economy.

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[page 44]

[The executive communication from the Departments of State and Justice is as follows:]

DEPARTMENT OF STATE,
Washington, D.C., October 31, 1975.

Hon. CARL O. ALBERT,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: The Department of State and Department of Justice submit for your consideration and appropriate reference the

[page 45]

enclosed draft bill, entitled "To define the circumstances in which foreign states are immune from the jurisdiction of U.S. courts and in which execution may not be levied on their assets, and for other purposes." This is a proposed revision of the draft bill which was submitted in a letter (enclosed) to you dated January 16, 1973, and subsequently introduced by Chairman Peter W. Rodino, Jr., and Congressman Edward Hutchinson as H.R. 3493. A revised section-by-section analysis explaining the provisions of the bill in some detail is also enclosed. A hearing was held on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the Committee of the Judiciary in the House of Representatives in the 1st session of the 93d Congress on June 7, 1973.

The broad purposes of this legislation—to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation—remain the same. To this end the revised bill, like its predecessor, would entrust the resolution of questions of sovereign immunity to the judicial branch of Government. The statute would codify and refine the "restrictive theory" of sovereign immunity which has guided United States practice with respect to jurisdiction originally set forth in the letter of May 19, 1952, from the Acting Legal Adviser, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman. It would also replace the absolute immunity now accorded foreign states from execution of judgment with an immunity from execution conforming more closely to the restrictive theory of immunity from jurisdiction. The measure also includes provisions for service of process, venue, and jurisdiction in cases against foreign states which would make it unnecessary to attach the assets of foreign states for purposes of jurisdiction.

Numerous technical changes have been made in the bill on the basis of the hearing in the House of Representatives, commentaries in a number of legal journals, and extensive discussions which have been held with members of the bar as well as the reports and recommendations of committees of several bar associations. A number of these technical revisions are important, but none of them alters the basic concept of the legislation as originally submitted.

The most important changes include (1) further definition of "commercial activity carried on in the United States by a foreign state" and "public debt" in section 1603; (2) clarification of the limitations of immunity in tort actions (sec. 1605(5)), in respect of counterclaims (sec. 1607), and in case of execution of judgment (sec. 1610); and (3) substantial revision of section 1608 relating to service of process to conform with article XXII of the Convention on Diplomatic Relations, signed at Vienna April 18, 1961, and with the Federal Rules of Civil Procedure.

In addition, important new provisions have been added to preserve the jurisdiction of the courts of the United States in cases in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of a foreign state (sec. 1605(b)), and to avoid interference with disbursements to foreign states by certain international organizations located in the United States (sec. 1611(a)). These and other changes are discussed in the enclosed analysis.

The Departments of State and Justice believe that this revised draft bill is worthy of and will receive the support of the bar and would

[page 46]

welcome hearings before the appropriate committees of the House to consider this measure as soon as possible.

The Office of Management and Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the administration's program.

Sincerely,

ROBERT S. INGERSOLL,
Deputy Secretary of State.
HAROLD R. TYLER, JR.,
Deputy Attorney General.

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CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, 1962 REVISION, INTERNATIONAL CHAMBER OF COMMERCE BROCHURE NO. 222 (U.C.P., 1962 REVISION)

Reprint of

UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS

(1962 REVISION)

THE INTERNATIONAL CHAMBER OF COMMERCE BROCHURE NO. 222

GENERAL PROVISIONS AND DEFINITIONS

a. These provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties cto unless otherwise expressly agreed.

b. For the purposes of such provisions, definitions and articles the expressions "documentary credit(s)" and "credit(s)" used in mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance the instructions of a customer (the applicant for the credit), is to make payment to or to the order of a third party (the beneficiary) to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or authorizes such payments to be made or such drafts e paid, accepted or negotiated by another bank, against stipulated documents and compliance with stipulated terms and conditions.

c. Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks in no way concerned with or bound by such contracts.

d. Credit instructions and the credits themselves must be complete and precise and, in order to guard against confusion and misrstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail.

e. When the bank first entitled to avail itself of an option it enjoys under the following articles does so, its decision shall be g upon all the parties concerned.

f. A beneficiary can in no case avail himself of the contractual relationships existing between banks or between the applicant e credit and the issuing bank.

A.—FORM AND NOTIFICATION OF CREDITS

Article 1.—Credits may be either

a) revocable, or

b) irrevocable.

All credits, therefore, should clearly indicate whether they are revocable or irrevocable.

In the absence of such indication the credit shall be deemed to be revocable, even though an expiry date is stipulated.

Article 2.—A revocable credit does not constitute a legally binding undertaking between the bank or banks concerned and the iary because such a credit may be modified or cancelled at any moment without notice to the beneficiary.

When, however, a revocable credit has been transmitted to and made available at a branch or other bank, its modification or can- n shall become effective only upon receipt of notice thereof by such branch or other bank and shall not affect the right of that or other bank to be reimbursed for any payment, acceptance or negotiation made by it prior to receipt of such notice.

Article 3.—An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that o the beneficiary or, as the case may be, to the beneficiary and bona fide holders of drafts drawn and/or documents presented ler, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the nd conditions of the credit are complied with.

An irrevocable credit may be advised to a beneficiary through another bank without engagement on the part of that other bank vising bank), but when an issuing bank authorizes another bank to confirm its irrevocable credit and the latter does so, such con- n constitutes a definite undertaking on the part of the confirming bank either that the provisions for payment or acceptance will fulfilled or, in the case of a credit available by negotiation of drafts, that the confirming bank will negotiate drafts without recourse er.

Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

Article 4.—When an issuing bank instructs a bank by cable, telegram or telex to notify a credit and the original letter of credit to be the operative credit instrument, the issuing bank must send the original letter of credit, and any subsequent amendments there- e beneficiary through the notifying bank.

The issuing bank will be responsible for any consequences arising from its failure to follow this procedure.

Article 5.—When a bank is instructed by cable, telegram or telex to issue, confirm or advise a credit similar in terms to one pre- stablished and which has been the subject of amendments, it shall be understood that the details of the credit being issued, confirmed l will be transmitted to the beneficiary excluding the amendments, unless the instructions specify clearly any amendments which ply.

Article 6.—If incomplete or unclear instructions are received to issue, confirm or advise a credit, the bank requested to act on such ns may give preliminary notification of the credit to the beneficiary for information only and without responsibility; and in that credit will be issued, confirmed or advised only when the necessary information has been received.

B.—LIABILITIES AND RESPONSIBILITIES

Article 7.—Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance he terms and conditions of the credit.

Article 8.—In documentary credit operations all parties concerned deal in documents and not in goods.

Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and condi- of a credit by a bank authorized to do so, binds the party giving the authorization to take up the documents and reimburse the bank has effected the payment, acceptance or negotiation.

If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms onditions of the credit, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or iation was not effected in accordance with the terms and conditions of the credit.

If such claim is to be made, notice to that effect, stating the reasons therefor, must be given by cable or other expeditious means bank from which the documents have been received and such notice must state that the documents are being held at the disposal of such or are being returned thereto. The issuing bank shall have a reasonable time to examine the documents.

Article 9.—Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume bility or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods repre- thereby, or for the good faith or acts and/or omissions, solvency, performance or standing of the consignor, the carriers or the rs of the goods or any other person whomsoever.

Article 10.—Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any mes- letters or documents, or for delay, mutilation or other errors arising in the transmission of cables, telegrams or telex, or for errors slation or interpretation of technical terms, and banks reserve the right to transmit credit terms without translating them.

Article 11.—Banks assume no liability or responsibility for consequences arising out of the interruption of their business by strikes, ts, riots, civil commotions, insurrections, wars, Acts of God or any other causes beyond their control. Unless specifically authorized, will not effect payment, acceptance or negotiation after expiration under credits expiring during such interruption of business.

Article 12.—Banks utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant for edit do so for the account and at the risk of the latter.

They assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken tiative in the choice of such other bank.

The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities im- by foreign laws and usages.

C.—DOCUMENTS

Article 13.—All instructions to issue, confirm or advise a credit must state precisely the documents against which payment, accept- negotiation is to be made.

Terms such as "first class", "well known", "qualified" and the like shall not be used to describe the issuers of any documents called der credits and if they are incorporated in the credit terms banks will accept documents as presented without further responsibility r part.

nents evidencing Shipment or Despatch (Shipping Documents)

Article 14.—Except as stated in Article 18, the date of the Bill of Lading, or date indicated in the reception stamp or by notation other document evidencing shipment or despatch, will be taken in each case to be the date of shipment or despatch of the goods.

Article 15.—If the words "freight paid" or "freight prepaid" appear by stamp or otherwise on documents evidencing shipment atch they will be accepted as constituting evidence of the payment of freight.

If the words "freight prepayable" or "freight to be prepaid" or words of similar effect appear by stamp or otherwise on such docu- they will not be accepted as constituting evidence of the payment of freight.

Unless otherwise specified in the credit or inconsistent with any of the documents presented under the credit, banks may honour nts stating that freight or transportation charges are payable on delivery.

Article 16.—A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defec- ndition of the goods and/or the packaging.

Banks will refuse shipping documents bearing such clauses or notations unless the credit expressly states clauses or notations may be accepted.

Bills of Lading

Article 17.—Unless specifically authorized in the credit, Bills of Lading of the following nature will be rejected:

a) Bills of Lading issued by forwarding agents.

b) Bills of Lading which are issued under and are subject to the conditions of a Charter-Party.

c) Bills of Lading covering shipment by sailing vessels.

However, unless otherwise specified in the credit, Bills of Lading of the following nature will be accepted:

a) "Port" or "Custody" Bills of Lading for shipments of cotton from the United States of America.

b) "Through" Bills of Lading issued by steamship companies or their agents even though they cover several modes of transport.

Article 18.—Unless otherwise specified in the credit, Bills of Lading must show that the goods are loaded on board.

Loading on board may be evidenced by an on board Bill of Lading or by means of a notation to that effect dated and signed or initialled by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board and shipment.

Article 19.—Unless transhipment is prohibited by the terms of the credit, Bills of Lading will be accepted which indicate that the goods will be transhipped enroute, provided the entire voyage is covered by one and the same Bill of Lading.

Bills of Lading incorporating printed clauses stating that the carriers have the right to tranship will be accepted notwithstanding the fact that the credit prohibits transhipment.

Article 20.—Banks will refuse a Bill of Lading showing the stowage of goods on deck, unless specifically authorized in the credit.

Article 21.—Banks may require the name of the beneficiary to appear on the Bill of Lading as shipper or endorser, unless the terms of the credit provide otherwise.

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er Shipping Documents, etc.

Article 22.—Banks will consider a Railway or Inland Waterway Bill of Lading or Consignment Note, Counterfoil Waybill, Postal Receipt, Certificate of Mailing, Air Mail Receipt, Air Transportation Waybill, Air Consignment Note or Air Receipt, Trucking Company Bill of Lading or any other similar document as regular when such document bears the reception stamp of the carrier or issuer, or when it bears a signature.

Article 23.—When a credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or any other official indication of weight on the shipping documents unless the credit calls for a separate or independent certificate of weight.

rance Documents

Article 24.—Insurance documents must be as specifically described in the credit, and must be issued and/or signed by insurance companies or their agents or by underwriters.

Cover notes issued by brokers will not be accepted, unless specifically authorized in the credit.

Article 25.—Unless otherwise specified in the credit, banks may refuse any insurance documents presented if they bear a date later than the date of shipment as evidenced by the shipping documents.

Article 26.—Unless otherwise specified in the credit, the insurance document must be expressed in the same currency as the credit.

The minimum amount for which insurance must be effected is the CIF. value of the goods concerned. However, when the CIF value of the goods cannot be determined from the documents on their face, banks will accept as such minimum amount the amount of the drawing under the credit or the amount of the relative commercial invoice, whichever is the greater.

Article 27.—Credits must expressly state the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as "usual risks" or "customary risks" shall not be used.

Failing specific instructions, banks will accept insurance cover as tendered.

Article 28.—When a credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, and will assume no responsibility if any particular risk is not covered.

Article 29.—Banks may accept an insurance document which indicates that the cover is subject to a franchise, unless it is specifically stated in the credit that the insurance must be issued irrespective of percentage.

mercial Invoices

Article 30.—Unless otherwise specified in the credit, commercial invoices must be made out in the name of the applicant for the credit.

Unless otherwise specified in the credit, banks may refuse invoices issued for amounts in excess of the amount permitted by the credit.

The description of the goods in the commercial invoice must correspond with the description in the credit. In the remaining documents the goods may be described in general terms.

Documents

Article 31.—When other documents are required, such as Warehouse Receipts, Delivery Orders, Consular Invoices, Certificates of Weight, of Quality or of Analysis, etc., without further definition, banks may accept such documents as tendered, without responsibility on their part.

D.—MISCELLANEOUS PROVISIONS

ity and Amount

Article 32.—The words "about", "circa" or similar expressions are to be construed as allowing a difference not to exceed 10% more or 10% less, applicable, according to their place in the instructions, to the amount of the credit or to the quantity or unit price of goods.

Unless a credit stipulates that the quantity of the goods specified must not be exceeded or reduced, a tolerance of 3% more or 3% will be permissible, always provided that the total amount of the drawings does not exceed the amount of the credit. This tolerance does apply when the credit specifies quantity in terms of packing units or containers or individual items.

ial Shipments

Article 33.—Partial shipments are allowed, unless the credit specifically states otherwise.

Shipments made on the same ship and for the same voyage, even if the Bills of Lading evidencing shipment "on board" bear dif- at dates, will not be regarded as partial shipments.

Article 34.—If shipment by instalments within given periods is stipulated and any instalment is not shipped within the period allowed that instalment, the credit ceases to be available for that or any subsequent instalment, unless otherwise specified in the credit.

dity and Expiry Date

Article 35.—All irrevocable credits must stipulate an expiry date for presentation of documents for payment, acceptance or nego- n, notwithstanding the indication of a latest date for shipment.

Article 36.—The words "to", "until", "till" and words of similar import applying to the expiry date for presentation of documents ayment, acceptance or negotiation, or to the stipulated latest date for shipment, will be understood to include the date mentioned.

Article 37.—When the stipulated expiry date falls on a day on which banks are closed for reasons other than those mentioned in cle 11, the period of validity will be extended until the first following business day.

This does not apply to the date for shipment which, if stipulated, must be respected.

Banks paying, accepting or negotiating on such extended expiry date must add to the documents their certification in the following ing:

> "Presented for payment (or acceptance or negotiation as the case may be) within the expiry date extended in accordance with Article 37 of the Uniform Customs."

Article 38.—The validity of a revocable credit, if no date is stipulated, will be considered to have expired six months from the date e notification sent to the beneficiary by the bank with which the credit is available.

Article 39.—Unless otherwise expressly stated, any extension of the stipulated latest date for shipment shall extend for an equal l the validity of the credit.

Where a credit stipulates a latest date for shipment, an extension of the period of validity shall not extend the period permitted ipment unless otherwise expressly stated.

nent, Loading or Despatch

Article 40.—Unless the terms of the credit indicate otherwise, the words "departure", "despatch", "loading" or "sailing" used in ating the latest date for shipment of the goods will be understood to be synonymous with "shipment".

Expressions such as "prompt", "immediately", "as soon as possible" and the like should not be used. If they are used, banks will in- t them as a request for shipment within thirty days from the date on the advice of the credit to the beneficiary by the issuing bank or advising bank, as the case may be.

ntation

Article 41.—Documents must be presented within a reasonable time after issuance. Paying, accepting or negotiating banks may documents if, in their judgment, they are presented to them with undue delay.

Article 42.—Banks are under no obligation to accept presentation of documents outside their banking hours.

Terms

Article 43.—The terms "first half", "second half" of a month shall be construed respectively as from the 1st to the 15th, and the o the last day of each month, inclusive.

Article 44.—The terms "beginning", "middle" or "end" of a month shall be construed respectively as from the 1st to the 10th, the o the 20th, and the 21st to the last day of each month, inclusive.

Article 45.—When a bank issuing a credit instructs that the credit be confirmed or advised as available "for one month", "for six s" or the like, but does not specify the date from which the time is to run, the confirming or advising bank will confirm or advise edit as expiring at the end of such indicated period from the date of its confirmation or advice.

E.—TRANSFER

Article 46.—A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon ct payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more parties (second beneficiaries).

A credit can be transferred only if it is expressly designated as "transferable" by the issuing bank. Terms such as "divisible", ionable", "assignable" and "transmissible" add nothing to the meaning of the term "transferable" and shall not be used.

A transferable credit can be transferred once only. Fractions of a transferable credit (not exceeding in the aggregate the amount of he credit) can be transferred separately, provided partial shipments are not prohibited, and the aggregate of such transfers will be con-idered as constituting only one transfer of the credit. The credit can be transferred only on the terms and conditions specified in the ori-inal credit, with the exception of the amount of the credit, of any unit price stated therein, and of the period of validity or period for hipment, any or all of which may be reduced or curtailed. Additionally, the name of the first beneficiary can be substituted for that of the pplicant for the credit, but if the name of the applicant for the credit is specifically required by the original credit to appear in any docu-ent other than the invoice, such requirement must be fulfilled.

The first beneficiary has the right to substitute his own invoices for those of the second beneficiary, for amounts not in excess of he original amount stipulated in the credit and for the original unit prices stipulated in the credit, and upon such substitution of invoices he first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices. When a redit has been transferred and the first beneficiary is to supply his own invoices in exchange for the second beneficiary's invoices but fails o do so on demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the redit, including the second beneficiary's invoices, without further responsibility to the first beneficiary.

The first beneficiary of a transferable credit can transfer the credit to a second beneficiary in the same country, but if he is to be ermitted to transfer the credit to a second beneficiary in another country this must be expressly stated in the credit. The first beneficiary hall have the right to request that payment or negotiation be effected to the second beneficiary at the place to which the credit has been ransferred, up to and including the expiry date of the original credit, and without prejudice to the first beneficiary's right subsequently to ubstitute his own invoices for those of the second beneficiary and to claim any difference due to him.

The bank requested to effect the transfer, whether it has confirmed the credit or not, shall be under no obligation to make such trans-er except to the extent and in the manner expressly consented to by such bank, and until such bank's charges for transfer are paid.

Bank charges entailed by transfers are payable by the first beneficiary unless otherwise specified.

NOTE: *In the U.S.A. the Definitions of Export Quotations, which are now in wide use, are known as the "Revised American Foreign rade Definitions—1941" adopted July 30, 1941.*

dherence of the United States banks, which have subscribed to these regulations, is effective July 1, 1963.

Distributed by

ankers' Association for Foreign Trade
(U. S. A.)

and

Committee on International Banking
(U. S. A.)

EXHIBIT 7 TO SIMMS AFFIDAVIT - AFFIDAVIT OF HON. O. JOLAOSO, AMBASSADOR TO THE UNITED STATES FROM NIGERIA SWORN TO OCTOBER 25, 1977

EMBASSY OF NIGERIA
2201 M STREET, N. W.
WASHINGTON, D. C. 20037

AFFIDAVIT

District of Columbia): ss.:

OLUJIMI JOLAOSO, being duly sworn, deposes and says:

1. I am the Ambassador to the United States from the Federal Republic of Nigeria. I make this affidavit on behalf of the Federal Republic of Nigeria (Nigeria) and the Central Bank of Nigeria (Central Bank), for use in several actions pending in the United States District Court for the Southern District of New York wherein Nigeria and Central Bank are defendants, which actions relate to cement contracts entered into by the Permanent Secretary of the Federal Ministry of Defense of Nigeria and letters of credit established by Central Bank pursuant to these cement contracts (the New York litigation).

2. I, on behalf of the Government of Nigeria and on behalf of Central Bank, assert sovereign immunity as a defense to the claims alleged by the plaintiffs in the New York litigation and as a defense to any application by any of

the plaintiffs in the New York litigation to attach, or in any way to proceed against, any monies or other property of the Government of Nigeria or of Central Bank.

3. Central Bank was established in 1958 under the Central Bank of Nigeria Act 1958. Section 4 (1) of the Act provides that:

> "The principal objects of the Bank shall be to issue legal tender currency in Nigeria, to maintain external reserves to safeguard the international value of that currency, to promote monetary stability and a sound financial structure in Nigeria and to act as banker and financial adviser to the Federal Government."

4. Central Bank is a department and organ of the Government of Nigeria and is the only agent of the Government authorized to hold funds of the Government of Nigeria extra-territorially. Central Bank acts as banker and financial advisor to the Government of Nigeria; it has no authority to exercise, and does not exercise, any judgment with respect to the financial transactions of the Government of Nigeria, but acts in accordance with the directives and requests of the Federal Ministry of Finance of the Government of Nigeria.

5. In August 1975, the Nigerian port of Lagos was completely congested by vessels principally carrying cement; these vessels were either berthed for unloading or were lying in Nigerian territorial waters awaiting clearance for berthing. Almost all available berths for unloading were preempted by the vessels discharging cement and as a result, the new Military Administration of the Federal Government of Nigeria

which came into power on July 29, 1975, was greatly concerned by the scarcity of essential consumer goods (milk, sugar, salt, flour and other essentials). The congestion in the port of Lagos was causing a severe and dire disruption of vital commerce and by August 1975 was a critical threat to the economic and social survival of Nigeria. The new Government of Nigeria acted by adopting official measures with the force of law to deal with the vessels already in Nigerian territorial waters, to regulate the arrival of new vessels and to allocate available berthing and warehouse facilities to allow for the importation of essential consumer goods. The Government published "Regulations on Sailings and Arrivals of Vessels into Nigerian Ports", Government Notice No. 1434,dated August 9,1975, issued by the Permanent Secretary, Federal Ministry of Transport, Lagos, Nigeria, a copy of which is appended hereto as an exhibit. In addition, the new Government of Nigeria communicated with each of the cement suppliers who had contracted with the Federal Ministry of Defense of Nigeria to advise of the port congestion and the substance of Government Notice No. 1434, and to invite each of the cement suppliers to renegotiate the partially performed or unperformed cement contracts, a necessity dictated by the critical ports congestion. The Government of Nigeria established the Cement Contracts Nego-

tiating Committee for the purpose of meeting with the cement suppliers; and since the organization of this Committee, meetings have been conducted and many of the cement contracts have been successfully renegotiated.

Olujimi Jolaoso

Sworn to before me this
25th day of October, 1977.

EMBASSY OF NIGERIA
WASHINGTON, D.C.

Commissioner for Oaths

Government Notice No. 1434

REGULATIONS ON SAILINGS AND ARRIVALS OF VESSELS INTO NIGERIAN PORTS

All Shipping Companies/Agents operating in Nigeria are requested to advise their Overseas Principals of the following regulations regarding arrivals of vessels in Nigerian Ports.

(1) With effect from 15th August, 1975, all Shipping Agents must register with the Nigerian Ports Authority before undertaking their activities in Nigeria.

(2) All shipping Companies/Agents must furnish the Nigerian Ports Authority, *at least two months prior to the departure of their vessels from the loading ports*, the following vital information :—

(a) Port/ports of sailing and estimated time of departure ;

(b) Port/ports of discharge in Nigeria ;

(c) Estimated dates of arrival in Nigerian Port/ports ;

(d) Detail information about cargo commodities to be imported into Nigeria ;

(e) Total deadweight/freight tonnage of cargo, e.g. general or bulk, carried in such vessels ;

(f) Description of the vessels, i.e. length, breadth and draught of such vessels.

(3) On receipt of the above information, the Nigerian Ports Authority will co-ordinate all sailing as well as regulate the arrivals of vessels in Nigerian ports.

(4) The information supplied will enable the Authority to confirm and approve such sailings or in the alternative, alter and fix a more suitable date(s) acceptable to the Authority.

(5) After the confirmation or alteration of the departure dates approved by the Authority, the Shipping Companies/Agents shall convey this information to their various Principals Overseas who in turn will be expected to arrange suitable sailings which should conform with the Authority's bookings.

A reconstituted Ports Operation Committee will be charged with the responsibility for allocating berths to ships which have obtained clearance with the Nigerian Ports Authority.

The Committee will, among others, consist of the Nigerian Ports Authority officials and some Shipping Companies/Agents' representatives and will normally meet once weekly.

There will also be weekly publication announcing estimated dates of arrival of vessels in Nigerian Ports and indicating their respective berths. This is to facilitate a pre-plan operation by all interested organisations.

Failure of any Shipping Company/Agent to comply with these regulations shall result in the Authority refusing service to their vessels.

Until the problem of ports congestion is resolved the Ministry of Finance has been requested to regulate the process by which it provides automatic foreign exchange convers to private ship charterers.

All enquiries in respect of this release should be forwarded to the appropriate Port Manager.

Y. A. Gomu,
Permanent Secretary,
Federal Ministry of Transport,
Lagos

9th August, 1975.

EXHIBIT 8 TO SIMMS AFFIDAVIT - PORTS (EMERGENCY PROVISIONS) DECREE 1975, DECREE NO. 40, DATED DECEMBER 19, 1975

Supplement to Official Gazette Extraordinary No. 63, Vol. 62, 22nd December, 1975—Part A

PORTS (EMERGENCY PROVISIONS) DECREE 1975

Decree No. 40

[19*th December* 1975] Commencement.

THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows :—

Supply of information before the departure of ship for Nigeria.

1. As from the commencement of this Decree, the owner of every ship intending to enter any port in Nigeria for any purpose whatsoever shall, not later than two months before the departure of that ship for Nigeria, furnish to the Nigerian Ports Authority (hereinafter referred to as "the Authority") a statement in writing setting out the following matters, that is to say—

(*a*) the name and physical particulars of the ship ;

(*b*) the name of port or ports of sailing and estimated time of departure for Nigeria ;

(*c*) the name of port or ports of discharge in Nigeria ;

(*d*) the estimated date of arrival in Nigerian ports ; and

(*e*) detailed information (including tonnage) in respect of the cargo carried in the ship.

Notice of permission to enter Nigerian ports, etc.

2. The Authority shall, on the receipt of the statement referred to in section 1 of this Decree, issue to the owner of the ship a notice hereinafter referred to as an "entry notice" stating—

(*a*) the port or ports in Nigeria to which the ship may proceed for any purpose ;

(*b*) the date on which the ship may enter any port or approach to a port in Nigeria ;

(*c*) the berth allocated to the ship in the port concerned and the period during which the ship may remain at such berth.

Prohibition of entry into Nigeria of ships in certain cases.

3. Except with the prior approval of the Authority, no ship shall enter any port or approach to any port in Nigeria except as may be permitted by and in accordance with the terms of an entry notice issued by the Authority in respect of that ship.

Alteration of allocation of ports, etc.

4. Notwithstanding anything contained in this Decree, the Authority may, if satisfied that circumstances of the case so require, at any time alter the date allocated for the entry of any ship into any port or approach to a port in Nigeria and shall by such means as it may deem convenient notify the owner of the ship of such alteration.

Publication of information on movement of ship, etc.

5. The Authority shall, from time to time, publish in the *Gazette* and in such other manner as it may deem necessary the estimated date of arrival of any ship in Nigeria, the port allocated for that ship and the berth at which that ship may discharge cargo.

Offences and penalty.

6.—(1) If any ship—

(*a*) enters any port or any approach thereto without an entry notice having been issued by the Authority in respect of that ship ; or

(*b*) enters any port or approach thereto otherwise than as permitted by the entry notice ; or

(*c*) fails to leave any port or approach thereto or to leave any berth at the port when required to do so by the harbour master of the port,

the master of that ship shall be guilty of an offence under this section and shall on conviction be sentenced to imprisonment for two years without the option of a fine.

(2) Where an offence under subsection (1) of this section is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of the owner of that ship, the owner shall be deemed to be guilty of the offence and shall on conviction—

(*a*) in the case of an individual, be sentenced to imprisonment for two years and a fine of ₦10,000 and a further fine of ₦10,000 for each day or part of a day during which the offence continues ; and

(*b*) in the case of a body corporate be sentenced to a fine of ₦10,000 and a further fine of ₦10,000 for each day or part of a day during which the offence continues.

(3) Any offence under this Decree shall, for the avoidance of doubt, be triable by the Federal Revenue Court.

Interpretation, etc.

Cap. 55.

7.—(1) In this Decree—

"the Authority" means the Nigerian Ports Authority established under section 7 of the Ports Act ;

"entry notice" means a notice issued by the Authority pursuant to section 2 of this Decree ;

"owner" includes any agent of the owner.

(2) Without prejudice to subsection (1) of this section expressions used in this Decree have the same meanings as in the Ports Act.

(3) Nothing in this Decree shall be construed as limiting to any extent whatsoever any powers conferred on the Authority under the Ports Act or any regulations made thereunder with respect to the maintenance, control and management of any port or approach thereto and with respect to the maintenance of good order in any port or approach thereto.

8. This Decree may be cited as the Ports (Emergency Provisions) Decree 1975. Citation.

MADE at Lagos this 19th day of December 1975.

BRIGADIER M. R. MUHAMMED,
Head of the Federal Military Government,
Commander-in-Chief of the Armed Forces,
Federal Republic of Nigeria

EXPLANATORY NOTE

(This note does not form part of the above Decree but is intended to explain its purport)

As an important measure towards ports decongestion, the Decree makes it obligatory for the owner or agent of the owner of every ship intending to enter into any port in Nigeria to supply certain information concerning that ship and its movements to the Nigerian Ports Authority at least two months before the departure of the ship for Nigerian ports. The Authority may after receipt of the required information issue an entry notice to the ship concerned.

If the master of a ship contravenes the provisions of the Decree he shall be liable to imprisonment for two years without the option of a fine.

PUBLISHED BY AUTHORITY OF THE FEDERAL MILITARY GOVERNMENT OF NIGERIA AND PRINTED BY THE MINISTRY OF INFORMATION, PRINTING DIVISION, LAGOS

EXHIBIT 9 TO SIMMS AFFIDAVIT - MESSAGE FROM CENTRAL BANK TO VERLINDEN, SENT FROM LAGOS ON SEPTEMBER 30, 1975

13

VERLINDEN B.V.
LOHMANSTRAAT 1, AMSTERDAM, NETHERLANDS

AS YOU ARE AWARE THERE IS PORT CONGESTION IN ALL THE NIGERIAN PORTS AND IN ORDER TO DRASTICALLY REDUCE THE FLOW OF SHIPS CARRYING CEMENT INTO OUR HARBOURS THE FEDERAL MILITARY GOVERNMENT OF NIGERIA HAD SET UP RENEGOTIATING AND RESCHEDULING OF DELIVERY PANEL X

YOU AS A BENEFICIARY OF MINISTRY OF DEFENCE LETTER OF CREDIT FOR CEMENT (NO. CEN/BO/75/145) ARE INVITED TO A MEETING OF THE COMMITTEE TO BE HELD IN CENBANK LAGOS ON 16TH OCTOBER, 1975 AT 10.00 A.M.

CENTRAL BANK OF NIGERIA
BILLS OFFICE
TINUBU SQUARE LAGOS

30/9/75

EXHIBIT 10 TO SIMMS AFFIDAVIT - LETTER FROM MORGAN GUARANTY TO VERLINDEN DATED SEPTEMBER 30, 1975

Pltf EXH. 21
AUG 2 1979 IDENT
JACK ALTUSH, C.S.R.

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 WALL STREET, NEW YORK, N.Y. 10015

New York September 30, 1975

INTERNATIONAL BANKING DIVISION

IN REPLYING PLEASE REFER TO

Commercial Credits

Verlinden B.V. of Lomanstraat 1
Amsterdam
Netherlands

Gentlemen:

Re: Central Bank of Nigeria, Lagos
L/C CBN/BO/75/145
Our Ref: A-10452

We quote below text of cables we received from the Central Bank of Nigeria, Lagos:

"PLEASE STOP DEMURRAGE PAYMENTS AGAINST SPECIFIED DOCUMENTS UNLESS SUCH DOCUMENTS HAVE BEEN CERTIFIED FOR PAYMENT BY THE CENTRAL BANK OF NIGERIA"

"RE PAYMENT OF DEMURRAGE THE INSTRUCTIONS RELATES TO ALL CREDITS IN FORCE NOW STOP WE ARE NOT STOPPING PAYMENT COMPLETELY BUT WE WANT YOU TO HAVE OUR CLEARANCE BEFORE ANY PAYMENT IS MADE STOP THE DOCUMENTS STATING THE NUMBER OF DAYS THE SHIP HAS BEEN AT UR WHARF WITHOUT BEING DISCHARGED MUST CARRY THE STAMP AND SIGNATURE OF THE CENTRAL BANK BEFORE YOU CAN MAKE ANY PAYMENT OF DEMURRAGE OF ALL OUTSTANDING AND FUTURE CREDITS STOP WE ARE FULLY AWARE OF OUR OBLIGATIONS UNDER ARTICLE 3 OF UNIFORM CUSTOMS AND PRACTICE AND DO NOT INTEND TO TAKE ANY ARBITRARY AND UNILATERAL ACTION STOP YOU WILL AGREE THAT THE PAYMENT OF DEMURRAGE HAS TO BE BASED ON THE NUMBER OF DAYS THE SHIP STAYS AT OUR PORT WITHOUT BEING DISCHARGED STOP THIS FACT HAS TO CERTIFIED AND IT IS TO ENSURE THAT THE NUMBER OF DAYS IS CORRECTLY CERTIFIED THAT WE INSIST ON CLEARANCE WITH US STOP PLEASE MAKE OUR POSITION CLEAR TO THE BENEFICIARIES STOP ALL VALID CLAIMS FOR DEMURRAGE WILL BE PAID AFTER CERTIFICATION STOP ON NO ACCOUNT SHOULD ANY SUPPLIER INSTRUCT THE SHIP OWNER TO SAIL AWAY WITH THE CARGOES AS THE LIEN CANNOT BE ARBITRARILY EXERCISED WHEN WE HAVE NOT REFUSED PAYMENT STOP ALL SUPPLIERS ARE BEING INVITED TO NIGERIA FOR DISCUSSION STOP"

"WE INSIST THAT SPECIFIED DOCUMENTS PRESENTED IN SUPPORT OF DEMURRAGE CLAIMS SHOULD BE SENT TO CENTRAL BANK OF NIGERIA FOR CERTIFICATION BEFORE PAYMENTS ARE MADE ON SUCH DOCUMENTS"

"THE NIGERIAN FEDERAL MILITARY GOVERNMENT HAS DIRECTED THAT IN VIEW OF OUR PORT SITUATION SHIPPING COMPANIES MUST GIVE TWO MONTHS NOTICE TO THE NIGERIAN PORTS AUTHORITY BEFORE SAILING STOP IN VIEW OF THIS YOU ARE REQUESTED NOT TO PAY AGAINST DOCUMENTS PRESENTED IN RESPECT OF LETTERS OF CREDIT WE HAVE OPENED UNLESS SUCH DOCUMENTS ARE ACCOMPANIED BY CERTIFICATES CONFIRMING THAT CLEARANCE HAS BEEN OBTAINED FOR THE

SHIPS TO SAIL TO NIGERIA STOP THUS WHEN DOCUMENTS ARE PRESENTED NO PAYMENT SHOULD BE MADE UNTIL WE CONFIRM TO YOU THAT THE SHIP HAS OBTAINED NECESSARY CLEARANCE TO SAIL TO NIGERIA STOP YOU SHOULD THEREFOR NOTIFY US OF THE NAME OF THE SHIP FOR WHICH DOCUMENTS HAVE BEEN PRESENTED SO THAT WE CAN ASCERTAIN CLEARANCE AND ADVISE YOU TO PAY ACCORDINGLY"

This is for your information and is without engagement or responsibility on our part.

Yours very truly,

Authorized Signature

EXHIBIT 11 TO SIMMS AFFIDAVIT - OPINION OF MAGISTRATE SCHREIBER DATED SEPTEMBER 19, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants

77 Civ. 2809 (LWP)

CHENAX MAJESTY, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 3045 (LWP)

DECOR BY NIKKEI INTERNATIONAL, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 2348 (LWP)

MAGISTRATE'S RECOMMENDATION

This is an action for damages arising out of alleged breach of contracts for the purchase of cement and

documentary letters of credit established pursuant to those contracts. The cement contracts were entered into between plaintiffs and the Federal Ministry of Defense of Nigeria and, pursuant thereto, letters of credit were established in Nigeria by the Central Bank of Nigeria. The contracts and the circumstances surrounding their breach are substantially similar, so plaintiffs have consolidated their claims. Defendants have moved to dismiss for lack of jurisdiction. In addition, both sides have moved for summary judgment. The motions were referred to me by Judge Lawrence Pierce of this court for review and recommendation.

In each action jurisdiction is asserted pursuant to the Foreign Sovereign Immunities Act of 1976 (hereinafter the "Immunities Act"), 28 U.S.C. §1605, the relevant sections of which provide:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection

> with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. §1605(a)(1)-(2) (1976).

Defendants assert the defenses of lack of jurisdiction under the Immunities Act, sovereign immunity and act of state.

The purchase agreements in question are mimeographed form contracts in which each plaintiff agreed to supply the Ministry of Defense of Nigeria with 240,000 metric tons of cement. To pay for the cement, letters of credit were established in Nigeria by defendant Central Bank and made payable through Morgan Guaranty Bank in New York. Each letter of credit provides that it is irrevocable, transferable abroad and subject to the Uniform Customs and Practice for Documentary Credits, 1962 Revision, International Chamber of Commerce, Brochure No. 222. The only material differences in the contracts are with respect to the law which is to govern the contracts and the banks through which letters of credit are to be advised. The contracts entered into by plaintiffs East Europe Import-Export, Inc. and Decor by Nikkei International Inc. provide that they are to be governed by the laws of the United States and that letters of credit established pursuant

the contracts are to be advised through First National City Bank in New York City. The contract with plaintiff Chenax Majesty, Inc. states that it is to be governed by the laws of Switzerland, with the letters of credit to be advised through Schroeder, Muenchmeyer, Hengst & Co. of Hamburg, Germany.

The alleged breach of the cement contracts arose out of Nigeria's embargo on all shipping entering the Nigerian port of Lagos Apapa in August 1975. Nigeria had mounted a massive cement purchase program, including orders totalling over twenty million metric tons in 68 different contracts with suppliers throughout the world. The huge quantities ordered greatly exceeded the unloading capacity of Nigeria's deep water ports. Although Nigeria's experience with contracts of this nature indicated that they could expect delivery of only 10% of the orders, the principal port of Lagos Apapa eventually became so congested with cement-laden vessels that an embargo on all shipping was imposed to alleviate the burden on the port's facilities. There was some concern on the part of Nigerian authorities that the unexpected response to the cement orders resulted from suppliers' visions of huge demurrage [1] claims when the inevitable port

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[1] Demurrage is a penalty imposed upon a consignee when a vessel is delayed in discharging its cargo, Hellenic Lines, Ltd. v. Director General of India Supply Mission, 319 F.Supp. 821 (S.D.N.Y. 1970), aff'd, 452 F.2d 810 (2d Cir. 1971). The Nigerian cement contracts provided for such penalties.

congestion delayed unloading. To enforce the embargo, Nigeria declared that all suppliers must henceforth give two months' advance notice of sailing and receive Nigerian permission for departure. Central Bank then cabled instructions to Morgan Guaranty Bank in New York, which in turn informed plaintiffs, that no letters of credit would be honored with respect to vessels transporting cement to Nigeria unless the letters of credit were accompanied by documents showing that Nigeria had been given two months' advance notice of the departure of each vessel and had approved the ship's departure. Plaintiffs contend that these instructions were a unilateral, unauthorized amendment of the terms of the letters of credit and therefore an anticipatory breach of the letters of credit and cement contracts.

This recommendation will principally discuss the issues presented by defendants' motions to dismiss, principally (1) whether this court has jurisdiction over defendant Nigeria pursuant to §1605 of the Immunities Act and (2) whether the act of state doctrine requires this court to decline to exercise Immunities Act jurisdiction on the grounds that the instant litigation would entail review of Nigeria's acts of embargoing its port and requiring prior notice and approval of cement shipments to Nigeria.

In 1976 the Immunities Act was passed to establish when and how parties can maintain lawsuits against foreign states and their entities in United States courts, H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7, reprinted in [1976] U.S. Code Cong. and Ad. News 6604 (hereinafter the "House Report"). One of the principal purposes of the Immunities Act is to codify the "restrictive" principle of sovereign immunity, which provides that the immunity of a foreign state is restricted to suits involving the state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). Id. The Immunities Act also transfers the function of making determinations of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assurin litigants that these decisions are made on consistent and purely legal grounds. Id. It was the intent of Congress to free the Department of State from the pressures of foreign governments to recognize their immunity from suit and from adverse consequences resulting from unpopular determinations as to immunity status. Id.

The Immunities Act outines several types of situations in which foreign sovereigns should not be granted immunity, 28 U.S.C. §§1605-07, and provides federal subject matter juris-

diction whenever the foreign sovereign is not immune, 28 U.S.C. §1330(a). In addition, Congress created a long-arm statute for acquiring in personam jurisdiction over foreign sovereigns 28 U.S.C. §1330(b), and the due process requirement of minimum contacts is embodied within the Immunities Act itself, See House Report 6612, for each of the immunity provisions, §§1605-07, requires some connection between the subject matter of the lawsuit and the United States, thus prescribing the necessary contacts which much exist before United States courts can exercise personal jurisdiction.

The specific exception to immunity applicable to the instant suit is the "commercial activity" rule of §1605(a)(2) of the Immunities Act, which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case. . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States,

Congress has defined "commercial activity" as "including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct." House Report 6614. Moreover, a single contract, if of the same character

as a contract which might be made by a private person, could constitute a "particular transaction or act." Id. at 6615. Congress explained that "the fact that goods or services are to be used for a public purpose is irrelevant: it is essentially the commercial nature of an activity or transaction that is critical," and pointed out that "a contract by a foreign government to buy provisions for its armed forces or to construct a government building constitutes a commercial activity." Id.

With respect to the third situation presented in §1605(a)(2), supra, Congress has stated that the provision embraces commercial conduct having a direct effect within this country and subjects such conduct to United States jurisdiction consistent with §18, Restatement (Second) Foreign Relations Law of the United States (1965), which provides:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if-
>
> . . .
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Comment (f) to §18 explains:

> The exercise of jurisdiction under the rule stated in Clause (b) of this section generally involves matters of an economic nature. In those circumstances, the rule stated in this clause does not require intent in the subjective sense and will usually deal with conduct which was intended to produce the effect within the territory in the sense that those responsible for the conduct had reason to foresee that the effect within the territory would result from the conduct outside.

See Markham v. Gray, 393 F.Supp. 163, 165-66 (S.D.N.Y. 1975), aff'd sub nom., Markham v. Anderson, 531 F.2d 634 (2d Cir. 1976).

The cement contracts are clearly commercial in nature and Nigeria's unilateral amendment of the letters of credit established pursuant to those contracts constitutes "an act outside the territory of the United States in connection with commercial activity elsewhere." Therefore, the pivotal question for this court to determine is whether there has been a direct, foreseeable and substantial effect within the United States as a result of the amendment of the letters of credit.

All of the beneficiaries of the letters of credit were incorporated in New York and the letters were payable at Morgan Guaranty Bank in New York. Nigeria's amendment of the letters directly affected the beneficiaries in New York, for after the amendment none could collect the debts owed to it without the appropriate documents newly demanded by Nigeria.

This effect was foreseeable by that nation, because it had entered contracts with New York corporations, made payable at a New York bank and expressly instructed Morgan Guaranty Bank in New York to dishonor letters of credit not complying with the amended payment procedures. Finally, the effects of the attempted amendment of the contracts are substantial, for over $42,000,000 worth of credit owed to the three plaintiffs has been cancelled. Accordingly, this court has subject matter jurisdiction pursuant to 28 U.S.C. §1605(a)(2).

Personal jurisdiction also exists over defendant Nigeria pursuant to §1330(b) of the Immunities Act. The legislative history of that section of the statute supports such a finding on the ground that Nigeria's conduct in connection with contracts havin foreseeable and substantial effects in New York provides in and of itself, sufficient contact with this state for due process purposes.

In addition, quasi in rem jurisdiction can be found over Nigeria on the basis that it maintains substantial funds on deposit with the Federal Reserve Bank in the form of treasury bills and over Central Bank because it maintains sizeable accounts with Morgan Guaranty Bank which are used to pay a wide range of trade debts incurred by Nigeria. Finally, official at Morgan Guaranty Bank have the power to transfer Nigeria's deposits at the Federal Reserve to Central Bank's account at

Morgan Guaranty Bank if Morgan officials decide the level of deposits has fallen too low.[2]

In addition to its defense of lack of personal jurisdiction, Nigeria contends that the instant litigation is precluded by the act of state doctrine. The traditional definition of that doctrine is found in Underhill v. Hernandez, 168 U.S. 250 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Two policy considerations have been articulated as the basis for the act of state doctrine. Some courts have emphasized that the doctrine rests on concern for international comity and respect for sovereignty, Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918), while others have emphasized that the doctrine is fundamental to our principles of separation of powers, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Although the disparate rationales have made consistent application of the doctrine

---

[2] In National American Corp. v. Fed. Rep. of Nigeria, 448 F.Supp 622 (S.D.N.Y. 1978), another case resulting from the Nigerian cement purchase program, Judge Goettel found these contacts sufficient to sustain jurisdiction under the rule of Shaffer v. Heitner, 97 S.Ct. 2569 (1977), upon quasi in rem grounds.

difficult, it has been generally agreed that the question of whether to invoke the doctrine in a given case is matter of judicial discretion. Id.; Alfred Dunhill of London, Inc, v. Cuba, 425 U.S. 682, 714 (1976)(Powell, J., concurring).

Since both the act of state doctrine and sovereign immunity can effectively destroy a litigant's claim, the two principles have often been confused. It is, therefore, important to note the distinction between the two. Sovereign immunity accords a defendant exemption from suit by virtue of its status as a foreign sovereign. Alfred Dunhill, supra, at 726 (Marshall, J., dissenting). The act of state doctrine, on the other hand, applies whether a sovereign nation is a party or not and precludes a suit from going forward when a court determines that the litigation will require inquiry into the validity of the public acts of a foreign sovereign. Id. A decision on whether to apply the act of state doctrine is made after considering the potential embarassment to the executive branch, and the general consensus on the issue in international law, Banco Nacional de Cuba, supra, at 428.

The instant suit requires scrutiny of two recent cases, Alfred Dunhill, supra, and Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977). When the Immunities Act was passed, Congress expressly declined to address the act of state doctrine, stating that it was confident that Alfred Dunhill provided the courts with adequate guidance for dealing with improper assertions of the doctrine. House Report 6619 n.1. That confidence may have been ill-founded.

In Alfred Dunhill, at 425 U.S. 682 (Part III), four members of the Court supported what has been termed the "commercial exception" to the act of state doctrine, the justices emphasizing that the doctrine applied only to governmental public acts and should not be extended to allow repudiation of a commercial debt, Id, at 705. That case arose after the Cuban government confiscated the business and assets of certain Cuban manufacturers of cigars and named "interventors" to take possession of and operate the seized businesses. Following the intervention, a number of United States importers paid the interventors for shipments which had been made by the original owners. When the District Court held that the Cuban interventors had to refund those payments to the American importers, the Cuban interventors indicated that they had no intention of doing so and that the court could not question their decision because it was an act of state. While accepting the premise that the confiscation was an act of state, the Supreme Court held, 5-4, that no second act of state had been proven, Id. at 690, stating that even if Cuba had repudiated the debt, the act of state doctrine did not apply to purely commercial acts.

The four dissenting justices refused to recognize any inflexible commercial/non-commercial distinction between acts of state, Id. at 716, and maintained that the interventors refusal to recognize that they owed any debt was legally in-

distinguishable from the original intervention. Id. The dissent noted that the act of state doctrine rested upon different considerations than sovereign immunity and warned that the broad commercial exception to sovereign immunity should not be automatically transferred to the act of state doctrine. emphasizing that act of state determinations should be made on a flexible case-by-case basis with all of the appropriate considerations being taken into account, Id, at 728,

Prior to Alfred Dunhill, courts interpreting the act of state doctrine made a preliminary determination as to, first, whether an act was vested with sovereign authority, and, second, whether adjudication of the claim would entail inquiry int the validity of the act such that there was potential for embarassment to the executive branch, Banco Nacional de Cuba, supra Under the Alfred Dunhill approach urged by Congress, courts must now additionally make a preliminary characterization as to the commercial or non-commercial nature of the act. The appropriate extent of this preliminary inquiry remains unsettled,

Hunt v. Mobil Oil Co., supra, the most recent Second Circuit opinion construing the act of state doctrine, suggests that this inquiry should be limited in scope, and, in fact, the decision is contrary to a recent trend limiting application of the doctrine. Hunt was an anti-trust suit against seven major oil companies working in the Persian Gulf and

Libyan oil fields, with plaintiff, an independent oil producer operating in Libya, alleging that the oil companies had manipulated plaintiff's transactions with Libya in such a manner as to provoke nationalization of plaintiff's oil assets. The court held that plaintiff could not prove his claim without inquiring into Libya's motivation for nationalizing the oil fields and that the act of state doctrine precluded such inquiry, 550 F.2d at 77. Although the doctrine had traditionally precluded inquiry into the validity of sovereign acts, the Second Circuit determined that Libya's motivation and the validity of the seizure were logically inseparable, reasoning that examination of the motivation required assessment of the validity of the act. Id. at 77-78. Thus, the court held that the act of state doctrine precludes judicial inquiry into either motivation for or the validi of the acts of a foreign sovereign committed within its own territory.

Judge Van Graafeiland's dissenting opinion in Hunt argued that Alfred Dunhill illustrated that the act of state doctri required, rather than precluded, inquiry into the nature of the act and its relationship to the foreign sovereign. Id. at 79.

It is apparent that after Hunt an inquiry into the commercial nature of conduct alleged to be an act of state should not include scrutiny of the sovereign's motivation for the act, but rather should be limited to those facts presented by the pleadings and affidavits.

Defendant Nigeria has alleged two acts of state: (1) the embargo of its ports and (2) the amendment of the letters of credit to require evidence of two months' notice and prior approval of shipment before payment.

The embargo should be accepted as a legitimate governmental act of state, for the inquiry necessary to characterize it a a commercial act would require review of Nigeria's motivation for the embargo. Recognition of the embargo as an act of state does not, however render plaintiffs' claims nonjustifiable, because this action can proceed without a review of the validity of the embargo. There is no direct causal link between the embargo and the alleged damages, for plaintiffs have alleged that their damages resulted not from the embargo, but rather from the amendment of the irrevocable letters of credit.

Defendants argue that the amendment of the letters of credit was merely an implementaion of the embargo. Although the embargo and the amendment of the letters of credit may have been part of an overall scheme to alleviate the confusion surrounding the overcrowded port, the acts are not inseparable, for Nigeria did a number of things to rectify the cement debacle, all of which cannot be lumped into one "act of state." For example, that government formed the Cement Contracts Negotiating Committee to settle claims arising from the situation. It would be logically inconsistent to find that the effort to settle the disputes and

the amendment resulting in more disputes were both a single act of state. Furthermore, the embargo would not itself have rendered the letters of credit uncollectable. Thus, since the embargo and the amendment of the letters of credit are severable acts, the instant litigation may proceed despite recognition of the embargo as a public act of state.

Nigeria contends that the amendment of the letters of credit is also an act of state, but it may not properly be so characterized, for the amendment lies within the Alfred Dunhill "purely commercial" exception to the act of state doctrine. The letters of credit arise out of a specific commercial contract for goods and the attempted amendment or modification of the letters was specifically directed at the cement suppliers. It is clear that Nigeria sought to alter the terms of a commercial agreement and this modification, like the repudiation of the commercial debt in Alfred Dunhill, was a purely commercial act. ~~The instant suit~~ DEFENDANTS' INSTANT MOTION is precisely of the type which Congress hoped Alfred Dunhill would prevent.

For the above reasons, it is recommended that defendants' motion to dismiss be denied. The cross-motions for summary judgmen should also be denied for there are numerous factual disputes.

Respectfully submitted,

/s/ S. Schreiber

SOL SCHREIBER
UNITED STATES MAGISTRATE

New York, New York
September 19, 1978

EXHIBIT 12 TO SIMMS AFFIDAVIT - AFFIDAVIT OF ALFRED KOEBEL, ASSISTANT VICE-PRESIDENT AND SENIOR TECHNICAL OFFICER IN LETTER OF CREDIT DEPARTMENT OF MORGAN GUARANTY SWORN TO NOVEMBER 12, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VERLINDEN B.V.,	:	
Plaintiff,	:	Index No. 79 Civ. 1150 (EW)
- against -	:	
CENTRAL BANK OF NIGERIA,	:	
Defendant.	:	AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ALFRED KOEBEL, being duly sworn, deposes and says:

1. I am an Assistant Vice-President and Senior Technical Officer in the Letter of Credit Department of Morgan Guaranty Trust Company of New York (Morgan Guaranty). I am fully familiar with the Morgan Guaranty file on the letter of credit established by Central Bank of Nigeria (Central Bank) in favor of Verlinden B.V., Amsterdam, the Netherlands (Verlinden), which letter of credit I understand is the subject of the above-captioned action.

2. The documents referred to herein and identified below are from the files maintained by Morgan Guaranty on the Verlinden letter of credit, except for Exhibit 5 hereto.

3. Morgan Guaranty's file on the Verlinden letter of credit reflects the following:

a. By letter dated June 23, 1975, Central Bank informed Morgan Guaranty that it had established its irrevocable documentary credit No. CBN/BO/75/145 in favor of Verlinden. Central Bank enclosed the credit with the letter and requested that Morgan Guaranty advise Verlinden of the credit; the credit is also dated June 23, 1975. (Central Bank's letter and documentary credit are Exhibit 1 hereto). By letter dated July 7, 1975, Morgan Guaranty air mailed the Verlinden letter of credit to Verlinden's bank, N.V. Slavenburg's Bank in Amsterdam, requesting Slavenburg's Bank to forward the original letter of credit to Verlinden. (Morgan Guaranty's letter of July 7, 1975, is Exhibit 2 hereto; and Morgan Guaranty's telex of July 9, 1975, advising Slavenburg's Bank that the Verlinden letter of credit had been airmailed on July 7, 1975, is Exhibit 3 hereto). On July 11, 1975 Verlinden telexed Morgan Guaranty, indicating that it had received the letter of credit, and requesting that certain amendments be made to the terms of the letter of credit. (Verlinden's telex to Morgan Guaranty of July 11, 1975 is Exhibit 4 hereto.)

b. The Verlinden letter of credit (Exhibit 1 hereto), at paragraph (2) of the Appendix thereto (last page of the document) provides: "Shipment: Shipment to commence within 45 days after receipt of the letter of credit in Amsterdam by the seller (Verlinden). Delivery shall be at the rate of 20,000

metric tons per mensem minus 10% at seller's option or plus such additional quantity as the seller may be able to deliver."

c. Verlinden's telex to Morgan Guaranty on July 11, 1975 is evidence that by that date Verlinden had received the letter of credit. Pursuant to the provision of the letter of credit quoted above, Verlinden was required to commence shipments of cement to Nigeria no later than August 25, 1975 (which is 45 days after July 11, 1975) unless the time for the commencement of shipments were amended, which it was not.

d. In addition to Verlinden's telex to Morgan Guaranty of July 11, 1979, Verlinden made other requests for amendments to terms of its letter of credit, most of which were granted by Central Bank and incorporated into the letter of credit; but there is no vidence in Morgan Guaranty's file of any request by Verlinden for an extension of the time for commencement of shipments to Nigeria. Paragraph (2) of the Appendix to the Verlinden letter of credit remained unchanged.

d. By telex and letter both dated September 29, 1975, well after the expiration of the 45 day period specified in the letter of credit, Slavenburg's Bank advised Morgan Guaranty that Verlinden was "intensively trying to solve the problems around this credit, as to . . . 2. to become extension for the commensing of time first shipment as per appendix clause two . . .". (Slavenburg's Bank's telex and letter of September 29, 1975 are Exhibit 6 hereto).

4. The Verlinden letter of credit by its terms is governed by the Uniform Customs and Practice for Documentary Credits, 1962 Revision, International Chamber of Commerce Brochure No.222 (U.C.P., 1962 Revision), a copy of which is Exhibit 5 hereto. Article 34 of U.C.P., 1962 Revision, provides: "If shipment by instalments within given periods is stipulated and any instalment is not shipped within the period allowed for that instalment, the credit ceases to be available for that or any subsequent instalment, unless otherwise specified in the credit."

5. The Verlinden letter of credit further required that the documents defined at page 1 thereof, evidencing the loading of a vessel with cement for Nigeria, be presented at Morgan Guaranty. Pursuant to Article 41 of U.C.P., 1962 Revision, such documents were required to "be presented within a reasonable time after issuance." In 1975, in accordance with the banking practices and procedures of Morgan Guaranty, the term "reasonable time" in Article 41 U.C.P., 1962 Revision, was interpreted to mean not more than 30 days.

6. There is no evidence in Morgan Guaranty's file on the Verlinden letter of credit of a presentment of documents by Verlinden evidencing a shipment of cement to Nigeria on or before the final shipping date of August 25, 1975. Pursuant to Articles 34 and 41 of U.C.P., 1962 Revision, since such documents were not presented within a reasonable time after August 25, 1975, Morgan Guaranty would not have honored any presentation of documents made under the letter of credit thereafter unless authorized to

do so by Central Bank. Without such an authorization, the letter of credit would no longer have been available at Morgan Guaranty. There is no evidence in Morgan Guaranty's file on the Verlinden letter of credit either of such an authorization by Central Bank or of the presentation of any documents by Verlinden.

7. I have been advised that Verlinden alleges in its complaint herein that Central Bank breached the Verlinden letter of credit anticipatorily in October 1975, when Central Bank informed Verlinden that additional documentation with respect to payments for cement or demurrage under the letter of credit would be required pursuant to directives of the Federal Government of Nigeria concerning the congestion in Nigerian ports. However, as indicated above, the Verlinden letter of credit had ceased to be available at Morgan Guaranty prior to October of 1975.

8. At the end of September 1975 and thereafter, Central Bank had requested Morgan Guaranty to transmit certain such instructions to all beneficiaries of the several cement related letters of credit that were advised through Morgan Guaranty. Morgan Guaranty's letter to Verlinden, dated September

30, 1975 (Exhibit 7 hereto) is an example of the transmissions made by Morgan Guaranty to all such beneficiaries.

Alfred Koebel

Sworn to before me this
12th day of November 1979.

Notary Public

LAURENCE MAY
Notary Public, State of New York
No. 31-4539203
Qualified in New York County
Commission Expires March 30, 19 80

EXHIBIT 1 TO KOEBEL AFFIDAVIT - VERLINDEN LETTER OF CREDIT (reproduced herein at pages 59a-64a)

EXHIBIT 2 TO KOEBEL AFFIDAVIT - LETTER FROM MORGAN GUARANTY TO N. V. SLAVENBURG'S BANK DATED JULY 7, 1975

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 WALL STREET, NEW YORK, N.Y. 10015

INTERNATIONAL BANKING DIVISION

New York July 7, 1975

IN REPLYING PLEASE REFER TO 11F

NV Slavenburg's Bank
Amsterdam
Netherlands

This refers to our cable of June 17, 1975

Dear Sirs:

Our Reference No. A 10452

Attached is original and copy of our advice concerning our above reference.

Please forward the original to the beneficiary, retaining the copy for your files.

Yours very truly,

Authorized Signature

Enclosure

EXHIBIT 3 TO KOEBEL AFFIDAVIT - TELEX FROM MORGAN GUARANTY TO N.V. SLAVENBURG'S BANK DATED JULY 9, 1975

X

N.V. SLOVENBURGS BANK
AMSTERDAM
HOLLAND

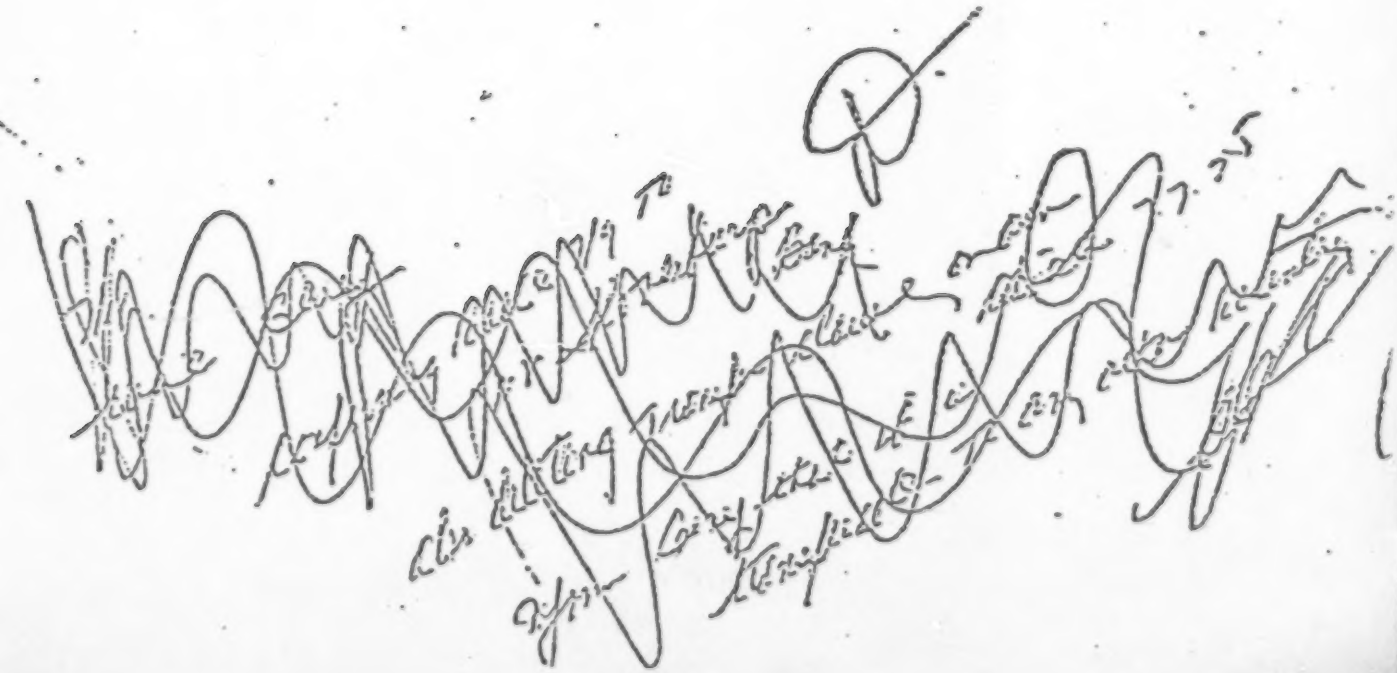
A.KIP/

7/9/75

658 26 501
MGT TELEX

BOM. C.

YOURS 6TH CENTRAL BANK OF NIGERIA CREDIT CBN/30/75/145 OUR REFERENCE A-10452 YOURS 12192 FULL PARTICULARS ADVISED YOU JULY 7 STOP CREDIT TRANSFERRABLE ONLY AT OUR OFFICE INSTEAD AS STATED OUR ADVICE ADVISING OUR TERMS



DATED JULY 11, 1975

11062

H

RCA1411/110
MORGAN NYK A
14586 VEREX NL
11 /7/75

THIS IS VERLINDEN OFFICE
LOMANSTRAAT 1
AMSTERDAM / HOLLAND

RE: OUR PHONE-CALL WITH MR. EDWARD B. MCLAUGHLIN. 23/15

YOUR REF. NR.: A 10452 IRREVOCABLE LETTER OF CREDIT
NR.: CBN/BO/75/145
IN FAVOUR OF VERLINDEN B.V. LOMANSTRAAT 1, AMSTERDAM / HOLLAND -

PLEASE TRY TO CHANGE THE FOLLOWING CLAUSES IN THE LETTER OF CREDIT:

1 PAGE 1 OF THE LETTER OF CREDIT FROM THE CENTRAL BANK OF NIGERIA
DOCUMENT: CLEAN ON BOARD BILLS OF LADING IN
CHARTER PARTY BILLS OF LADING

2 PAGE 2 SAYS FOR ANY EUROPEAN PORTS THE INSURANCE CLAUSE IN THE APPENDIX NR. 3 SPEAKS OF SPECIAL PORTS

PLEASE CHANGE THIS ALSO IN THE INSURANCE CLAUSE IN ANY EUROPEAN PORTS

&4

IF IT IS POSSIBLE FOR YOU TO SEND THE TELEX TO N.V. SLAVENBURG'S BANK CONCERNING THE SITUATION THAT THE L/C IS TRANSFERABLE ABROAD TO ANY COUNTRY IN THE WORLD THROUGH YOUR OFFICE.
WE ARE EEE ARRANGE WITH THE DIRECTORS OF THE SLAVENBURG BANK THAT WE CAN PICK UP THE TELEX IN THE WEEKEND.

WE WILL BE VERY PLEASED IF YOU CAN ARRANGE THE ABOVE MENTIONED AND SEND THE TELEX TO N.V. SLAVENBURG'S BANK, AMSTERDAM TODAY - THE TELEX NUMBER IS: 12192 SLABA NL.

THANK YOU KINDLY FOR YOUR CO-OPERATION

REGARDS,
From:
VERLINDEN B.V.
Amsterdam Nord.
14586 VEREX NL 7/11/1984 2:35 p.m.

MORGAN NYK A

EXHIBIT 5 TO KOEBEL AFFIDAVIT - UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, 1962 REVISION, INTERNATIONAL CHAMBER OF COMMERCE BROCHURE NO. 222 (U.C.P., 1962 REVISION) (reproduced herein at pages 113a-117a)

BURG'S BANK TELEX AND LETTER OF SEP-
TEMBER 29, 1975

N.V. SLAVENBURG'S BANK .

ESTABLISHED AT ROTTERDAM .

AMSTERDAM OFFICE
HERENGRACHT 179
Telephone 227228
Telex 12182
Cableaddress: SLAVADAM

FOREIGN DEPARTMENT
WB/JP

AMSTERDAM, 29th September, 1975
POSTBOX 29

Morgan Guaranty Trust Company
15, Broadstreet
10005 NEW YORK, N.Y.
- U.S.A. -

Dear Sirs,

We herewith confirm our todays telex message to you, reading as follows:

Your ref. nr. a-10452 re: central bank, nigeria
L/C nr. cbn/bc/75/145 for dlrs. 14,400,000.00,
our ref. AD/86077.

This is to refer to your telex message dated 2/9/75 offering to add your confirmation provided beneficiaries pay your confirmationcommission dlrs. 28,800,00 within 30 days from 9/3/75, so this offer expires at the end of this week.

At the special request of beneficiaries we herewith ask you to investigate whether or not you are in a position to extend said expirationdate with another month.

We understand that beneficiaries are intensively trying to solve the problems around this credit, as to
1. the shipment possibility notwithstanding the indigestion in Nigerian ports,
2. to become extension for the commensing time first shipment as per appendix clause two,

etc, etc, etc,

Thanks for an early reply per telex.

Yours faithfully,
N.V. SLAVENBURG'S BANK

Ex. 6

SP 29 A 10:11

ARE YOU MORGAN GUARANTY TRUST COMPANY, N.Y.+?
12192 SLAD NL
12192Z SLAD NL
29/9/1975

HERE: N.V. SLAVENBURGS BANK, AMSTERDAM, THE NETHERLANDS
TO : MORGAN GUARANTY TRUST COMPANY, NEW YORK 9-29-75
INTERNATIONAL BANK DIVISION. 10:15A

YOUR REF. NR.A-10452 RE: CENTRAL BANK NIGERIA
L/C NR. CBN/30/75/145 FOR DLRS. 14,400,000.00
OUR REF. AD/36077

THIS IS TO REFER TO YOUR TELEX MESSAGE DATED 2/9/75 OFFERING TO ADD YOUR CONFIRMATION PROVIDED BENEFICIARIES PAY YOUR CONFIRMATIONCOMMISSION DLRS. 28.800,-- WITHIN 30 DAYS FROM 9/3/75.
SO THIS OFFER EXPIRES AT THE END OF THIS WEEK.
AT THE SPECIAL REQUEST OF BENEFICIARIES WE HEREWITH ASK YOU TO INVESTIGATE & WHETHER OR NOT YOU ARE IN A POSITION TO EXTEND SAID EXPIRATIONDATE WITH ANOTHER MONTH.
WE UNDERSTAND THAT BENEFICIARIES ARE INTENSIVELY TRYING TO SOLVE THE PROBLEMS AROUND THIS CREDIT.,

Ex. 6

AS TO 1. THE SHIPMENT POSIBILITY NOTWITHSTANDING THE INDIGESTION IN NIGERIAN PORTS,

2. TO BECOME EXTENSION FOR THE COMMENCING TIME FIRST SHIPMENT AS PER APPENDIX CLAUSE TWO

ETC, ETC, ETC.,

THANKS FOR AN EARLY REPLY PER TELEX.

REGARDS

12152 SLAD NLG

A420230 MGT UI

12152 SLAD NL

DATED SEPTEMBER 30, 1975

EXH. 21

AUG 2 1979

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 WALL STREET, NEW YORK, N.Y. 10015

New York September 30, 197

INTERNATIONAL BANKING DIVISION

IN REPLYING PLEASE REFER TO

Commercial Credits

Verlinden B.V. of Lomanstraat 1
Amsterdam
Netherlands
Gentlemen:

Re: Central Bank of Nigeria, Lagos
L/C CBN/BO/75/145
Our Ref: A-10452

We quote below text of cables we received from the Central Bank of Nigeria, Lagos:

"PLEASE STOP DEMURRAGE PAYMENTS AGAINST SPECIFIED DOCUMENTS UNLESS SUCH DOCUMENTS HAVE BEEN CERTIFIED FOR PAYMENT BY THE CENTRAL BANK OF NIGERIA"

"RE PAYMENT OF DEMURRAGE THE INSTRUCTIONS RELATES TO ALL CREDITS I FORCE NOW STOP WE ARE NOT STOPPING PAYMENT COMPLETELY BUT WE WANT YOU TO HAVE OUR CLEARANCE BEFORE ANY PAYMENT IS MADE STOP THE DOCUMENTS STATING THE NUMBER OF DAYS THE SHIP HAS BEEN AT UR WHARF WITHOUT BEING DISCHARGED MUST CARRY THE STAMP AND SIGNATURE OF THE CENTRAL BANK BEFORE YOU CAN MAKE ANY PAYMENT OF DEMURRAGE OF ALL OUTSTANDING AND FUTURE CREDITS STOP WE ARE FULLY AWARE OF OUR OBLIGATIONS UNDER ARTICLE 3 OF UNIFORM CUSTOMS AND PRACTICE AND DO NOT INTEND TO TAKE ANY ARBITRARY AND UNILATERAL ACTION STOP YOU WIL AGREE THAT THE PAYMENT OF DEMURRAGE HAS TO BE BASED ON THE NUMBER O DAYS THE SHIP STAYS AT OUR PORT WITHOUT BEING DISCHARGED STOP THIS FACT HAS TO CERTIFIED AND IT IS TO ENSURE THAT THE NUMBER OF DAYS I CORRECTLY CERTIFIED THAT WE INSIST ON CLEARANCE WITH US STOP PLEASE MAKE OUR POSITION CLEAR TO THE BENEFICIARIES STOP ALL VALID CLAIMS DEMURRAGE WILL BE PAID AFTER CERTIFICATION STOP ON NO ACCOUNT SHOUL ANY SUPPLIER INSTRUCT THE SHIP OWNER TO SAIL AWAY WITH THE CARGOES AS THE LIEN CANNOT BE ARBITRARILY EXERCISED WHEN WE HAVE NOT REFUSE PAYMENT STOP ALL SUPPLIERS ARE BEING INVITED TO NIGERIA FOR DISCUSS STOP"

"WE INSIST THAT SPECIFIED DOCUMENTS PRESENTED IN SUPPORT OF DEMURRAG CLAIMS SHOULD BE SENT TO CENTRAL BANK OF NIGERIA FOR CERTIFICATION BEFORE PAYMENTS ARE MADE ON SUCH DOCUMENTS"

"THE NIGERIAN FEDERAL MILITARY GOVERNMENT HAS DIRECTED THAT IN VIEW OUR PORT SITUATION SHIPPING COMPANIES MUST GIVE TWO MONTHS NOTICE T THE NIGERIAN PORTS AUTHORITY BEFORE SAILING STOP IN VIEW OF THIS YO ARE REQUESTED NOT TO PAY AGAINST DOCUMENTS PRESENTED IN RESPECT OF LETTERS OF CREDIT WE HAVE OPENED UNLESS SUCH DOCUMENTS ARE ACCOMPAN BY CERTIFICATES CONFIRMING THAT CLEARANCE HAS BEEN OBTAINED FOR THE

contd.....

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK

September 30, 19

SHIPS TO SAIL TO NIGERIA STOP THUS WHEN DOCUMENTS ARE PRESENTED NO PAYMENT SHOULD BE MADE UNTIL WE CONFIRM TO YOU THAT THE SHIP HAS O TAINED NECESSARY CLEARANCE TO SAIL TO NIGERIA STOP YOU SHOULD THER NOTIFY US OF THE NAME OF THE SHIP FOR WHICH DOCUMENTS HAVE BEEN PRESENTED SO THAT WE CAN ASCERTAIN CLEARANCE AND ADVISE YOU TO PAY ACCORDINGLY"

This is for your information and is without engagement or responsi ility on our part.

Yours very truly,

Authorized Signature

EXHIBIT 13 TO SIMMS AFFIDAVIT - ORDER OF WEINFELD, D. J. DATED OCTOBER 12, 1979 (reproduced herein at pages 22a-24a)

EXHIBIT 14 TO SIMMS AFFIDAVIT - TELEX FROM CENTRAL BANK TO MORGAN GUARANTY DATED OCTOBER 22, 1979

667240A MGTFX UW

21350 CEBANK NG 22/10/79

TO MORGAN GUARANTY TRUST COMPANY OF NEW YORK NEW YO

WIRE & CABLE DEPT

KNUSA

45 FUNDS - WE HAVE INSTRUCTED FEDERAL RESERVE BANK TO PAY YOU
DLRS.4,360,000 X UPON RECEIPT PLEASE CREDIT FUNDS TO OUR ACCOUNT X
THE PURPOSE OF THIS TRANSFER IS TO COMPLY WITH A COURT ORDER WHICH
REQUIRES US TONKEEP A MINIMUM BALANCE X OF D RS.4,360,000 ON OUR
ACCOUNTWITH YOU PENDING THE DETERMINATION TF A SUIT I
PLEASE ENSURE THAT THE BALANCE ON OUR ACCOUNT DOES NOT FALL
ELOW DLRS.4,360,000 HENCEFORTH X

EST NO. 45337 - TESTED ON DLRS.4,360,000 --

ENTRAL BANK OF NIGERIA+++ Lagos

67240A MGTFX UW

1350 CEBANK NG

ANY

TELEGRAM

MORGAN GUARANTY OF NEW Y

OCTOBER 26, 1977

2470350
62-34261

RCA OCT 26 1207Z

232087B MGTX URZ

232087B MGTX UR

21350 CEBANK NG 26/10/79

TO MORGANBANK NEW YORK

ATTENTION A J BROWN

54/FUNDS - FURTHER TO OUR 48/FUNDS OF OCTOBER 23 WE HAVE INSTRUCTED FEDERAL RESERVE BANK OF NEW YORK TO PAY YOU DOLLARS 870,000.00 VALUE OCTOBER XX 26 1979 X UPON RECEIPT INVEST FUNDS IN THE SPECIAL 30 DAYS TIME DEPOSIT ACCOUNT X THIS IS IN ADDITION TO DOLLARS 4,360,000.00 IN SAME ACCOUNT TO MEET JUDGE WEINFIELD'S ORDER OF OCTOBER 12 1979 X ADVISE DIRECTOR OF FOREIGN OPERATIONS X

TEST NO 54534 ++

CENTRAL BANK OF NIGERIA+++Z

232087B MGTX UR

THE COMPLAINT AND FOR RELIEF FROM ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

VERLINDEN B.V.,	:	Index No.
Plaintiff,	:	AFFIDAVIT ON BEHALF OF PLAINTIFF IN
-against-	:	OPPOSITION TO DEFENDANT'S MOTION UNDER F.R. CIV.
CENTRAL BANK OF NIGERIA,	:	P.60(b)
Defendant.	:	

----------X

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

BERTHOLD H. HOENIGER, being duly sworn, deposes and says:

1. I am the attorney for plaintiff herein and am personally familiar with the matters hereinafter set forth. I make this affidavit in opposition to defendant's motion pursuant to F.R. Civ. P.60(b) to vacate the order of this Court dated October 12 and filed October 15, 1979.

The General Background

2. In 1975, the Federal Republic of Nigeria ("Nigeria"), acting through its Federal Ministry of Defence, contracted for some 16 million tons of cement, intending and expecting the performance of less than 20% of those contracts. The contracts, typically providing for the sale by the supplier and the purchase by Nigeria of 240,000 metric tons of cement at a price of about $60 per ton, CIF Lagos, were payable through the establishment of irrevocable letters of credit by Central Bank of Nigeria ("CBN"), to be confirmed by a prime bank in the supplier's home country. Through representations by Central Bank to the various suppliers that CBN was irrevocably committed to honor its engagements (see Exhibits A and B), and instructions to its correspondent banks such as Morgan Guaranty Trust Company of New York ("Morgan")

to make similar representations to suppliers (see Exhibit C), CBN induced the various suppliers, such as plaintiff Verlinden here, to waive the requirement of confirmation and to accept CBN's irrevocable but unconfirmed letters of credit.

3. When, contrary to Nigeria's and CBN's intent, all or most of the cement contracts began to be performed, incredible congestion in the port of Lagos and in other Nigerian ports resulted. Nigeria anticipatorily breached the cement contracts in the late summer and fall of 1975, threatening the use of military force to stop any further cement vessels from entering Nigerian territorial waters, and threatening masters and shipowners of any such vessels with heavy fines and imprisonment. At the same time, and pursuant to Nigeria's instructions, CBN repudiated its irrevocable letters of credit.

4. In the Confidential Information Memorandum prepared by Nigeria, through its Federal Ministry of Finance, to obtain a $750 million Eurocurrency loan, Nigeria states as follows (Exhibit D, p. 79):

> "LITIGATION
>
> The Cement Question
>
> In 1975, the Nigerian Federal Ministry of Defence contracted with 109 overseas suppliers to purchase 16 million metric tonnes of cement to be delivered within approximately one year. The Ministry was prompted to contract for so much partly because previous experience had shown that performance of such contracts had generally been less than 20%.
>
> In pursuance of these contracts, the Federal Ministry of Finance requested the Central Bank of Nigeria to open letters of credit in favour of the suppliers. The maximum tonnage of cement which could be discharged in the Nigerian ports in 1975 did not exceed 4.5 million tonnes. Unfortunately in 1975 there was a slump in world shipping and this resulted in an unusually large number of ships being available to freight cement to Nigeria.
>
> It was therefore impossible for the port facilities

to discharge all the cement ordered. As a result, Nigerian ports became heavily congested by the middle of 1975, with over 400 ships awaiting berthing of which over 260 carried cement. After the government change in July 1975, the new administration took steps to remedy the situation. These measures included the suspension of further cement imports, the limitation of payments on demurrage, a request to suppliers to renegotiate their contracts in order to reschedule deliveries over a longer period and an order making it obligatory for shippers to obtain official clearance before sending their ships to Nigeria. The Federal Ministry of Finance also instructed the Central Bank of Nigeria to suspend payments for transactions under letters of credit for cement, pending further discussions with cement suppliers. Most of the 109 suppliers agreed to new terms and this resulted in the reduction of the quantity ordered to 4 million metric tonnes. However, certain others continued sending ships to Lagos, probably in order to claim demurrage. When the Federal Military Government refused to pay any further demurrage to such shippers, some of them commenced legal proceedings against the Central Bank in Paris, Frankfurt/Main, Zurich, London and New York. The Federal Military Government was named as a co-defendant in five lawsuits commenced in New York. In some cases, suppliers also attached or sought to attach funds held by the Central Bank."

5. Revealing as these admissions are, they are false in several respects. According to the testimony of Mr. David-West, Deputy Solicitor General of Nigeria, at the recent East Europe/Nikkei/Chenax trial before Judge Pierce, the Nigerian authorities demanded of all 109 suppliers the total cancellation, without compensation, of their contracts and letters of credit, against the promise of the award of equally or more profitable new contracts when Nigeria resumed the import of cement. The suppliers were told that unless they agreed to such cancellation without compensation, they would not be paid monies already due them for cement delivered and demurrage accrued. Of the 43 suppliers who accepted such cancellation, virtually all were then each owed millions of dollars for cement and demurrage, and "accepted" such cancellation under dire economic duress. Virtually no suppliers who did not already have cement vessels in Lagos, and who were thus not subject to such economic black-mail, agreed to such cancellation without compensation. (East

Europe/Nikkei/Chenax trial minutes, pp. 396-97, 399-409, 459-61.)

6. Not surprisingly, Nigeria's breach and CBN's repudiation of 109 of its irrevocable letters of credit -- characterized by a senior Morgan officer as "virtually unprecedented in international trade" (trial minutes, p. 738) -- has naturally led to extensive litigation both in the United States and abroad against CBN, Nigeria, or both. It is noteworthy that in all such suits and proceedings, Nigeria and/or CBN have sought to avoid the merits through the plea of sovereign immunity or its close relative, the act of state doctrine. It is even more noteworthy that these attempts to avoid the merits of an unprecedented breach and dishonor of commercial obligations has been rejected by every forum to which they were presented. See, e.g.,

(a) National America Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria, 420 F. Supp. 954, 956-57 (S.D.N.Y. 1976);

(b) Same v. Same, 448 F. Supp. 622, 639-42 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979);

(c) Reale International, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria, (S.D.N.Y., 78 Civ. 0023-CSH), orders of Judge Haight dated May 16, 1978 and January 19, 1979 (collectively Exhibit E):

(d) Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] W.L.R. 356 (Court of Appeal, Great Britain 1977), Exhibit F;

(e) Nada v. Central Bank of Nigeria, District Court (Landgericht) of Frankfurt/Main, West Germany, dated August 25, 1976 (Exhibit G);

(f) Ipitrade International v. Nigeria, award of Dr. Max Brunner, as arbitrator appointed by the International Chamber of Commerce's Court of Arbitration, dated April 25, 1978 (Exhibit H); enforcement granted, 465 F. Supp. 824 (D.C. 1978);

(g) Planta A.G. v. Federal Republic of Nigeria, International Chamber of Commerce Court of Arbitration (see Exhibit D, p. 81, item 2).

CBN's Response to Litigation

7. There is considerable evidence tending to show that Nigeria and CBN, having been denied the sanctuary of sovereign immunity, have sought by other means to immunize their assets against future suits and proceedings, and indeed to frustrate the collection of awards made against them and of settlement agreements which they have entered into for the satisfaction of such awards and judgments.

8. Thus, in Ipitrade, the International Chamber of Commerce made an award of approximately $10 million against Nigeria (not $820,000, as represented by Nigeria in Exhibit D, p. 81). Nigeria and Ipitrade then entered into an agreement for the satisfaction of said award, which Nigeria failed to honor. As a result, Ipitrade sued and obtained judgments in both France and the United States. The decision of the U. S. District Court for the District of Columbia is reported at 465 F. Supp. 824. The proceedings in France caused by Nigeria's failure to honor its settlement agreement with Ipitrade, and by its misstatements in the Confidential Information Memorandum (Exhibit D), are described in the lead article in the November 1978 issue of Euromoney, entitled "The Extraordinary Nigerian Jumbo," pp. 20-23; a copy of said article is annexed as Exhibit I.

9. I am similarly informed and believe that in West Germany, after Nada commenced its action against Central Bank and obtained an attachment of Central Bank funds, Central Bank withdrew all of its remaining funds from Germany. The source of my information and belief is an affidavit by Mr. David Randall Sinnatt, an English solicitor, sworn to August 4, 1976, and lodged by Mr. Sinnatt with the High Court of Justice, Queen's Bench Division, in an action then pending there.

The Supposed "Inequity" of this Court's Order

10. We turn then to the argument that it "is inequitable to continue the restriction on Central Bank's property." In support of that argument, it is alleged that "there is nothing to suggest that Central Bank ... would fail to pay in full any judgment ultimately obtained by Verlinden herein," (Simms aff. ¶66), and that Mr. Simms' "firm is aware of no legal proceeding abroad relating to similar cement contracts or letters of credit in which Nigeria or Central Bank has failed to satisfy any judgment or award taken against it" (Simms aff. ¶67).

11. Unfortunately, these statements are at variance with the record facts. First, it appears that Central Bank, after it was sued by Nada in West Germany and CBN funds were attached there, withdrew all other funds from West Germany, obviously in an effort to forestall other attachments by other holders of repudiated CBN letters of credit. See ¶9, supra.

12. More significantly, in Ipitrade, Nigeria entered into an agreement with Ipitrade for the satisfaction, by the payment of a somewhat lesser amount, of the $10 million award rendered in favor of Ipitrade and against Nigeria by the Court of Arbitration of the International Chamber of Commerce in Paris. Nigeria then breached the settlement agreement which it had itself negotiated with Ipitrade. See ¶8, supra; Exhibit I hereto, at pp. 20-23; and Ipitrade International v. Nigeria, 465 F. Supp. 824 (D.C. 1978). Further, the facts in Ipitrade have been known for approximately the last year to Mr. Simms, a member of the firm of Kissam, Halpin & Genovese; I first furnished Mr. Simms with a copy of the Euromoney article which is annexed hereto as Exhibit I at the beginning of 1979. Further, I am informed that Mr. Simms' firm had at least a peripheral involvement in the

cited action by Ipitrade in the District of Columbia.

13. Thus, contrary to Mr. Simms' assertions in his moving affidavit, the record thus far justifies apprehension that CBN may seek to render any judgment recovered against it in this action uncollectible and unenforceable.

13-A. Further, the testimony of George W. Ryan, an officer of the Federal Bank of New York, at the trial of the National American action before Judge Gottel, shows that in 1976, Nigeria caused all funds held by CBN at the Federal Reserve to be switched into the name of Nigeria. The relevant portion of Mr. Ryan's testimony is annexed as Exhibit J. Obviously, if the Nigerian Government were to order a similar switch of funds at Morgan from CBN's name to that of Federal Republic of Nigeria, any judgment recovered by plaintiff against CBN herein might well be rendered uncollectible and unenforceable; the transfer, although a fraudulent conveyance vis-a-vis plaintiff, might well be beyond this Court's power to remedy because of the act of state doctrine.

14. Mr. Simms implies that the requirement that CBN keep approximately $5.2 million in its account at Morgan pending the final determination of this action is or may be economically detrimental to CBN. Such implication is totally false.

15. I have agreed with Messrs. Warshavsky & Hoffman, the attorneys for Morgan herein, that the CBN funds which are being thus held by Morgan may be placed in interest-bearing time deposits. That argument is memorialized in the letter from Warshavsky & Hoffman to me dated November 1, 1979 (Exhibit K). The current rate of interest on such time deposits is approximately 13%. These certificates of deposit are thus like the several hundred million dollars in Treasury obligations, certificates of deposit and other debt instruments which CBN keeps in its custody account at Morgan. See Exhibit L.

16. More important, CBN clearly does not consider the tie-up of its funds to be either detrimental or prejudicial to it. In the National American case, well over $10 million were held at Morgan pursuant to an attachment -- that action having been commenced prior to the effective date of the Immunities Act -- for a number of years, and until a few months ago. A Morgan file memorandum dated 10/11/78 from Mr. Arthur J. Brown, Assistant Treasurer, reports on a lunch meeting by Mr. Brown and Mr. Paul Winston Fitzpatrick, Vice President, with Mr. A. Ogedegbe, CBN's Director of Foreign Operations. The memorandum, copy of which is annexed hereto as Exhibit M, states in its seventh paragraph as follows:

> "Ogedegbe said that he could not foresee any quick settlements to the remaining cement cases still pending in New York, It seems to him that there is a stalemate between National American Corporation and the Government of Nigeria. He said Nigeria is willing to wait it out since they are not too upset as the attached funds are earning interest for them and they look upon these attached funds as part of the reserves they would be holding in dollars anyway." (Emphasis added.)

Thus, CBN, by its own admissions -- contrary to Mr. Simms' assertions -- is not concerned about attached funds which, like the $5.2 million here, are earning interest, and simply looks at these funds as part of its dollar reserves. CBN's own admission thus clearly belies the assertion of prejudice and inequity made to this Court by its attorney.

17. Of course, the $5.2 million now being held in CBN's account at Morgan pursuant to this Court's order are not attached funds. This Court's order directed CBN to issue irrevocable instructions to Morgan to retain said $5.2 million in CBN's account at Morgan pending the final determination of this action. The instructions by CBN to Morgan in supposed compliance to this order are comprised of three telexes, copies of which are annexed hereto collectively as Exhibit N. The Court will note that not

one of these three telexes states that the instructions to Morgan by CBN are irrevocable.

18. Morgan itself, in a letter to Mr. Simms dated November 16, 1979, copy of which is annexed hereto as Exhibit O, carefully noted this fact. The letter concludes with the following sentence:

> "Morgan Guaranty will hold the funds pursuant to the instructions of the Central Bank of Nigeria contained in the telexes and pursuant to such instructions as Morgan Guaranty may receive from the Central Bank of Nigeria in the future." (Emphasis added.)

19. Two facts are thus clear:

> (a) CBN has not complied with this Court's order, since its instructions to Morgan are not by their terms irrevocable, and Morgan has carefully noted that fact; and
>
> (b) CBN remains free at any time to alter the instructions contained in the three telexes to Morgan, and to witndraw, hypothecate, or otherwise deal with the $5.2 million in a manner contrary to this Court's order.

20. If CBN were to withdraw, hypothecate or otherwise dispose of the $5.2 million contrary to this Court's order, it might well prove impossible for this Court to fashion any meaningful sanction, despite the fact that CBN's conduct would constitute a willful and contumacious violation of this Court's order and, under New York law, a fraudulent transfer. If such disposition of these funds, or their transfer to an account entitled "Federal Republic of Nigeria," occurred pursuant to orders or instructions of Nigeria, this Court might find it impossible to impose any sanctions or to afford plaintiff any relief because of the act of state doctrine, which precludes judicial jurisdiction over the governmental acts of a foreign sovereign.

21. Even had CBN complied with this Court's order and denominated its instructions to Morgan as being irrevocable,

free to revoke even such "irrevocable" instructions. After all, this action, and the many other actions and proceedings in the United States and in Europe, have arisen precisely because CBN did repudiate over 100 irrevocable letters of credit issued by it, with a face value of well over $1 billion, plus an open-ended amount for demurrage.

22. In short, this Court's order of October 12, even had it been complied with by CBN, rests for its effect largely, if not wholly, on the hope that CBN and its master, the government of Nigeria, will not deliberately flout the order of a United States District Court. The validity of this hope must remain subject to considerable question.

23. In this case, CBN defaulted for months in responding to the complaint, a courtesy copy of which had been furnished to Mr. Simms at the beginning of this year, when it was first filed with the Clerk of this Court. Rather than pressing for the entry of the default judgment, I merely asked this Court for some assurance -- admittedly limited and largely moral in nature -- that if plaintiff is ultimately successful, there will continue to be CBN funds in New York, at Morgan, out of which such judgment can be satisfied, and that CBN's present funds will not be switched into the name of "Federal Republic of Nigeria," as was previously done with CBN funds at the Federal Reserve Bank of New York (see Exhibit J), or otherwise transfered out of the United States so as to render a judgment herein uncollectible.

One of my considerations for, in effect, consenting to the opening of CBN's default was that the entry of a default judgment for over $5 million because of the failure of Mr. Simms and his firm to respond to the complaint would certainly place Mr. Simms and his firm in an extremely embarrassing position

vis-a-vis their clients, CBN and Nigeria and might well expose them to claims by CBN. This forbearance on my part has now been rewarded by a motion to vacate this Court's order, which relieved defendant of its default but imposed a rather mild constraint on the opening of that default. I must confess that this course of events seems, at the very least, anomalous.

24. If defendant's motion to vacate this Court's order of October 12, 1979 is granted, ther in simple equity both parties should be restored to the position in which they were prior to October 12. Otherwise, the defendant will have secured an opening of its default without

(a) ever having applied therefor;

(b) having proffered any explanation or excuse whatever for its default, although this is clearly required by F.R. Civ. P. 55(c) and 60(b); or

(c) having shown that defendant has a meritorious defense to this action.

In that event, I respectfully ask on behalf of plaintiff, that this Court restore, or consider as renewed, the plaintiff's original motion for entry of default judgment dated September 7, 1978, and upon such restoration or renewal grant said motion, direct the entry of default judgment, and fix a date for the assessment for plaintiff's damage and the hearing required under the Immunities Act, 28 U.S.C. §1608(e).

Conclusion

Accordingly, I respectfully ask that defendant's motion be in all respects denied; or alternatively, if granted, that this Court deem plaintiff's motion for entry of default judgment to have been renewed, and that it grant said motion.

Sworn and subscribed to before me this [illegible] day of December, 1979.

Berthold H. Hoeniger

JEFFREY S. GUNN
NOTARY P[illegible] of New York
No. 31-[illegible]
Qualifie[illegible] Yates County
Commission E[illegible] March 30, 19[illegible]

EXHIBIT A TO HOENIGER AFFIDAVIT - LETTER FROM CENTRAL BANK TO CHENAX MAJESTY DATED MAY 27, 1975

ed

Lagos

PRIV: MAIL BAG 12194: CABLES: CENBANK:

TELEPHONE

Our Ref: CBN/BO/75/79

27th May, 1975.

The Director,
Chenax Majesty,
1 Union Square West,
New York 10003,
U.S.A.

Dear Sir,

Letter of credit for U.S.$14,400,000.00 in favour of Chenax Majesty of 1, Union Square, West, New York 10003, U.S.A.

I write to inform you that no confirmation is required for credits opened by us directly with our correspondent Banks, of which Morgan Guaranty Trust Company, New York is one.

We are irrevocably committed to honour our engagements under this credit. Moreover, our correspondent Morgan Guaranty Trust Company has our authority to pay the beneficiary the full value of this letter of credit through your bank on presentation of relevant shipping documents to them in New York; provided the documents are in order (Photocopy of our letter of authority dated 25th April, 1975 to our correspondent bank attached). As a Government Bank and a prime Bank, no supplier should have any cause to doubt our ability to pay our bills promptly. The question of our correspondent banks confirming our letters of credit should, therefore not arise.

We are sending a copy of this letter to our correspondent Bank, Morgan Guaranty Trust Co. New York, U.S.A. and you may wish to contact them for any further information you may require about us.

Yours faithfully,

Bills Manager

EXHIBIT B TO HOENIGER AFFIDAVIT - LETTER FROM CENTRAL BANK TO EAST EUROPE IMPORT INC. DATED JULY 14, 1975

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos
PRIVATE MAIL BAG 12194 : CABLES : CENBANK :
TELEPHONE

14th July, 1975.

Mr. Robert Ross,
East Europe Import Inc.,
440 Park Avenue South,
New York, N.Y. 10016,
(212) 686 - 7590,
U. S. A.

Dear Sir,

Letter of credit for US $14,280,000 in favour East Europe Import Export Inc. (U.S.A.).

I write with reference to your letter dated 2nd July, 1975, on the above-mentioned subject and to inform you that your proposed addition to your performance Bond will be acceptable to us except the portion of paragraph 1, sub-division 5 of the Contract Agreement of 28th January, 1975, which specified the following:-

CONFIRMED LETTER OF CREDIT.

It is not our practice to issue confirmed letters of credit. Our letters of credits are irrevocable credits and by virtue of our position no supplier should doubt our ability to settle our bills promptly. However, sceptical suppliers are free to initiate status enquiry about us. In this circumstance, you are advised to delete the word 'CONFIRMED' from your proposed addition to the performance bond.

I attach a copy of the specimen performance bond, which you said was not enclosed in our letter of 20th June, 1975.

Thank you for the copy of contract agreement forwarded to us for ease of reference. Sincere greetings to Mr. William H. Deleon.

Yours faithfully,

Bills Manager.

EXHIBIT C TO HOENIGER AFFIDAVIT - LETTER FROM CENTRAL BANK TO MORGAN GUARANTY DATED FEBRUARY 12, 1975

12th February, 1975.

Mr. Ralph J. Bunche, Jr.,
Assistant Treasurer,
Morgan Guaranty Trust Company
of New York,
23 Wall Street,
New York, N.Y. 10015.

Dear Sir,

IRREVOCABLE LETTERS OF CREDIT ISSUED BY THE C.B.N.: CONFIRMATION OF

We have been receiving requests from beneficiaries of Irrevocable Letters of Credit issued by the Central Bank of Nigeria, asking for confirmation. We wish to make it clear that our irrevocable letters of credit require no further confirmation by our correspondents as these credits are definite undertakings on our part to the beneficiaries and bona fide holders of drafts drawn or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credits will be duly fulfilled provided that all terms and conditions of the credits are complied with.

As our correspondent, you have our authority to pay beneficiaries of letters of credit on presentation of relevant documents. As the Central Bank of Nigeria, with a very good image to protect, no suppliers should have any cause to doubt our ability to pay our bills promptly. Any sceptical beneficiary could call for a status report on us which we expect you to give.

You should, therefore, when advising beneficiaries' bankers of our Letters of Credit, assure them of our ability to honour our obligations on due date.

Yours faithfully,

Chief of Banking Operations

MG 84

EXHIBIT D TO HOENIGER AFFIDAVIT - EXCERPTS FROM CONFIDENTAL INFORMATION MEMORANDUM PREPARED BY THE FEDERAL REPUBLIC OF NIGERIA

CONFIDENTIAL INFORMATION MEMORANDUM

THE FEDERAL REPUBLIC OF NIGERIA

US $750,000,000

Multicurrency Credit Facility

DRESDNER BANK AKTIENGESELLSCHAFT
NATIONAL WESTMINSTER BANK GROUP
CHASE MANHATTAN LIMITED
CITICORP INTERNATIONAL GROUP
FIRST CHICAGO LIMITED
MIDLAND BANK LIMITED

as Lead Managers

September, 1978

The banks listed on page 7 of this Memorandum as Lead Managers, Managers and Co-Managers (together, "the Managers", which term, as hereinafter used, shall include the companies affiliated with any of them) have been requested by the Federal Republic of Nigeria (the "Borrower") to arrange the Credit Facility described in this Memorandum, and to distribute this Memorandum to potential participants in the Credit Facility. Unless otherwise indicated, the information contained herein has been provided by the Central Bank of Nigeria, the Federal Ministry of Finance, the Federal Ministry of Economic Development—the Central Planning Office, the Federal Office of Statistics and various other ministries of the Federal Republic of Nigeria. The information has not been independently verified by the Managers and no representation or warranty, express or implied, is made by the Managers or any of their affiliated companies with respect to the completeness or accuracy of any information contained herein, or that any information remains unchanged in any respect as of any date or dates after those stated herein. The Managers have requested projections of Nigeria's Balance of Payments for the calendar year 1978 and projected International Reserves as of December 1978 from the Borrower and have been advised by the Ministry of Finance of the Borrower that such information is not available at this time.

At the request of the Ministry of Finance of the Federal Republic of Nigeria, contained in their letter on page 5 of this Memorandum, the information is being submitted to selected financial institutions in connection with the Credit Facility. Each potential participant in this Credit Facility should make its own independent evaluation of the Federal Republic of Nigeria, and its determination of interest in participating should be based on such investigation as it deems necessary. Officials of the Federal Republic of Nigeria are available to answer any questions concerning the information provided herein. The information in this Memorandum may not be reproduced or used in whole or in part for any other purpose.

Notes:

1. Unless otherwise stated the following IMF yearly exchange rates (1₦=US $) have been used throughout this Memorandum.

1972	1973	1974	1975	1976	1977	1978
1.5200	1.5227	1.5904	1.6248	1.5959	1.5352	1.5600

2. The sign ₦ refers to Nigerian Naira.

3. The sign $ refers to United States dollars.

4. The Nigerian financial year commences on April 1st and ends on March 31st of the succeeding calendar year.

5. Standard engineering and technical abbreviations, which the managers believe are self explanatory are used in this Memorandum including:
"bpd" for barrels per day.

TABLE OF CONTENTS

	Page
TERMS & CONDITIONS OF PROPOSED CREDIT FACILITY	6
THE PROJECTS	9
Iron and Steel	11
Telecommunications	16
Power	22
Petroleum	28
Sugar	36
THE FEDERAL REPUBLIC OF NIGERIA	41
Background	43
Geography	43
Population	43
History	43
Political Organisation	44
Judicial System	44
International Relations	45
THE NIGERIAN ECONOMY	46
Introduction and Structure of the Economy	46
Agriculture	50
Mining and Quarrying (excluding Oil)	51
Industry	51
Education	52
Energy	52
Communications	53
Transportation	53
Ports	54
THE NIGERIAN PETROLEUM INDUSTRY	55
Overview	55
Oil Production	55
Exports/Oil Prices	56
Oil and the Nigerian Economy	58
Indigenisation and Industry Structure	59
Revenue System	60
Incentives for Oil Producers	60

Budget Process 61
Current Revenues 61
Current and Capital Expenditures 61
Budget Summary 63
Budget Projections 63
Development Planning 65

MONEY AND BANKING 66
Monetary Developments 66
Banking—Central Bank of Nigeria 67
Commercial Banks 69
Merchant Banks 69
Others 69
Development of Financial Markets 69
Reform of the Financial System 70

THE EXTERNAL ECONOMY 71
Foreign Trade 71
Exports 72
Imports 73
Trading Partners 74
Balance of Payments 75
International Reserves 76
Naira Rate 77
External Public Debt 77
Litigation 79

The following letter has been received from the Federal Ministry of Finance, Lagos, Nigeria:

THE FEDERAL MINISTRY OF FINANCE OF THE
FEDERAL REPUBLIC OF NIGERIA

To: The Managers of the Credit Facility mentioned below.

11th September, 1978

Sirs,

We refer to the proposed Credit Facility of US $750,000,000 which you are arranging, at our request, for the Federal Republic of Nigeria and the principal terms of which are reflected in the attached Information Memorandum.

We confirm that the funds disbursed under this Facility will only be applied to projects as specified under the Projects Section of this Memorandum. Furthermore, we confirm that starting from page 9 all the information set forth in the Memorandum has been supplied by us on behalf of the Federal Republic of Nigeria and consequently on behalf of the Republic we approve the same. By this letter we request and authorise you to distribute the Information Memorandum on a strictly confidential basis to prospective participants in the proposed Credit Facility.

In consideration of your arranging the Facility and of distributing the Information Memorandum, we, on behalf of the Federal Republic of Nigeria, agree to indemnify you against all costs, claims, demands and expenses (if any) which you may sustain or incur as a result of or arising from legal actions brought or threatened in connection with the Information Memorandum or its contents or the distribution thereof; and confirm that we accept full responsibility for the Information Memorandum and the accuracy or otherwise for its contents.

Yours faithfully,

S. A. Musa,

for and on behalf of the Federal Ministry of Finance
of the Federal Republic of Nigeria.

THE FEDERAL MINISTRY OF FINANCE OF THE FEDERAL REPUBLIC OF NIGERIA

To: Banks concerned.

Following the recent invitation to your bank to participate in the US $1 billion financing being managed amongst others by Dresdner Bank, National Westminster Bank Limited, Chase Manhattan Limited, Citicorp International Bank Limited, First Chicago Limited and Midland Bank Limited, the Federal Republic of Nigeria would like to take this opportunity to clarify its external financing programme.

2. In the mandate given to the lead managers of 7th July and in subsequent discussions with members of the management group officials of the Federal Ministry of Finance gave an undertaking that the Federal Republic of Nigeria had no intention of re-entering the Euro-currency floating interest rate market before January 1979. This undertaking is without prejudice to any bilateral i.e. (government to government) or multilateral i.e. (World Bank and other multilateral financial agencies) credits which might be extended to the Federal Government or to any bond issues that it might decide to float in order to fulfil its borrowing programme in the 1978/79 Financial Year.

3. It had been reported to the Ministry of Finance by the management group that a number of banks have not taken any final decision to participate in Nigeria's US $1 billion syndication because some of their customers are competing to secure or have secured government contracts for which the banks might be called upon to provide finance. The projects that are usually associated with these contracts are in the power (including the Shiroro and Jebba Hydroelectric Projects), telecommunications, iron and steel (with the possible exception of Direct Reduction Steel Plant at Warri) and petroleum sectors (inciuding the Kaduna and Warri Refineries) of the Third National Development Plan. To avoid any misunderstanding we feel it necessary to reiterate that the Federal Government attaches the highest priority to the financing of these and other projects through the syndicated loan which it is presently raising. We should like to stress that we attach much value to seeing the $1 billion loan well placed and accepted by the market, in view of the important role such a loan plays in the financing of Nigeria's capital budget and consequently in the financing of your customers' projects. For projects attracting the exporting country's government credit facilities i.e. (Eximbank, Coface, Hermes, E.C.G.D., Eximbank of Japan etc.) shortfalls in funding will be met from internal resources or by additional generally syndicated eurocurrency borrowings, floating rate notes, and fixed rate instruments. We have no intention of financing these projects through any other form of bank borrowing, such as project-related commercial bank loans.

4. It is necessary to re-emphasise that the Federal Ministry of Finance is solely responsible for negotiating and concluding any agreement for external borrowings or guarantees for all public sector borrowings by both Federal and State governments and their agencies. In the case of state governments, it is necessary to point out that their external borrowings are limited only to export credits and project loans procured on their behalf by the Federal Government from the World Bank or regional development banking institutions such as the African Development Bank.

5. Consequent upon the foregoing clarification, the Federal Ministry of Finance hereby calls upon all those banks who have made financial commitments to Ministries or Government agencies with a view to financing any of the projects enumerated above to transfer such amounts to the US $1 billion syndicated loan presently being arranged.

Office of the Permanent Secretary

Federal Ministry of Finance, Lagos

3rd August, 1978.

SUMMARY OF TERMS OF PROPOSED CREDIT FACILITY

Borrower:	The Federal Republic of Nigeria.
Purpose:	Proceeds of the Loan will be employed to assist in financing the completion of certain high priority development projects in Nigeria. A list of specific projects to be financed is included in the Information Memorandum.
Amount:	US Dollars 750,000,000 or its equivalent in other currencies freely convertible into US Dollars.
Maturity:	Eight years from the date of signing of the Credit Agreement.
Availability Period:	Twelve months from signing of the Credit Agreement.
Repayment:	In eleven equal semi-annual instalments commencing 36 months from signing of the Credit Agreement.
Prepayment:	Permitted without penalty on interest payment dates provided 15 days notice is given.
Interest Rate:	One per cent per annum for the first four years from date of signing and 1⅛ per cent per annum thereafter over the London Interbank Offered Rate (LIBOR) for 3 or 6 month US Dollar deposits or other currencies in which the facility is denominated.
Participation fees:	As specified in the offering telex.
Minimum Participation:	US Dollars 2,000,000.
Commitment Fee:	One half of one per cent per annum on the undrawn portion of the loan during the drawdown period commencing fifteen days after the date of signing of the Credit Agreement. Commitment fees are payable 6 months from the date of signing and upon the termination of the drawdown period.
Taxes:	All payments due and payable under the Credit Agreement will be made free and clear of any form of taxation in Nigeria or any political subdivision of taxing authority thereof.
Reference Banks:	A representative sample of banks participating in this Credit Facility will be selected as reference banks to establish LIBOR at the start of each interest period.
Governing Law and Jurisdiction:	The Credit Agreement will be governed by the laws of England. The Borrower agrees to non-exclusive jurisdiction in the courts of Nigeria, England and the State or Federal courts of the state of New York.
Documentation:	Completion of this transaction is subject to execution of legal documentation satisfactory to all parties, including, *inter alia*, a Credit Agreement containing clauses customary for Eurodollar loans. Documentation will include provision for cross default, sovereign immunity, increased costs and changes in law, and will be similar to documentation governing the previous $1 billion loan for Nigeria.
Legal Counsel to the Lenders:	Allen and Overy—English C. Ogunbanjo —Nigerian.

National Westminster Bank Group
Chase Manhattan Limited
Citicorp International Group
First Chicago Limited
Midland Bank Limited

Managers: Banque Nationale de Paris
Société Generale

Co-Managers: The Bank of Tokyo, Ltd.
Barclays Bank International Limited
First Pennsylvania Bank N.A.
IBJ International Limited
Morgan Guaranty Trust Company of New York
Standard Chartered Merchant Bank Limited

Agent: International Westminster Bank Limited

Financial Advisor to the Borrower: The First Boston Corporation

Nigeria has 3,670 km. of ..ways connecting Lagos with Nguru in the North-East and Port Harcourt with Kaura Namoda in the North-West, with extensions from Kafanchan to Maiduguri in the far North-East and from Minna to Baro. An expansion programme is under consideration by the Nigerian Railways Corporation under which the track is expected to be extended by a total of 1,175 km., from the west through Bendel State to the eastern States, as far as the port of Calabar and from Gusau to Sokoto. A third line which will connect Port Harcourt to Ajaokuta near the new Federal Capital of Abuja is also presently under active consideration.

The Nigerian National Shipping Line (NNSL) provides both passengers and cargo services. It is estimated that NNSL ships make about 70 voyages and carry about 750,000 tonnes of cargo per year. The NNSL is expected to improve on this performance through the acquisition of an additional fleet of 19 vessels for which deliveries are due shortly. In addition, the first Nigerian oil tanker with a carrying capacity of 270,000 tonnes was launched in 1976 and more deliveries are expected as part of a major expansion programme presently underway.

There are also plans underway to improve the inland waterways transport of goods along the Niger and part of the Benue rivers. The various dams to be built in connection with the hydroelectric power projects will improve the navigational capabilities of the Niger and the Benue in the future.

Ports

Following the easing of the congestion of Nigerian ports in 1976, the Nigerian Ports Authority, the statutory corporation responsible for administering the Nigerian ports, embarked upon a major expansion programme to meet immediate and future requirements. Lagos Port has been extended and Tin Can Island Port has been completed within schedule bringing into use 10 berths. In addition, the large scale lighterage operation at Lagos Port and the use of midstream buoy berths which were introduced during the decongestion exercise are being continued and the number of ships awaiting berths in Lagos have been reduced to about 75.

The expansion programmes for additional berthing facilities at Warri, Port Harcourt, Calabar and other ports are near completion.

Table 12

Shipping Activity

	1974	1975	1976	1977	% Change 1975	% Change 1976	% Change 1977
Total Shipments (thousand tonnes) ..	7,507	8,522	8,848	12,007	+13.5	+3.8	+35.7
Imports (thousands of tonnes) ...	5,110	6,545	7,954	11,323	+28.1	+21.5	+42.4
Exports (thousands of tonnes) ..	2,397	1,977	894	684	−17.5	−54.8	−23.5

Source: Central Bank of Nigeria.

Table 45

Projected Debt Service

($ million)

	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
Debt Service on Existing Debt ..	85	88	90	102	108	112	111	103	46	46
(Principal)	(44)	(44)	(43)	(54)	(59)	(64)	(65)	(58)	35	34
(Interest)	(41)	(44)	(47)	(48)	(49)	(48)	(46)	(45)	(11)	(12)
Debt Service on First $1 billion Multicurrency Loan[1]	—	63	90	90	299	279	259	239	—	—
(Principal)	(—)	(—)	(—)	(—)	(222)	(222)	(222)	(222)	—	—
(Interest)	(—)	(63)	(90)	(90)	(77)	(57)	(37)	(17)	—	—
Debt Service on Second $1 billion Multicurrency Loan[2]	—	6.0	67	90	179	260	240	223	207	190
(Principal)	—	—	—	—	(90)	(182)	(182)	(182)	(182)	(182)
(Interest)	—	(6.0)	(67)	(90)	(88)	(78)	(58)	(41)	(25)	(8)
Total Debt Service:	85	157	247	278	576	651	610	565	253	236
(Principal)	(44)	(44)	(43)	(54)	(362)	(468)	(469)	(462)	(217)	(216)
(Interest)	(41)	(113)	(204)	(224)	(214)	(183)	(141)	(103)	(36)	(20)
% of 1977 Exports of goods and services	0.64%	1.2%	1.9%	2.1%	4.3%	4.9%	4.6%	4.2%	1.9%	1.8%

Assumptions:

[1] *Drawdown March 31, 1978, interest rate at 9% p.a. interest calculated on calendar year basis.*

[2] *Drawdown Schedule:—250 million October 30, 1978*
250 million December 31, 1978
500 million March 31, 1978.
Interest rates calculated on following basis:
9% first 4 years
9¼% for remaining 4 years.

Source: Federal Ministry of Finance.

LITIGATION

The Cement Question

In 1975, the Nigerian Federal Ministry of Defence contracted with 109 overseas suppliers to purchase 16 million metric tonnes of cement to be delivered within approximately one year. The Ministry was prompted to contract for so much partly because previous experience had shown that performance of such contracts had generally been less than 20%.

In pursuance of these contracts, the Federal Ministry of Finance requested the Central Bank of Nigeria to open letters of credit in favour of the suppliers. The maximum tonnage of cement which could be discharged in the Nigerian ports in 1975 did not exceed 4.5 million tonnes. Unfortunately in 1975 there was a slump in world shipping and this resulted in an unusually large number of ships being available to freight cement to Nigeria.

It was therefore impossible for the port facilities to discharge all the cement ordered. As a result, Nigerian ports became heavily congested by the middle of 1975, with over 400 ships awaiting berthing of which over 260 carried cement. After the government change in July 1975, the new administration took steps to remedy the situation. These measures included the suspension of further cement imports, the limitation of payments on demurrage, a request to suppliers to renegotiate their contracts in order to reschedule deliveries over a longer period and an order making it obligatory for shippers to obtain official clearance before sending their ships to Nigeria. The Federal Ministry of Finance also instructed the Central Bank of Nigeria to suspend payments for transactions under letters of credit for cement, pending further discussions with cement suppliers. Most of the 109 suppliers agreed to new terms and this resulted in the reduction of the quantity ordered to 4 million metric tonnes. However, certain others continued sending ships to Lagos, probably in order to claim demurrage. When the Federal Military Government refused to pay any further demurrage to such shippers, some of them commenced legal proceedings against the Central Bank in Paris, Frankfurt/Main, Zurich, London and New York. The Federal Military Government was named as a co-defendant in five lawsuits commenced in New York. In some cases, suppliers also attached or sought to attach funds held by the Central Bank.

Most of the lawsuits have been settled. The suits against the Central Bank still pending are for a total amount of approximately $91 million, out of which a total of approximately $24 million also name the Federal Republic of Nigeria as co-defendant.

Update on cases

Trendtex Trading Corporation Ltd. as claimant against Central Bank of Nigeria. Amount claimed is $13,968,190. The court of appeals gave judgment in favour of the plaintiff, but the Central Bank of Nigeria has appealed to the House of Lords. This has now been settled out of court for $8,000,000.

Following suits still pending or in final stages of settlement:

1. Exportadora Espanola de Cementos Portland as claimant against Central Bank of Nigeria. Amount claimed is $34,000,000. The matter has been adjourned pending the ruling of the House of Lords in the Trendtex case. Negotiations for an out of court settlement are taking place following the settlement of the Trendtex case.

2. Hispano-American Mercantile S.A. and William Tegtmeyer as claimants against Central Bank of Nigeria. Amount claimed is $17,073,230. Status: Recently, the company has requested an out of court settlement on a revised claim of $5,000,000.

3. Establissement Esefka International Anstalt as plaintiff against Central Bank of Nigeria. Amount claimed is $7,566,318. The matter has been adjourned pending the decision of the House of Lords in the Trendtex case. No change since the settlement of the Trendtex case.

4. Fralis S.R.L. as plaintiff against Central Bank of Nigeria. Amount claimed is $3,010,080 and/or damages, and interest. Status: similar to (2) above. No further developments.

In all the above cases, solicitors for the Central Bank of Nigeria are Messrs. Hedleys, 15 St. Helen's Place, Bishopsgate, London EC3A 6DJ.

Actions pending in the United States District Court for the Southern District of New York are:

1. National American Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria for $14,876,350, which was subsequently revised to be $11,471,113.82, has again been revised to $6,000,000. Case was heard in December/January 1978. Judgment was rendered in favour of the Central Bank. The company has appealed.

2. National Bank and Trust Company of North America Ltd. v. J.L.M. International Inc., Federal Republic of Nigeria, Central Bank of Nigeria and Interexporte S.A.R.L. for $1,272,510. The company has requested an out of court settlement.

3. East Europe Import-Export, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria for $6,980,000. Also requested an out of court settlement.

4. Decor by Nikkei International, Inc. doing business as Nikkei International, Inc., v. Federal Republic of Nigeria and Central Bank of Nigeria for $3,102,000. Statements of claim and defence have been filed—no further developments.

5. Chenax Majesty, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria for $1,433,680 as above.

6. Reale International v. Federal Republic of Nigeria and Central Bank of Nigeria.

The Plaintiff has sued the Defendants in a New York Court of US $14,400,000. This is a recent case and although statements of claim and defence have been filed no date has been fixed for hearing.

7. Texas Trading & Milling Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria.

Plaintiff has taken out a summons in a New York Court. Plaintiff demands US $3,765,000.67 from Defendants. Defendant compiling necessary papers for our defence.

Counsel for the Central Bank of Nigeria and the Federal Republic of Nigeria in New York are Messrs. Kissam, Halpin and Genovese, 120 Broadway, New York, N.Y. 10005.

The following arbitrations are pending or being settled:

1. Ipitrade International Inc. against Federal Republic of Nigeria. Amount claimed is FF 4 million (approximately $820,000). Award has been made by the International Chamber of Commerce, Paris. The Cement Contracts Negotiating Committee has agreed to meet with Ipitrade to work out payments.

2. Planta AG against Federal Republic of Nigeria. Amount claimed is SFrs. 7,300,000 (approximately $3,320,000) in Zurich. Award has been made by the International Chamber of Commerce, Paris, and Planta seeking to recover funds.

EXHIBIT E TO HOENIGER AFFIDAVIT - ORDERS OF JUDGE HAIGHT IN REALE INTERNATIONAL, INC. v. FEDERAL REPUBLIC OF NIGERIA AND CENTRAL BANK OF NIGERIA (S.D.N.Y., 78 Civ. 0023-CSH)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

REALE INTERNATIONAL, INC., :

Plaintiff, : 78 Civ. 23-CSH

-against- : MEMORANDUM OPINION AND ORDER

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, :

Defendants. :

- - - - - - - - - - - - - - - - - - - x

HAIGHT, District Judge:

Pursuant to a stipulation and order of May 16, 1978, the parties to this action agreed to be bound by the decision of District Judge Pierce with respect to defendants' motions for dismissal or summary judgment in three actions pending before Judge Pierce and bearing docket numbers 77 Civ. 2809, 77 Civ. 3045 and 77 Civ. 2348. The motions asserted lack of subject matter jurisdiction, lack of jurisdiction over the defendants, sovereign immunity, non-justiciability by virtue of the Act of State doctrine, and failure to state a claim upon which relief may be granted. By order of November 6, 1978, Judge Pierce denied defendants' motions.

Subsequent to Judge Pierce's decision, defendants filed an answer in this case asserting as their first, second, third and ninth affirmative defenses, the grounds previously rejected by Judge Pierce. Plaintiff has now moved for an order, pursuant to F.R.Civ.P. 12(f), striking the above-mentioned affirmative defenses.

Defendants represent that they are not attempting to relitigate the issues raised by these affirmative defenses, but rather are acting to insure that the defenses are preserved for appellate review in this case. Defendants have accomplished this by virtue of their answer. However, pursuant to the parties' stipulation, Judge Pierce's decision constitutes the law of this case with respect to the matters raised in these affirmative defenses. Accordingly, plaintiff's motion is granted. Defendants' first, second, third and ninth affirmative defenses are hereby stricken.

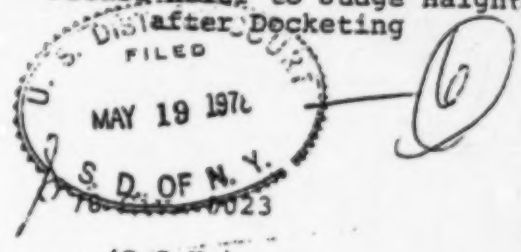
It is So Ordered.

Dated: New York, New York
January 19, 1979

CHARLES S. HAIGHT, JR.
U. S. D. J.

— Treaty — — Judge Haight —

Please Refer to Judge Haight after Docketing



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REALE INTERNATIONAL INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

78 Civ. 0023

(C.S.H.)

STIPULATION AND ORDER

WHEREAS, in the following three actions presently consolidated before the Hon. L.W. Pierce of this Court, which actions also relate to cement contracts and letters of credit, defendants herein have moved to dismiss the complaints and seek summary judgment on the grounds that this Court is without jurisdiction under the Foreign Sovereign Immunities Act of 1976 and that the act of state doctrine renders the claims alleged nonjusticiable:

East Europe Import-Export, Inc. v.
Federal Republic of Nigeria and
Central Bank of Nigeria
77 Civ. 2809 (LWP)

Chenax Majesty, Inc. v.
Same
77 Civ. 3045 (LWP)

Decor by Nikkei International, Inc. v.
Same
77 Civ. 2348 (LWP);

and

WHEREAS defendants have advised this Court and plaintiff's counsel herein that they intend to make the same motion in this action, and whereas the Court and counsel for

on the part of this Court and on their part;

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the District Court's decision of defendants' aforesaid motion in East Europe, Chenax Majesty, and Nikkei shall be deemed in all respects applicable to this action, as if indentical moving and opposing papers had been submitted herein and this Court had made a disposition of said motion herein identical to that to be made by the District Court in East Europe, Chenax Majesty, and Nikkei with respect to the defendants' motions to dismiss and for summary judgment in those three actions.

Dated: New York, New York
May 16, 1978

BAILEY MARSHALL HOENIGER & FREITAG
Attorneys for Plaintiff

By Berthold H. Hoeniger
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KISSAM, HALPIN & GENOVESE
Attorneys for Defendants

By James G. Simms
James G. Simms

120 Broadway
New York, New York 10005
Tel.No.: (212) 962-2000

SO ORDERED: 5/18/78

Charles S. Haight, Jr., U.S.D.J.

IN TRENDTEX TRADING CORP. v. CENTRAL BANK OF NIGERIA, [1977] W. L. R. 356 (CT. OF APPEAL, GREAT BRITAIN 1977)

[1977]

[COURT OF APPEAL]

TRENDTEX TRADING CORPORATION *v.* CENTRAL BANK OF NIGERIA

[1975 T. No. 3663]

1976 Oct. 6, 7, 8, 11, 12, 13, 14, 15, 18;
1977 Jan. 13

Lord Denning M.R., Stephenson and Shaw L.JJ.

Conflict of Laws—Sovereign immunity—Bank—Commercial transaction for supply of cement to Nigerian state—Central bank issuing irrevocable letter of credit—Action to enforce payment—Status of bank—Whether department of state—Whether immunity in respect of commercial transactions exists

International Law—Recognition—Effect—Whether incorporated into English law—Whether rule of stare decisis applicable in England—Central Bank of Nigeria's claim to sovereign immunity

The Central Bank of Nigeria was incorporated in 1958 by a Nigerian statute as a central bank modelled on the Bank of England. It issued legal tender and acted as banker and financial adviser to the Government of Nigeria. It also acted as banker for other banks and its affairs were under considerable governmental control.

In July 1975 the Central Bank issued an irrevocable letter of credit for over $14,000,000 in favour of the plaintiff, a Swiss company, to pay for 240,000 tons of cement which the plaintiff had sold to an English company. The cement was to be shipped to Nigeria where it was to be used to build government barracks. The plaintiff shipped the cement to Nigeria but there was congestion in the port of discharge and the Central Bank declined to make payments claimed to be due for the price and for demurrage.

By writ of November 1975 the plaintiff claimed against the Central Bank for payments due in respect of the bank's breaches and repudiation of the letter of credit. Mocatta J. granted the plaintiff an injunction ordering the bank to retain $13,968,190 within the jurisdiction until the trial of the action or further order. Donaldson J., on the bank's application, set aside the writ and stayed further proceedings in the action on the ground that the bank was a department of the State of Nigeria and was therefore immune from suit.

On the plaintiff's appeal:—

Held, allowing the appeal, (1) that the bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status, was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore not entitled to immunity from suit (post, pp. 371D, 373H—374A, 375H—376A, 382A, 385B–C).

Baccus S.R.L. v. *Servicio Nacional Del Trigo* [1957] 1 Q.B. 438, C.A. and *Mellenger* v. *New Brunswick Development Corporation* [1971] 1 W.L.R. 604, C.A. distinguished.

Krajina v. *Tass Agency* [1949] W.N. 309; [1949] 2 All E.R. 274, C.A. considered.

(2) That (*per* Lord Denning M.R. and Shaw L.J.) even if the bank were part of the Government of Nigeria, since international law now recognised no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature, it was not immune from suit on the plaintiff's claim in respect of the letter of credit (post, pp. 369D–E, 371H, 386B–D, 389A–E).

Per curiam. The modern principle of restrictive sovereign immunity in international law giving no immunity to acts of a commercial nature is consonant with justice, comity and good sense (post, pp. 367H, 380E, 385G–H, 386B–C).

Per Lord Denning M.R. and Shaw L.J. International law knows no rule of stare decisis (post, pp. 365H, 388H).

Per Stephenson L.J. The Court of Appeal is bound by previous decisions to hold that absolute sovereign immunity is a rule of international law until the House of Lords or Parliament declares to the contrary (post, p. 381G, H).

Dicta of Lord Mansfield C.J. in *Triquet* v. *Bath* (1764) 3 Burr. 1478, 1481 applied.

Reg. v. *Keyn* (1876) L.R. 2 Ex. 63; *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W.L.R. 1485, C.A. and *The Philippine Admiral* [1976] 2 W.L.R. 214, P.C. considered.

(3) That since the bank was not entitled to immunity from suit the injunction preserving funds within the jurisdiction to satisfy the plaintiff's claim should be continued (post, pp. 371G, 382F–F, 389C).

Decision of Donaldson J. [1976] 1 W.L.R. 868; [1976] 3 All E.R. 437 reversed.

The following cases are referred to in the judgments:

Alfred Dunhill of London Inc. v. *Republic of Cuba*, May 24, 1976, Supreme Court of the United States.

Baccus S.R.L. v. *Servicio Nacional Del Trigo* [1957] 1 Q.B. 438; [1956] 3 W.L.R. 948; [1956] 3 All E.R. 715, C.A.

Bank voor Handel en Scheepvaart N.V. v. *Administrator of Hungarian Property* [1954] A.C. 584; [1954] 2 W.L.R. 867; [1954] 1 All E.R. 969, H.L.(E.).

Barbuits' Case in Chancery (1737) Forr. *Cas. temp.* Talb. 281; *sub nom. Buvot* v. *Barbut* (1736) 2 Burr. 1481 and see 4 Burr. 2016.

Chung Chi Cheung v. *The King* [1939] A.C. 160; [1938] 4 All E.R. 786, P.C.

Claim Against the Empire of Iran Case (1963) 45 International Law Reports 57.

Compania Mercantil Argentina v. *United States Shipping Board* (1924) 131 L.T. 388, C.A.

Compania Naviera Vascongado v. *S.S. Cristina (The Cristina)* [1938] A.C. 485; [1938] 1 All E.R. 719, H.L.(E.).

Doe d. Lloyd v. *Passingham* (1827) 6 B. & C. 305.

Heathfield v. *Chilton* (1767) 4 Burr. 2016.

Juan Ysmael & Co. Inc. v. *Government of the Republic of Indonesia* [1955] A.C. 72; [1954] 3 W.L.R. 531; [1954] 3 All E.R. 236, P.C.

Kahan v. *Pakistan Federation* [1951] 2 K.B. 1003, C.A.

Krajina v. *Tass Agency* [1949] W.N. 309; [1949] 2 All E.R. 274, C.A.

Mackenzie-Kennedy v. *Air Council* [1927] 2 K.B. 517, C.A.

Mellenger v. *New Brunswick Development Corporation* [1971] 1 W.L.R. 604; [1971] 2 All E.R. 593, C.A.

Metropolitan Meat Industry Board v. *Sheedy* [1927] A.C. 899, P.C.

Odessa, The [1915] P. 52.

Parlement Belge, The (1880) 5 P.D. 197, C.A.

Philippine Admiral, The [1976] 2 W.L.R. 214; [1976] 1 All E.R. 78, P.C.

Porto Alexandre, The [1920] P. 30, C.A.

Rahimtoola v. *Nizam of Hyderabad* [1958] A.C. 379; [1957] 3 W.L.R. 884; [1957] 3 All E.R. 441, H.L.(E.).

Reg. v. *Kent Justices, Ex parte Lye* [1967] 2 Q.B. 153; [1967] 2 W.L.R. 765; [1967] 1 All E.R. 560, D.C.

Reg. v. *Keyn* (1876) L.R. 2 Ex.D. 63.

Reg. v. *Secretary of State for the Home Department, Ex parte Thakrar* [1974] Q.B. 684; [1974] 2 W.L.R. 593; [1974] 2 All E.R. 261, C.A.
Republic of Mexico v. *Hoffman* (1945) 324 U.S. 30.
Swiss Israel Trade Bank v. *Government of Salta* [1972] 1 Lloyd's Rep. 497.
Tamlin v. *Hannaford* [1950] 1 K.B. 18; [1949] 2 All E.R. 327, C.A.
Thai-Europe Tapioca Service Ltd. v. *Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W.L.R. 1485; [1975] 3 All E.R. 961, C.A.
Triquet v. *Bath* (1764) 3 Burr. 1478.
Ulen & Co. v. *Bank Gospodarstwa Krajowego* (1940) 24 N.Y.S. 2d. 201.
West Rand Central Gold Mining Co. Ltd. v. *The King* [1905] 2 K.B. 391.
Y.M.N. Establishment v. *Central Bank of Nigeria*, December 2, 1975, Provincial Court of Frankfurt, 8th Chamber for Commercial Matters: *sub nom. Youssef M. Nada Establishment* v. *Central Bank of Nigeria*, August 25, 1976, District Court of Frankfurt.

The following additional cases were cited in argument:

Blagojevic v. *Bank of Japan*, March 16, 1974, Cour D'Appel, Paris.
Bulmer (H. P.) Ltd. v. *J. Bollinger S.A.* [1974] Ch. 401; [1974] 3 W.L.R. 202; [1974] 2 All E.R. 1226, C.A.
Charkieh, The (1873) L.R. 4 A. & E. 59.
D. v. *National Society for Prevention of Cruelty to Children* [1976] 3 W.L.R. 124; [1976] 2 All E.R. 993, C.A.
De Wutz v. *Hendricks* (1824) 2 Bing. 314.
Dhiellemes et Masurel S.A. v. *Banque Centrale de la République de Turquie* (1963) 45 International Law Reports 85, Belgium Court of Appeal.
Dolder v. *Lord Huntingfield* (1805) 11 Ves.Jun. 283.
Grunfeld v. *United States of America* [1968] 3 N.S.W.R. 36.
Johore, Sultan of v. *Abubakar Tunku Aris Bendahar* [1952] A.C. 318; [1952] 1 All E.R. 1261, P.C.
Jonmenjoy Coondoo v. *Watson* (1884) 9 App.Cas. 561, P.C.
Krol v. *Bank Indonesia* (1958) 26 International Law Reports 150, Court of Appeal, Amsterdam.
Martin v. *Bank of Spain* (1952) 19 International Law Reports 202, Court de Cassation, France.
Minister of Supply v. *British Thomson-Houston Co. Ltd.* [1943] 1 K.B. 478; [1943] 1 All E.R. 615, C.A.
New York and Cuba Mail Steamship Co. v. *Republic of Koren* (1955) 132 F.Supp. 684.
Novello v. *Toogood* (1823) 1 B. & C. 554.
N.V. Cabolent v. *National Iranian Oil Co.*, November 28, 1968, Court of Appeal, The Hague.
Parkin v. *Government of the Republique Democratique du Congo* [1971] 1 S.A.L.R. 259.
Republic of Congo v. *Venne* (1971) 22 D.L.R. (3d) 669.
Rich v. *Naviera Vacuba, S.A.* (1961) 197 F.Supp. 710.
Strousberg v. *Republic of Costa Rica* (1880) 44 L.T. 199, C.A.
Twycross v. *Dreyfus* (1877) 5 Ch.D. 605, C.A.
United States of America and Republic of France v. *Dollfus Mieg et Cie, S.A. and Bank of England* [1952] A.C. 582; [1952] 1 All E.R. 572, H.L.(E.).
United States of America v. *Republic of China* [1950] Q.L.R. 6.
Vavasseur v. *Krupp* (1878) 9 Ch.D. 351, C.A.
Victory Transport Inc. v. *Comisaria General de Abastecimientos y Transportes* (1964) 336 F. (2d) 354.
Viveash v. *Becker* (1814) 3 M. & S. 284.
Weilamann v. *Chase Manhattan Bank* (1959) 192 N.Y.S. 2d 469.

Zeevi (J.) and Sons Ltd. v. *Grindlays Bank (Uganda) Ltd.* (1975) 37 N.Y. 2d 220.

APPEAL from Donaldson J.

On November 4, 1975, the plaintiff, Trendtex Trading Corporation, issued a writ against the Central Bank of Nigeria, the defendant, in respect of payments due to the plaintiff from the bank under a letter of credit dated July 24, 1975, relating to a contract of the same date for the purchase of cement from the plaintiff by Pan-African Export and Import Co. Ltd. The plaintiff claimed that by reason of the defendant's breaches and repudiation of the letter of credit (which repudiation the plaintiff had accepted) the plaintiff had suffered loss and damage. On November 4, Mocatta J. ordered that the plaintiff should have leave to serve a concurrent writ of summons against the bank and to serve notice thereof on the bank at its registered office in Nigeria and he granted the plaintiff an injunction that the bank should retain $13,968,190, or its equivalent in sterling, within the jurisdiction against the plaintiff's claim until the hearing of a summons returnable on November 11, 1975. On December 9, 1975, following an order on November 11, Mocatta J. ordered that the injunction be continued until the trial of the action or further order.

On March 26, 1976, on the bank's application by summons for the writ to be set aside on the ground that it was a department of the Federal Republic of Nigeria and was thereby immune from suit, Donaldson J. [1976] 1 W.L.R. 868, 877, held that the bank was "an emanation, an arm, an alter ego and a department of the State of Nigeria" and ordered (p. 879) that "the injunctions be discharged, the proceedings set aside and all further proceedings . . . stayed."

The plaintiff appealed on the grounds that (1) the judge erred in fact or law in holding (a) that the bank was entitled to sovereign immunity; (b) that the bank was an emanation, an arm, an alter ego, and a department of the State of Nigeria; (c) that it was established or sufficiently established that all funds held or deposited in the United Kingdom in the name of the bank were funds held or deposited for and on behalf of the Nigerian state; (d) that the bank was not estopped from reliance upon a plea of sovereign immunity by the terms of its letter of April 28, 1975, to Credit Suisse of Lausanne; and (e) that the principles of sovereign immunity to be applied were not affected by community law. (2) The judge erred in fact or law in failing to hold (a) that the acts and functions of the bank which were relied on for the purposes of the plaintiff's claim in the proceedings should not be accorded sovereign immunity; (b) that the funds of the bank within the jurisdiction which were subject to the injunction were not funds lodged or available for the payment of its creditors; and (c) that the bank was not entitled to the benefit of sovereign immunity in the proceedings; and (3) that it would be contended that the plea of sovereign immunity by the bank should be rejected for the additional reasons: (i) that on the facts the bank waived any right to rely thereon; and (ii) the commercial nature of the transactions which were relied upon for the puposes of the plaintiff's claim in the proceedings.

The facts are stated in the judgment of Lord Denning M.R.

F. P. Neill, Q.C., M. A. Pickering and *D. P. O'Connell* (and *Christopher French Q.C.* and *David Hunt* on the delivery of judgments) for Trendtex.

T. H. Bingham Q.C. and *A. G. Guest* for the Central Bank.

Cur. adv. vult.

January 13, 1977. The following judgments were read.

LORD DENNING M.R. In July 1975 the port of Lagos/Apapa was congested with shipping. All the berths were occupied. There were 300 to 400 ships outside waiting. More ships were arriving daily. Most of them were carrying cement. All of those waiting were on demurrage. It was because the government departments had ordered far too much. No doubt Nigeria needed cement. It was a country which was developing fast. They were building houses, factories, barracks, and so forth. All of the work required cement. Previously the average rate of import through all ports had been two million tons of cement a year. Yet early in 1975 the government departments then in charge in Nigeria had ordered 10 times that quantity, 20 million tons, to be delivered over the next 12 months. The ports were utterly unable to cope with it. Even for all commodities together, the discharging capacity at Lagos/Apapa did not amount to two million tons a year. Yet here was 10 times that amount arriving—of cement alone—leaving nothing for other vital imports of food and materials. The crisis was one of the reasons for a change of government in Nigeria. On July 29, 1975, a new military administration took over the reins. One of its first tasks was to find out the root cause of the congestion. It found that the previous administration had made contracts for cement which were "unorthodox, imprudent or inequitable." Not only were the quantities far too large, but there were no proper safeguards in regard to payment of the price or demurrage. As a first step the new military administration issued a notice suspending the import of cement into Nigeria. It told suppliers not to load any more cement for the time being. It warned them that it would not pay demurrage unless it was certified as proper. In addition, the new administration launched a "crash programme" to increase the rate of discharge from the waiting vessels. It set up a committee to negotiate fresh terms with the suppliers. The object was to reduce the quantities on order and to spread the deliveries over a longer time. Most of the suppliers have appreciated the difficulties and fresh terms have been arranged. The steps thus taken have proved successful. The congestion of vessels has been cleared. But there is an aftermath. It is a large number of legal proceedings.

This case is one of them. It is a claim on a letter of credit issued by the Central Bank of Nigeria, the defendant. We are not concerned with the rights or wrongs of the claim: but only with a preliminary point. The Central Bank of Nigeria claim that they cannot be sued in this country on the letter of credit: because they are entitled to sovereign immunity. The plaintiff, Trendtex Trading Corporation, disputes this on the ground that this is an ordinary commercial transaction to which sovereign immunity does not apply. So I must describe the nature of the transaction.

The story starts with a contract which was made on April 25, 1975, before the crisis broke. The Ministry of Defence in Nigeria agreed to buy 240,000 tons of Portland cement from an English company, the Pan-African Export and Import Co. Ltd. The price was U.S. $60.00 per ton c.i.f. Lagos/Apapa ports. Shipment at the rate of 20,000 tons a month, plus or minus 10 per cent., all to be delivered not later than August 15, 1976.

In pursuance of that contract the Ministry of Defence instructed the Central Bank of Nigeria to open a letter of credit in favour of Pan-African to the extent of U.S. $14,400,000 to be valid for payment against shipping documents conformable to the contract of purchase.

The Central Bank of Nigeria duly issued a letter of credit in favour of Pan-African. It was numbered 83035. It was issued in London through their correspondent bank, the Midland Bank Ltd., 60, Gracechurch Street, London. It was transferable abroad once only and was subject to the uniform customs rules of the International Chamber of Commerce relating to documentary credits (1962 revision). It covered not only the price of $14,400,000, but also demurrage of $4,100 a day.

It is important to notice that the Midland Bank Ltd. were only correspondents acting as agents for the Central Bank of Nigeria. The Midland Bank Ltd. did not confirm the credit so as to make themselves liable on it. They only advised the seller of its terms. On the credit itself, they said:

> "We are requested to advise you of the terms of a credit which is irrevocable on the part of our principals but does not bear our confirmation."

The responsibility of the Central Bank of Nigeria

The point about confirmation had been expressly raised by suppliers: and the Central Bank of Nigeria had said that confirmation was unnecessary. They wrote an important letter on April 28, 1975, to the suppliers' bank in these words:

> "I write to inform you that no confirmation is required for credits opened by us direct with our correspondent banks, of which the Midland Bank Ltd., London, is one. We are *irrevocably* committed to honour our engagements under this credit. Moreover, our correspondent, the Midland Bank Ltd., has our authority to pay the beneficiary the full value of this letter of credit through your bank on presentation of relevant shipping documents to them in London, provided the documents are in order. (See our letter of authority dated March 11, 1975, to our correspondent bank attached.) As a government bank and a prime bank, no supplier should have any cause to doubt our ability to pay our bills promptly. The question of our correspondents confirming our letters of credit should, therefore, not arise."

The transfer to Trendtex

In order to fulfil their contract to supply the cement, Pan-African entered into a contract with the Trendtex Trading Corporation of Zurich, Switzerland. The contract was dated July 24, 1975. By it Pan-African agreed to buy 240,000 tons of Portland cement from Trendtex. The price was U.S.$59.50 per ton, c.i.f. Lagos/Apapa, thus showing a small profit of U.S.$00.50 a ton to Pan-African. All other terms were to be as expressed in the Central Bank of Nigeria letter of credit (Midland Bank advice no. 83035) as transferred to the seller by the buyer.

On the same day, July 24, 1975, the credit was transferred to Trendtex. It was done by means of a new irrevocable letter of credit issued by the Central Bank of Nigeria through its correspondent the Midland Bank, London. It was numbered (83035A) and was for U.S.$14,280,000, the price of the cement and again demurrage at U.S.$4,100 a day.

In order to fulfil this contract to supply cement, Trendtex agreed to buy 240,000 tons of cement from Alsen-Breitenburg of Hamburg, and established a letter of credit issued by a Swiss bank for the price.

The shipments

During August and September 1975, Trendtex shipped four consignments of cement under their contract with Pan-African. In August they shipped 9,000 tons on *The Gempita* and 13,000 tons on *The Sugar Importer*. In September 10,600 tons on *The Newport* and 9,000 tons on *The Constantinos*. For those shipments Trendtex presented shipping documents to the Midland Bank Ltd., London, and were paid the price. In October 1975, Trendtex made two further shipments: 10,560 tons on *The Leodamas* and 10,900 on *The Dinos Methanitis*. They presented the shipping documents for these last two to the Midland Bank but were not paid the price. When each of those six vessels arrived off Lagos, the port was congested with hundreds of vessels loaded with cement, all waiting to discharge. Each waited its turn. *The Gempita* came on demurrage on September 5. *The Sugar Importer* on September 26. *The Newport* on October 25. *The Constantinos* on October 26. *The Leodamas* on October 31, and *The Dinos Methanitis* on November 20, 1971. Trendtex claimed payment of this demurrage under the letter of credit. They presented documents, all in order, to the Midland Bank, London, in support of their claim for demurrage. But the Midland Bank declined to pay. This was because of a telex message sent on September 24, from the Midland Bank to the bankers of Trendtex:

> "Please inform Trendtex Trading Corporation Ltd., Zurich, beneficiaries of our account 83035A that we have received the following authenticated message from our principals, Central Bank of Nigeria, Lagos, reading as follows: 'Please stop demurrage payments against specified documents unless such documents have been certified for payment by the Central Bank of Nigeria.' Please request beneficiaries to be guided, accordingly."

Trendtex also wanted payment of the price for the October shipments but the bank refused to pay. This was because of a message on October 8, 1975, from the Central Bank of Nigeria to the Midland Bank and relayed to Trendtex:

> "The Nigerian Federal Military Government has directed that in view of our port situation, shipping companies must give two months' notice to the Nigerian Ports Authority before sailing. In view of this, you are requested not to pay against documents presented in respect of letters of credit we have opened unless such documents are accompanied by certificates confirming that clearance has been obtained for the ships to sail to Nigeria. Thus, when documents are presented, no payment should be made until we confirm to you that the ship has obtained necessary clearance to sail to Nigeria."

On October 8, 1975, representatives of Trendtex went to Lagos and made representations to the Nigerian government. They were told that no payment whatever would be made on the last two vessels: and demurrage would only be paid on the first four vessels if certified by the Central Bank of Nigeria for payment.

The action

On November 4, 1975, Trendtex issued a writ in the High Court of Justice in London against the Central Bank of Nigeria. They claimed demurrage on all six vessels. They claimed the price of the cement shipped on the last two vessels. They claimed damages for non-acceptance of the

balance of 175,340 tons still outstanding (out of the 240,000 tons ordered). They claimed damages on account of their obligations to their suppliers, Alsen-Breitenburg.

The Central Bank of Nigeria applied to set aside the writ on the ground that the Central Bank of Nigeria is a department of the Federal Republic of Nigeria and, therefore, immune from suit.

On March 26, 1976, Donaldson J. [1976] 1 W.L.R. 868 set aside the writ. Trendtex appeal to this court. Trendtex also applied for an order that the bank do retain $14 million in London to meet the claim. Mocatta J. made that order. It is effective because the bank have that sum to their credit with the Midland Bank. The money is being retained here pending the appeal.

One thing I would mention at the outset. There was a string of contracts for the purchase of cement—by the Ministry of Defence at Lagos from the Pan-African company in London—by the Pan-African company from Trendtex—and by Trendtex from Alsen-Breitenburg. Those contracts are altogether distinct from the contracts contained in the letter of credits. The contract sued upon in this action is the contract contained in the letter of credit issued by the Central Bank of Nigeria in favour of Pan-African and transferred to Trendtex. Trendtex can sue upon that contract as a distinct contract completely separate from the contract of sale. In the provisions of Uniform Customs issued by the International Chamber of Commerce it is said:

> "Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts."

See *Gutteridge and Megrah, The Law of Bankers' Commercial Credits*, 5th ed. (1976), p. 205 (and p. 59).

Another point I would mention is that many people must have suspicions about the validity of the contracts made by the previous administration. There must have been some mismanagement somewhere to lead to this pile-up of vessels off Lagos. This may give rise in some of these claims to defences on the merits. But no considerations of that kind arise at this stage. The only question now is whether the action should be allowed to proceed at all. Is it to be stayed or struck out on the ground of sovereign immunity?

The case has been presented to us by both sides in a manner to which I would pay sincere tribute. The documents have been prepared admirably with all the relevant material and authorities collected, photographed and arranged for convenient study. The arguments have been put forward convincingly by two of the most able and persuasive advocates of the day. We cannot hope to do full justice to them, but we are much indebted to them.

The general picture

The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world. All nations agree upon it. So it is part of the law of nations.

To my mind this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it. That is what the Privy Council did in *The Philippine Admiral* [1976] 2 W.L.R. 214: see especially at pp. 232–233; and we may properly do the same.

The two schools of thought

A fundamental question arises for decision. What is the place of international law in our English law? One school of thought holds to the doctrine of *incorporation*. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of *transformation*. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But, under the doctrine of transformation, the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops.

(i) *The doctrine of incorporation.* The doctrine of incorporation goes back to 1737 in *Buvot* v. *Barbut* (1736) 3 Burr. 1481; 4 Burr. 2016; sub nom. *Barbuit's Case in Chancery* (1737) Forr. 280, in which Lord Talbot L.C. (who was highly esteemed) made a declaration which was taken down by young William Murray (who was of counsel in the case) and adopted by him in 1764 when he was Lord Mansfield C.J. in *Triquet* v. *Bath* (1764) 3 Burr. 1478:

> "Lord Talbot declared a clear opinion—'That the law of nations in its full extent was part of the law of England, . . . that the law of nations was to be collected from the practice of different nations and the authority of writers.' Accordingly, he argued and determined from such instances, and the authorities of Grotius, Barbeyrac, Binkershoek, Wiquefort, etc., there being no English writer of eminence on the subject."

That doctrine was accepted, not only by Lord Mansfield himself, but also by Sir William Blackstone, and other great names, too numerous to mention. In 1853 Lord Lyndhurst in the House of Lords, with the concurrence of all his colleagues there, declared that . . . "the law of nations, according to the decision of our greatest judges, is part of the

A law of England": see Sir George Cornewall Lewis's book, *Lewis on Foreign Jurisdiction* (1859), pp. 66–67.

(ii) *The doctrine of transformation.* The doctrine of transformation only goes back to 1876 in the judgment of Cockburn C.J. in *Reg.* v. *Keyn* (1876) L.R. 2 Ex.D. 63, 202–203:

> "For writers on international law, however valuable their labours
> B may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. . . . Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would
> C practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature."

To this I may add the saying of Lord Atkin in *Chung Chi Cheung* v. *The King* [1939] A.C. 160, 167–168:

> "So far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are
> D accepted and adopted by our own domestic law."

And I myself accepted this without question in *Reg.* v. *Secretary of State for the Home Department, Ex parte Thakrar* [1974] 1 Q.B. 684, 701.

(iii) *Which is correct?* As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognise a change in the rules of
E international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth: "But it does move." International law does change: and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were
F justified in applying the modern rules of international law: see the "Statement of Opinion" by Sir R. Phillimore, Mr. M. Bernard and Sir H. S. Maine appended to the *Report of the Royal Commission on Fugitive Slaves* (1876), p. XXV, paras. 4 and 5. Again, the extent of territorial waters varies from time to time according to the rule of international law current at the time, and the courts will apply it accordingly: see *Reg.* v. *Kent Justices, Ex parte Lye* [1967] 2 Q.B. 153, 173, 189. The
G bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognised in many countries, and the courts—of our country and of theirs—have given effect to them, without any legislation for the purpose. Notably in the decision of the Privy Council in *The Philippine Admiral* [1976] 2 W.L.R. 214.

(iv) *Conclusion on this point.* Seeing that the rules of international law
H have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court—as to what was the ruling of international law 50 or 60 years ago—is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it

can give effect to that change—and apply the change in our English law —without waiting for the House of Lords to do it. A

Has there been a change?

(i) *The doctrine of absolute immunity.* A century ago no sovereign state engaged in commercial activities. It kept to the traditional functions of a sovereign—to maintain law and order—to conduct foreign affairs— and to see to the defence of the country. It was in those days that England —with most other countries—adopted the rule of absolute immunity. It was adopted because it was considered to be the rule of international law at that time. In *The Parlement Belge* (1880) 5 P.D. 197, 205, Brett L.J. said: B

> "The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations . . . [so also] of some property . . . The universal agreement which has made these propositions part of the law of nations has been an implied agreement." C

The rule was stated by Dicey in his work on *Conflict of Laws*, and repeated religiously by the judges thereafter. The classic restatement of it was made by Lord Atkin in *Compania Naviera Vascongado* v. *S.S. Cristina* (*The Cristina*) [1938] A.C. 485, 490: D

> "The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages."

That doctrine was repeated by Viscount Simonds in *Rahimtoola* v. *Nizam of Hyderabad* [1958] A.C. 379, 394. He treated it as if it was a rule of English law, fixed and immutable, not to be departed from, even by the House of Lords itself. E

(ii) *The doctrine of restrictive immunity.* In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state—or creates its own legal entities—which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as jure imperii, but no immunity to acts of a commercial nature, jure gestionis. In 1951 Sir Hersch Lauterpacht showed that, even at that date, many European countries had abandoned the doctrine of absolute immunity and adopted that of restrictive immunity—see his important article, "The Problem of Jurisdictional Immunities of Foreign States" in *The British Year Book of International Law, 1951*, vol. 28, pp. 220–272. Since that date there have been important conversions to the same view. Great impetus was given to it in 1952 in the famous "Tate letter" in the United States. Many countries have now adopted it. We have been given a valuable collection of recent decisions in which the courts of Belgium, Holland, the German Federal Republic, the United States of America and others have abandoned absolute immunity and granted only restrictive immunity. Most authoritative of all is the opinion of the Supreme Court F G H

A of the United States in *Alfred Dunhill of London Inc.* v. *Republic of Cuba*. It was delivered on May 24, 1976, by White J. with the concurrence of the Chief Justice, Powell J. and Rehnquist J.:

> "Although it had other views in years gone by, in 1952, as evidenced by . . . (the Tate letter) . . . the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view
B under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our government since that time, as the attached letter of November 25, 1975, confirms . . . 'Such adjudications are consistent with international law on sovereign immunity'."

C To this I would add the European Convention on State Immunity (Basle, 1972), article 4, paragraph 1, which has been signed by most of the European countries.

Are we to follow likewise?

D Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, some one some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind
E on the bank. ". . . We must take the current when it serves, or lose our ventures.": *Julius Caesar*, Act IV, sc. III.

In one respect already the Privy Council have abandoned the absolute theory and accepted the restrictive theory. It is in respect of actions in rem: see *The Philippine Admiral* [1976] 2 W.L.R. 214, 232. But, unfortunately, the Privy Council seem to have thought that the absolute
F theory still applied to actions in personam. They said, at p. 233:

> ". . . it is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so."

That is a dismal forecast. It is out of line with the good sense shown in the rest of the judgment of the Privy Council. This is how they put
G it, at pp. 232–233:

> ". . . the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions . . . Their Lordships themselves think that it is wrong that it should be so applied . . . Thinking as they do that the restrictive theory is more
H consonant with justice they do not think that they should be deterred from applying it."

Such reasoning is of general application. It covers actions in personam. In those action, too, the restrictive theory is more consonant with justice. So it should be applied to them. It should not be retained as an indefensible anomaly.

I see no reason why we should wait for the House of Lords to make the change. After all, we are not considering here the rules of English

law on which the House has the final say. We are considering the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong.

The modern rule

What then is the modern rule of international law? I tried to state it nearly 20 years ago in *Rahimtoola* v. *Nizam of Hyderabad* [1958] A.C. 379, 422:

> "If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but, if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."

I recently re-stated it in *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W.L.R. 1485, 1491:

> ". . . a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market; or if it has a state department which charters ships on the Baltic Exchange: it thereby enters into the market places of the world: and international comity requires that it should abide by the rules of the market."

Since those cases, there have been two very recent cases on the subject: *The Philippine Admiral* [1976] 2 W.L.R. 214 in November 1975, in the Privy Council; and *Alfred Dunhill of London Inc.* v. *Republic of Cuba* on May 24, 1976, in the Supreme Court of the United States. There is a Bill also before the House of Representatives of the United States reported on September 9, 1976 (now passed into law, Foreign Sovereign Immunities Act of 1976) which is very much on the lines I suggested. All this confirms me in the view which I have expressed.

The law of the European Community

Even if there were no settled rule of international law on the subject, there should at least be one settled rule for the nine countries of the European Economic Community. The Treaty of Rome is part of the law of England. One of the objectives contained in article 3 (*h*) [see Cmnd. 5179] is to ensure "the approximation of the laws of member states to the extent required for the proper functioning of the common market."

It is one of the functions of the Commission and the Council to issue directives to achieve this approximation: see articles 100, 101 and 102. I regard the word "approximation" in the treaty to mean "harmonisation."

A In view of those provisions, it seems to me that it is the duty of each of the member states—and of the national courts in those states—to bring the law as to sovereign immunity into harmony throughout the community. The rules applied by each member state on the subject should be the same as the rules applied by the others. There is only one acceptable way of doing it. That is by adopting the doctrine of restrictive immunity on the lines I have suggested.

B

The application to this case

So I turn to see whether the transaction here was such as to attract sovereign immunity, or not. It was suggested that the original contracts for cement were made by the Ministry of Defence of Nigeria: and that the cement was for the building of barracks for the army. On this C account it was said that the contracts of purchase were acts of a governmental nature, jure imperii, and not of a commercial nature, jure gestionis. They were like a contract of purchase of boots for the army. But I do not think this should affect the question of immunity. If a government department goes into the market places of the world and buys boots or cement—as a commercial transaction—that government department should D be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.

There is another answer. Trendtex here are not suing on the contracts of purchase. They are claiming on the letter of credit which is an entirely separate contract. It was a straightforward commercial transaction. The letter of credit was issued in London through a London bank in the ordinary course of commercial dealings. It is completely E within the territorial jurisdiction of our courts. I do not think it is open to the Government of Nigeria to claim sovereign immunity in respect of it.

The German decision

It is interesting to find that the German courts have had to deal with a precisely similar point. In February 1975, the Ministry of Defence in F Nigeria agreed to purchase 240,000 tons of cement from a firm in Liechtenstein. The Central Bank of Nigeria issued letters of credit through its correspondent the Deutsche Bank in Frankfurt. The goods were shipped. The price paid. The vessel arrived at Lagos but, owing to the congestion, had to wait. The holders of the letters of credit claimed demurrage. They levied distress on the assets of the Central Bank of G Nigeria then in Germany. The Central Bank claimed the release of these assets on the ground of sovereign immunity. On December 2, 1975, the Commercial Court of Frankfurt in *Y.M.N. Establishment* v. *Central Bank of Nigeria* rejected the plea. Their reasons were as follows:

> "According to the decisions of the Federal Constitutional Court of 1962 and 1963 . . . a foreign state may be granted immunity from H German jurisdiction only in respect of its sovereign activity (acta jure imperii) but not in respect of its non-sovereign activity (acta jure gestionis), because no general rule of public international law exists under which the domestic jurisdiction for actions against a foreign state in relation to its non-sovereign activity is precluded."

We are told that that decision is subject to appeal. So be it. But it affords strong support for the view I have expressed, seeing that the German court decided in just the same way for just the same reasons.

Alter ego or organ of government

If we are still bound to apply the doctrine of absolute immunity, there is, even so, an important question arising upon it. The doctrine grants immunity to a foreign government or its department of state, or any body which can be regarded as an "alter ego or organ" of the government. But how are we to discover whether a body is an "alter ego or organ" of the government?

The cases on this subject are difficult to follow, even in this country: let alone those in other countries. And yet, we have to find what is the rule of international law for all of them. It is particularly difficult because different countries have different ways of arranging internal affairs. In some countries the government departments conduct all their business through their own offices—even ordinary commercial dealings—without setting up separate corporations or legal entities. In other countries they set up separate corporations or legal entities which are under the complete control of the department, but which enter into commercial transactions, buying and selling goods, owning and chartering ships, just like any ordinary trading concern. This difference in internal arrangements ought not to affect the availability of immunity in international law. A foreign department of state ought not to lose its immunity simply because it conducts some of its activities by means of a separate legal entity. It was so held by this court in *Baccus S.R.L. v. Servicio Nacional Del Trigo* [1957] 1 Q.B. 438.

Another problem arises because of the internal laws of many countries which grant immunities and privileges to its own organisations. Some organisations can sue, or be sued, in their courts. Others can not. In England we have had for centuries special immunities and privileges for "the Crown"—a phrase which has been held to cover many governmental departments and many emanations of government departments—but not nationalised commercial undertakings: see *Tamlin* v. *Hannaford* [1950] 1 K.B. 18. The phrase "the Crown" is so elastic that under the Crown Proceedings Act 1947 the Treasury have issued a list of government departments covered by the Act. It includes even the Forestry Commission. It cannot be right that international law should grant or refuse absolute immunity according to the immunities granted internally. I would put on one side, therefore, our cases about the privileges, prerogatives and exceptions of the "Crown."

It is often said that a certificate by the ambassador, saying whether or not an organisation is a department of state, is of much weight, though not decisive: see *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274. But even this is not to my mind satisfactory. What is the test which the ambassador is to apply? In the absence of any test, an ambassador may apply the test of control, asking himself: is the organisation under the control of a minister of state? On such a test, he might certify any nationalised undertaking to be a department of state. He might certify that a press agency or an agricultural corporation (which carried out ordinary commercial dealings) was a department of state, simply because it was under the complete control of the government.

I confess that I can think of no satisfactory test except that of looking to the functions and control of the organisation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions. That is the way in which we

looked at it in *Mellenger* v. *New Brunswick Development Corporation* [1971] 1 W.L.R. 604, when I said, at p. 609:

> "The corporation . . . has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that a government department does."

With these considerations in mind, I turn to our problem.

Central Bank of Nigeria

At the hearing we were taken through the Act of 1958 under which the Central Bank of Nigeria was established, and of the amendments to it by later decrees. All the relevant provisions were closely examined: and we had the benefit of expert evidence on affidavit which was most helpful. The upshot of it all may be summarised as follows. (i) The Central Bank of Nigeria is a central bank modelled on the Bank of England. (ii) It has governmental functions in that it issues legal tender; it safeguards the international value of the currency; and it acts as banker and financial adviser to the government. (ii) Its affairs are under a great deal of government control in that the Federal Executive Council may overrule the board on monetary and banking policy and on internal administrative policy. (iv) It acts as banker for other banks in Nigeria and abroad, and maintains accounts with other banks. It acts as banker for the states within the federation: but has few, if any, private customers.

In these circumstances I have found it difficult to decide whether or no the Central Bank of Nigeria should be considered in international law a department of the Federation of Nigeria, even though it is a separate legal entity. But, on the whole, I do not think it should be.

This conclusion would be enough to decide the case, but I find it so difficult that I prefer to rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department.

Waiver or estoppel

It was submitted that, by the letter of April 28, 1975, the Central Bank of Nigeria waived any claim to sovereign immunity or is estopped from claiming it. But the point was not pressed in this court because of previous decisions, such as *Kahan* v. *Pakistan Federation* [1951] 2 K.B. 1003. It was reserved for the House of Lords.

Injunction

It was said that the money standing to the credit in the books of the Midland Bank was money belonging to the Federation of Nigeria: and that it was not subject to seizure or to an injunction. This point seems to me to depend on precisely the same grounds as those considered earlier. If the Central Bank is entitled to immunity from being sued, so also can the funds be immune from being seized. Otherwise not.

Conclusion

In my opinion the plea of sovereign immunity does not avail the Central Bank of Nigeria. I would allow the appeal, accordingly.

STEPHENSON L.J. The Central Bank of Nigeria issued a letter of credit drawn on the Midland Bank in London in favour of Trendtex

Trading Corporation, a Swiss company. It was to pay for a large quantity of cement sold by Trendtex to an English company. The bank assured Trendtex by letter that there was no need to get the letter of credit confirmed by another bank: the money would be available. So Trendtex went ahead, bought the cement from a German company, sold it to the English company, and shipped it to Nigeria. Now the bank refuses to pay and treats the letter of credit as a scrap of paper. The cement was bought by the English company to build barracks for the Ministry of Defence of the Government of Nigeria, which had agreed to buy it from the English company. The bank claims to be an arm or department of that government and to have performed an act of government in granting Trendtex this letter of credit. Whether the grant was a public act of government or a private commercial transaction, it would offend against the dignity of the sovereign state of Nigeria and the comity of civilised nations if the bank had to defend Trendtex's claim to payment in accordance with the letter of credit in the courts of this country against the Nigerian Government's will; and it would be a breach of international law if the High Court of Justice in England were to compel the bank to defend the claim. The court ought therefore to act in accordance with international law, to give effect to the plea of sovereign immunity and to stay all further proceedings in the action. This the judge has done. We have to consider whether that was rightly done or whether he should have held that he was not required by international law to uphold the plea of sovereign immunity in respect of an act done by the bank in the ordinary course of banking business in connection with an ordinary commercial transaction and should have allowed the action to go on.

There is apparently no answer to the claim except the plea of sovereign immunity, and I would have to be satisfied that the law of nations plainly requires the courts of this country to prevent Trendtex from pursuing its claim before I could agree with the judge that in spite of what the bank wrote in their letter of April 28, 1975, which Lord Denning M.R. has read, its promise to pay was in effect a mere obligation of honour not enforceable in an English court of law.

In 1958 when the bank was incorporated by the Central Bank of Nigeria Act, there were other central banks in existence, notably the Bank of England, on which the Central Bank of Nigeria was modelled. In 1958 the functions of central banks were well known to be partly governmental and partly private. In 1958 the law of nations relating to sovereign immunity was on the move. It was uncertain how far it was going or how far it had gone in its development; but a body declared to be constitutionally a government department was certainly entitled to sovereign immunity for some of its acts and perhaps still for all its acts. Yet this bank was not declared to be so. Was it nevertheless a government department, and if not has it become one?

Lord Cross of Chelsea delivering the judgment of the Privy Council in *The Philippine Admiral* [1976] 2 W.L.R. 214, 228 said:

> "There is no doubt that since the Second World War there has been both in the decisions of courts outside this country and in the views expressed by writers on international law a movement away from the absolute theory of sovereign immunity championed by Lord Atkin and Lord Wright in *The Cristina* towards a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a state which are done jure imperii and acts done by it jure

gestionis and accords the foreign state no immunity either in actions personam or in actions in rem in respect of transactions falling under the second head."

After referring to a decision of the United States Supreme Court in 1945 (*Republic of Mexico* v. *Hoffman* (1945) 324 U.S. 30) and the "Tate letter" of May 19, 1952, the judgment proceeded, at p. 230:

"According to the Tate letter the countries of the world were then fairly evenly divided between those whose courts adhered to the absolute theory and those which adopted the restrictive; but there is no doubt that in the last 20 years the restrictive theory has steadily gained ground. According to a list compiled by reference to the various textbooks on international law and put before their Lordships by agreement between the parties there are now comparatively few countries outside the Commonwealth which can be counted adherents of the absolute theory."

We have that list, and since the Privy Council's advice was given we have the judgments of the Supreme Court of the United States in *Alfred Dunhill of London Inc.* v. *Republic of Cuba*, May 24, 1976, and of the District Court of Frankfurt/M in *Youssef M. Nada Establishment* v. *Central Bank of Nigeria*, decided against the bank on a similar letter of credit on August 25, 1976.

This movement had gained a fair amount of ground by 1958 in the courts of many countries, as was demonstrated by the decisions collected by Professor Lauterpacht in the Appendix to his article on "The Problem of Jurisdictional Immunities of Foreign States" published in the *British Year Book of International Law 1951*, vol. 28, p. 220, at pp. 250 and following. The decisions reviewed by the Federal Constitutional Court of the Federal Republic of Germany in 1963 in the *Claim against the Empire of Iran Case*, 45 International Law Reports 57, show that by 1958 several countries had accepted and enforced the rule of restrictive immunity. In this country an interdepartmental committee appointed in 1949 had been dissolved in 1953 without doing more than recognise the divergencies in the practice of states in relation to sovereign immunity and the differences of its own members as to what the best principle was, and without being able to decide either what the rule was or what it ought to be: see Dr. F. A. Mann's article on "Sovereign Immunity" in (1955) 18 M.L.R. 184, 185. In 1958 the unanimity of English judges was divided by one judicial voice speaking out in favour of restricting immunity to acts jure imperii: Lord Denning in *Rahimtoola* v. *Nizam of Hyderabad* [1958] A.C. 379, 422. In 1957 and 1958 the Asian-African Legal Consultative Committee was discussing the immunity of states, though agreement was not reached or restrictive immunity recommended until 1960: see the *Claim against the Empire of Iran Case*, 45 International Law Reports 57, 77.

It might therefore have been thought necessary, as it certainly would have been prudent, to take the first step requisite for obtaining sovereign immunity for the bank's acts by according it in statutory terms a status which qualified for that immunity. Yet the Government of Nigeria in that year created not a government department but a bank: a central bank, a "government bank and a prime bank," if you like to call it that, but all the same a bank with many of the powers and duties of a bank and with no declaration of government status: a separate entity

not stated to be a government department or to be immune from suit internally or externally, or to be subject to claims under the Petitions of Right Act 1958, as is any ministry or department of the Nigerian Government, but on the contrary capable of suing and being sued in its own name under section 3 (2) of the Central Bank of Nigeria Act 1958. Such a body can be an emanation of government, immune from suit at home or abroad or everywhere: *Baccus S.R.L.* v. *Servicia Nacional Del Trigo* [1957] 1 Q.B. 438. It can be certified to be so by a representative of its own government or perhaps of the government of the country in which proceedings are brought against it. And a certificate from the ambassador of the government claiming sovereign immunity is, as was held in *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274, weighty but not conclusive—weighty because he speaks with knowledge of his country and its law, which may be the law applicable to the question whether the body is a government department; inconclusive because he may apply a test which the courts of the country where proceedings are brought against the body would not consider decisive, as Lord Denning M.R. has pointed out.

In this case we have the affidavits of the High Commissioner of the Federal Republic of Nigeria in the United Kingdom, the Acting High Commissioner and the Solicitor General, since the hearing before Donaldson J. reinforced by the affidavit of Professor Nwabueze. I should not differ from these authoritative opinions if I were satisfied that their authors had asked themselves what Mr. Neill for Trendtex has convinced me are the right questions: what was the legislative intention of the Government of Nigeria in creating this bank by the statute which we have examined, and in tightening control over it by the subsequent decrees to which we have been referred? and, is the bank, controlled as it now is by the Government of Nigeria, the sort of body which the law of nations, or if it differs, the law of this country, recognises as entitled to the immunity which it accords to a sovereign state?

The first of these questions is not answered by any express provision in the Act or decrees. I would not accept Mr. Neill's extreme submission that such an express provision is universally necessary, particularly when there is evidence that it is not the practice of the Nigerian Government to make such express provision. There may be countries where such a provision could not be expected, though Mr. Bingham has not persuaded me that Nigeria is one of them. The affidavit of Professor Nwabueze, on which he relied, states that it is not the practice in Nigeria to establish a body specifically as a department of government, but that executive departments of government are created by a decision of the executive recorded in a gazette notice, never—or only exceptionally—by statute: an opinion which throws little light on the constitutional status of a bank which is created by statute. That status is a question on which the law of Nigeria may be relevant. But I am not satisfied by the affidavit evidence that there is any difference between the law of England and the law of Nigeria on the question whether a separate legal entity is a department of a foreign government. If there were any material difference between the laws of the two countries I should be content to follow the opinion of MacKenna J. in *Swiss Israel Trade Bank* v. *Government of Salta* [1972] 1 Lloyd's Rep. 497, 506 and hold that the foreign law may determine that a particular quality is inconsistent with the status of a department of state and perhaps that the foreign body in question pos-

A sesses those characteristics which English law considers essential to that status, but it is the conception of a government department according to English law which that body must satisfy in an English court. But I accept Mr. Neill's submission that English courts should be extremely careful not to extend sovereign immunity to bodies which are not clearly entitled to it: and I regard the absence in a 1958 enactment of any clear expression of intent to confer the status of a government department on B the bank as a pointer towards the opposite intention.

Then does the bank prove, as it must, that the intention to make the bank a department or an organ of the Nigerian State is of necessity to be implied from the Act and the amending decrees? Like Lord Denning M.R., I have found this a difficult question. The judge set out and analysed the provisions which he regarded as important in an admirably C clear and careful statement [1976] 1 W.L.R. 868, 874–876. Counsel on both sides have referred to a great number of them in an exhaustive and helpful exegesis of their terms and implications. I do not propose to review them again or to compare them with those which regulate the Bank of England in the Acts of 1694 and 1946—its constitutional position was not directly in issue or, properly, the subject of any concession by Mr. Bingham—or other banks such as the Provincial Bank of Salta D set out in *Swiss Israel Trade Bank* v. *Government of Salta* [1972] 1 Lloyd's Rep. 497 or the National Economic Bank of Poland examined in *Ulen* v. *Bank Gospodarstwa Krajowego* (1940) 24 N.Y.S. 2d 201; or with the constitutions and functions of many other bodies which have pleaded sovereign immunity with varying success. There is nothing as strong as the articles constituting the Tass Agency which justified the Soviet ambas- E sador's certificate in *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274. Nor shall I go into the reasoning (mostly adopted in Mr. Neill's argument for Trendtex) by which Dr. Cotran and Professor Read have reached their conclusions that the bank is not part and parcel of the State of Nigeria or a department of its government. I would add only a word of caution against using decisions on the immunity of Crown servants and agents internally as more than a guide to determining the immunity of F government agencies externally. We were told that this was the first case in which cases on both questions had been brought together. Their collocation in this case was foreshadowed by Cohen L.J.'s citation of *Mackenzie-Kennedy* v. *Air Council* [1927] 2 K.B. 517 in *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274, 280 and by Lord Denning M.R.'s citation of *Tamlin* v. *Hannaford* [1950] 1 K.B. 18 in *Mellenger* v. *New Brunswick* G *Development Corporation* [1971] 1 W.L.R. 604, 609. We were taken to such helpful authorities as *Metropolitan Meat Industry Board* v. *Sheedy* [1927] A.C. 899 and *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* [1954] A.C. 584. But a meat industry board or a custodian of enemy property may not necessarily be recognised as in the same position at home and abroad when it comes to considering relationship to the state and immunity from suit. I shall simply state my H conclusions, differing with hesitation from the opinion of Donaldson J. [1976] 1 W.L.R. 868, 872–877, on what he called the personality issue, that the bank has not proved its case. I am not satisfied that the bank was created by the Act a department of the Nigerian Government or has been changed into one by any of the eleven amending decrees which it was contended for the bank had dramatically eroded its independence. A hobbled horse is still a horse. A corporation may change its constitution by degrees, but I am not satisfied that any of the amendments of the

Act incorporating the bank have changed its constitution and turned it into an organ of the Nigerian State.

I would allow the appeal on this ground, but will state my conclusions on the other questions which have to be decided if I am wrong on this point, and which have been put before us with a wealth of care and skill in preparation and argument to which I would join with Lord Denning M.R. in acknowledging a debt of gratitude.

Of these remaining questions I take first the question whether, assuming that the bank is a body entitled to plead sovereign immunity, it is entitled to plead it in respect of an action on the letter of credit which it issued to Trendtex. That resolves itself into two questions. (1) Was the issue of the letter of credit by the bank in favour of Trendtex an ordinary trading transaction? (2) If it was, can an English court below the House of Lords reject the bank's plea of sovereign immunity in respect of such a transaction?

(1) The movement or trend of opinion towards restricting sovereign immunity is based on the distinction between ordinary trading transactions and governmental acts. The new doctrine would restrict immunity to the latter, labelled in Latin as acta jure imperii, and deny it to the former under the description of acta jure gestionis. The distinction between the two categories has been found as difficult to draw as the distinction between a state's agents who are not immune and a state's agencies which are. But I entertain no doubt that the issue of this letter of credit in payment for this cement fell on the private and commercial side of the line and was an ordinary trading transaction. It was a separate transaction from the sale to the English company in whose favour the first letter of credit was issued by the bank: see General Provision and Definition (c) of Uniform Customs and Practice for Documentary Credits (1962 Revision) from which Lord Denning M.R. has quoted, ante, p. 363D.

If it were necessary, or permissible, to look at that underlying contract of sale, or below it at the purpose for which the cement was required, namely, to build barracks for the Nigerian Ministry of Defence, I would still regard the whole transaction as commercial. Trendtex must be taken to have known that the bank's transferable letter of credit in favour of the English company was opened with the Midland Bank in London on account of the Permanent Secretary, Ministry of Defence, Lagos. But the letter of credit opened in favour of Trendtex was on account of the English company. There are those who regard the purpose of the transaction as determining the question whether it is public and governmental or private and commercial; I prefer the view incorporated in the Bill introduced into the United States House of Representatives in 1975:

> "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose": see section 1603 (*d*) of the Foreign Sovereign Immunity Act 1976.

This accords with the judgment of the German Federal Constitutional Court in the *Claim against the Empire of Iran Case*, 45 International Law Reports 57, 80.

(2) Are we prevented from enforcing the bank's obligation to pay in accordance with the letter of credit? Are we bound by authority to

A the doctrine of absolute immunity which protects a sovereign in respect of all his acts whether jure imperii or jure gestionis? This is the question of the most general importance raised by this appeal and perhaps of the greatest difficulty. On the one hand, Mr. Neill for Trendtex has argued that every court in the United Kingdom can and should apply the relevant contemporary rule of international law with certain exceptions which do not include a previous decision of binding authority applying B a different rule no longer in force; and the relevant contemporary rule is restrictive immunity. On the other hand, Mr. Bingham, for the bank, contended that the rule of absolute immunity for a sovereign state or one of its organs sued in personam is still binding upon this and every court in the United Kingdom unless and until the House of Lords decides to depart from its previous decisions or Parliament repeals the rule; and C there is not yet established by international law any new rule of restrictive immunity which exempts acts of a sovereign state or one of its organs from immunity or agrees on what those exempted acts are. The first difficulty in deciding between these two submissions is caused by the nature of international law and the manner in which municipal courts ascertain what it is, how the law of nations is made and how proved.

D Sir William Blackstone wrote: "The law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land." He went on to add that "the law merchant (in which I include the law relating to letters of credit) . . . is a branch of the law of nations": *Blackstone's Commentaries*, 15th ed. (1809), Book IV, Ch. 5, p. 67. That opinion reproduces the opinion attributed to Lord Talbot L.C. in *Buvot* v. *Barbut*, 3 Burr. 1481, by Lord Mansfield C.J., one of E the counsel in the case, in *Triquet* v. *Bath*, 3 Burr. 1478, 1481, and *Heathfield* v. *Chilton* (1767) 4 Burr. 2016. There is no trace of any such opinion, or of the elaborate and solemn argument to which Lord Mansfield also refers there, in the report of *Barbuit's Case* in Forrester's cases in Equity *temp.* Talbot 281, where it is dated 1737. But preserved and adopted by Lord Mansfield and Blackstone and other judges, Lord F Talbot's opinion has great force which I should be the last to disparage, coming as it does from a judge whom Bayley J. described in 1827 as "one of the greatest real property lawyers that ever filled the office of Lord Chancellor": *Doe d. Lloyd* v. *Passingham* (1827) 6 B. & C. 305, 315. Lord Talbot was, however, deciding that a consul was not entitled to "the antient universal jus gentium" belonging to ambassadors of which the statute of Anne was declaratory, and for my part I would G attach more importance to his going to contemporary jurists to ascertain the relevant rule of the law of nations than to his description of the law of nations generally as part of the law of England. For the law of nations is, according to *Blackstone* (p. 66), "a system of rules, deducible by natural reason, and established by universal consent among the civilised inhabitants of the world" and which "must necessarily result from those principles of natural justice in which all the learned of every nation H agree." But the universal consent required by this confident and exacting 18th century definition is, as Lord Denning M.R. has pointed out, a fiction; if it ever existed, it is not now forthcoming in many spheres of international law, and certainly not, in my judgment, in the area of sovereign immunity.

There is, however, ample authority not for the view that each nation can decide what rule suggested by any jurist or body of jurists, or laid down and applied by any foreign court or courts, it can and should itself

apply, but for the view that it can and should apply a generally accepted rule. I cite two statements from the early years of this century. In 1915 Sir Samuel Evans P. in *The Odessa* [1915] P. 52, 61–62, defined the law of nations as

> "the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion."

He went on to say:

> "In the domain of international law, in particular, there is room for the extension of old doctrines or the development of new principles, where there is, or is even likely to be, a general acceptance of such by civilised nations. Precedents handed down from earlier days should be treated as guides to lead, and not as shackles to bind. But the guides must not be lightly deserted or cast aside."

He may have felt a greater freedom in the Prize Court than a judge of a court of common law to let precedents lead him on to the future and not bind him to the past; but his judgment does, I think, point the way in which Mr. Neill asks this court to go. Against this forward movement, which Lord Talbot's doctrine of incorporation is claimed to permit, is set the doctrine of transformation derived from the judgment of Cockburn C.J. in *Reg.* v. *Keyn*, L.R. 2 Ex.D. 63, 202–203, which Lord Denning M.R. has quoted, and other judgments considered to require adoption of a rule of international law by the courts of this country and to forbid the adoption of a new rule at variance with or developed from a rule already adopted by the courts of this country. One such judgment is that of the Queen's Bench Division, Lord Alverstone C.J., Wills and Kennedy JJ., in *West Rand Central Gold Mining Co. Ltd.* v. *The King* [1905] 2 K.B. 391 in which Lord Alverstone C.J. said, at pp. 406–408:

> "The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration: 'What, then, is international law? I know no better definition of it than that it is the sum of the rules or

usages which civilised states have agreed shall be binding upon them in their dealings with one another.' In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term 'international law' is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of his proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants: for instance, *Barbuit's Case*, Forr. 280, *Triquet* v. *Bath*, 3 Burr. 1478 and *Heathfield* v. *Chilton*, 4 Burr. 2016, are cases in which the courts of law have recognised and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognised rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and a fortiori if they are contrary to the principles of her laws as declared by her courts."

I have quoted this passage in its full extent because it suggests that the differences between the two schools of thought are more apparent than real: which I think is the view of Professor Brownlie in his *Principles of Public International Law*, 2nd ed. (1973), pp. 44–59 for which I am indebted to Mr. O'Connell, junior counsel for Trendtex; for it is the nature of international law and the special problem of ascertaining it which create the difficulty in the way of adopting, or incorporating, or recognising as already incorporated, a new rule of international law. I would find less difficulty in accepting restrictive immunity, Lord Denning M.R.'s fourth exception in *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W.L.R. 1485, 1491, in place of absolute immunity if restrictive immunity were as generally accepted today as absolute immunity was in the pa)—and that may not have been as universally accepted as I have assumed. But rules of international law, whether they be part of our law or a source of our law, must be in some sense "proved," and they are not proved in English courts by expert evidence like foreign law: they are "proved" by taking judicial notice of "international treaties and conventions, authoritative text books, practice and judicial decisions" of other courts in other countries which show that they have "attained the position of general acceptance by civilised nations": *The Cristina* [1938] A.C. 485, 497, *per* Lord Macmillan: and those sources come seldom if ever from every civilised nation or agree upon a universal rule; they move from one generally accepted rule towards another. But if none moved, old rules would never die and new rules never come into being. Some move must be made by states, or their tribunals, or jurists, to prevent petrifaction of the living law. When should a court of law accept or adopt or incorporate or assent to what is alleged to be a new rule of international conduct? Can an English court ever make the first move in this country? Or must it wait for a "Tate letter" from the Government of the United Kingdom? Or for an Act of Parliament? If one asks the questions indicated by the judgment in *West Rand Central Gold Mining Co. Ltd.* v. *The King* [1905] 2 K.B. 391 the answers do not give Trendtex much help. Have civilised states

agreed that the doctrine of restrictive immunity shall be binding upon them in their dealings with one another? The answer is doubtful; many have. Is there evidence that Great Britain has ever assented to the doctrine? The answer must be no—until she ratifies the European Convention on State Immunity which she signed at Basle on May 16, 1972, and perhaps also the Brussels Convention of 1926. Has it been proved by satisfactory evidence that the doctrine has been recognised and acted upon by our own country? No. Or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it? The answer to that might be yes; the Government of Nigeria has not repudiated the doctrine by instructing the bank to plead immunity for what it alleges to be an act done jure imperii, but it is a bold claim that no civilised state would repudiate the application of the restrictive doctrine to actions in personam, and inconsistent with the opinion of the Privy Council to which Lord Denning M.R. has referred, that the House of Lords is unlikely to apply it to them: *The Philippine Admiral* [1976] 2 W.L.R. 214, 233. Have the opinions of jurists received the express sanction of international agreement, or have they grown to be part of international law by their frequent practical recognition in dealings between various nations? On all the material put before us I could not answer that question in the affirmative. It is clearly difficult if not impossible to prove that governments have acted on the "rule" of restrictive immunity by failing to plead immunity for ordinary commercial transactions. How do you prove that the gestation of a new rule is over and that it has come to birth? Or that an old rule has grown and developed into a new form?

It is part of Mr. Bingham's case that a vacuum may have been created in the law of nations by the dissent of many from the old rule, but that the vacuum has not been filled by any agreed new rule. Even if the law of nations does not abhor a vacuum, it is entirely unsatisfactory that the courts of this country should not lift a finger to help fill it by a new rule which is "consonant with justice." In my judgment this new rule is consonant with justice. It is in accord with the law merchant which requires that payments on letters of credit should be honoured. It is now so widely and generally accepted that no civilised country which has not yet expressly assented to it should be presumed to repudiate it. It would be repugnant to justice if an English court were to repudiate it in modern conditions and so in effect extend the old rule of immunity to transactions which were never considered subject to it by former judges and jurists because such transactions would never in their time have been carried out by sovereign states or their emanations.

We ought therefore to keep in step, if we can, with the Supreme Court of the United States of America in *Alfred Dunhill of London Inc.* v. *Republic of Cuba* and the German courts in their decisions in *Youssef M. Nada Establishment* v. *Bank of Nigeria.*

We should also keep in step with the courts of the other countries who have signed the Treaty of Rome. Article 3 (*h*) is primarily directed to such economic questions as distortion by competition, as articles 100–102 show. But it lays down a general idea of approximation or "rapprochement" or "Angleichung"; that is "harmonisation" to be "undertaken by member states of the Council of Europe in the legal field" (see the preamble to the Basle Convention of 1972 cited in *The Philippine Admiral* [1976] 2 W.L.R. 214, 231F–H) which ought to result in the courts of all the European Economic Community countries coming as close to each

A other as possible in their decisions, the law which they apply and their application of it. If the courts of the European Economic Community countries were out of step with other countries in the international law which they recognised and applied, there might be a conflict. Here there is none—but a getting as nearly into line with them as possible. I am therefore of opinion that in so far as the Treaty of Rome has any effect upon the power or duty of our courts to adopt the rule of restrictive B immunity, it tends to reinforce the argument that they have that power and duty.

Has this court the power to do what Trendtex asks and to reject the bank's plea of sovereign immunity by applying the sufficiently accepted rule of restrictive immunity? Having overcome the first difficulty in Trendtex's way I am confronted with a barrier which prevents me, with C diffidence and regret, from agreeing with Lord Denning M.R. that we can defeat the plea by applying his fourth exception in the *Thai-Europe Tapioca Service Ltd.* case [1975] 1 W.L.R. 1485, 1491, even if the bank is not an arm of the Nigerian State. That barrier is the decision of the majority of this court in that case. That decision was unanimous in rejecting the plea of sovereign immunity. Lord Denning M.R.'s statement of the fourth exception was obiter, because it was held not to apply to D the facts of the case. But both the other members of the court, Lawton and Scarman L.JJ., rejected the exception and refused to base their decisions that the plea must be rejected on the ground that the transaction sued on was not an actum jure imperii. They decided the case on the ground that it was outside the territorial jurisdiction of the English courts, but the "fascinating" and "erudite" argument of counsel for the plaintiffs E invited a decision on the question whether the Pakistan Government could rely on sovereign immunity for trading activities of the corporation for which it was substituted as defendant and whether the commercial nature of the transaction brought it within an exception to the rule of immunity: [1975] 1 W.L.R. 1485, 1488B, 1490D, 1492H, 1494H. Lawton and Scarman L.JJ. each rejected that argument on the ground that the doctrine of stare decisis applied to a rule of international law and the rule of absolute F immunity had been incorporated into our municipal law by decisions binding on this court (pp. 1493, 1495). Even if their reasoning or conclusion were wrong—and they seem to follow the opinions of all three members of this court in *Reg.* v. *Secretary of State for the Home Department, Ex parte Thakrar* [1974] Q.B. 684—they clearly decided, by no means per incuriam, that it was not open to them to accept the rule of G restrictive immunity, and the ratio of that decision of theirs was that this court is bound by previous decisions as to what international law is to hold that it is the same until altered by the House of Lords or the legislature; and that this court is bound by previous decisions to hold that absolute sovereign immunity is a rule of international law until the House of Lords or the legislature declares that it is so no longer.

H Neither has done so. The Judicial Committee of the Privy Council has in *The Philippine Admiral* [1976] 2 W.L.R. 214 cleared the way forward by restricting the immunity for actions in rem, but has discouraged any advance towards restricting the immunity for actions in personam. The recent American and German decisions already cited may encourage the legislature or the executive or the House of Lords to recognise and adopt the new development of the old doctrine. But meanwhile I must stand loyally but reluctantly on the old doctrine and the old decisions.

I therefore prefer to rest my decision in this case on the ground that the bank is not an emanation, arm, alter ego or department of the State of Nigeria.

On the issue of waiver or estoppel no point arises for our decision in this court.

On what the judge called the property issue I feel more doubt than the other members of this court. In the action Trendtex claims damages for breach of undertakings under the letter of credit and for repudiation of obligations under the letter of credit. It is not a claim to the moneys in a bank account like the claim in *Rahimtoola* v. *Nizam of Hyderabad* [1958] A.C. 379. But the injunctions order that assets held by the bank be retained within the jurisdiction and they do operate on funds in a bank account. There is uncontradicted evidence from the Acting High Commissioner supported by the evidence of the Governor of the Central Bank of Nigeria that all the assets held by the bank to which the injunctions relate are part of the external reserves of Nigeria and are the property of the Federal Government. The Acting High Commissioner clearly lays a claim to those assets which I find it hard to regard as "illusory" or "founded on a title manifestly defective" when challenged, if at all, by nothing more than the unexplained discrepancy in the bank's balance sheet at December 31, 1974, on which Mr. Neill relied. If what was said by Viscount Jowitt in *Juan Ysmael & Co. Inc.* v. *Government of the Republic of Indonesia* [1955] A.C. 72, 89 is to be applied, I would agree with the judge and discharge the injunctions. But the Acting High Commissioner may have been influenced by his opinion that the bank was a department of state. Furthermore the German courts refused to release the bank's assets held by the Deutsche Bank in Frankfurt, on what evidence is not clear but apparently because they rejected the plea of sovereign immunity in respect of similar "non-sovereign activity." In *Ulen's* case, 24 N.Y.S. 2d 201, 207 the same view appears to have been taken of funds claimed to be part of the public debt of Poland. I do not therefore dissent from Lord Denning M.R.'s opinion on this point that it depends on precisely the same grounds as those considered earlier and that we should continue the injunctions.

For these reasons I concur in allowing the appeal.

SHAW L.J. The cardinal question is whether the Central Bank is properly to be regarded as a department of the Government of Nigeria in the guise of a bank, or whether it is in truth a bank to which the execution of specific aspects of government control of finance has been delegated. In the first case the Central Bank may be entitled to immunity from suit in the courts of this country; in the second case it can claim no such immunity. There can be no intermediate hybrid status occupied by the bank wherein it is to be regarded as a government department for certain purposes and as an ordinary commercial or financial institution for different purposes. It must be one or the other and counsel for the bank did not contend otherwise. The burden of his submission was that the bank was subordinated to and subservient of the Federal Government to such a degree that it was a mere instrument of that government and was therefore to be identified with it. The opposing argument was that the Central Bank was constituted as a bank and that the functions assigned to it in relation to the economic and financial affairs of the Nigerian State did not have the result of changing its fundamental character. There is much

A to be said for each of these views and indeed much was most admirably said in the presentation of the case for the respective parties.

The proposition that what is on its face a financial institution with the descriptive title of "Central Bank of Nigeria" is a mere government bureau obviously calls for stringent scrutiny. Its acceptance may, and in the present case will, result in serious and substantial detriment to the material interests of others. While this consideration cannot of itself B determine whether the proposition is valid or fallacious it serves to sound a note of caution against a too facile attribution of sovereign immunity; the more so because in these times, as Lord Denning M.R. has pointed out the encroachment of government upon many forms of activity not traditionally within its sphere grows ever more extensive.

Whether a particular organisation is to be accorded the status of a C department of government or not must depend on its constitution, its powers and duties and its activities. These are the basic factors to be considered. The view of the government concerned must be taken into account but is not of itself decisive (*Krajina* v. *Tass Agency* [1949] 2 All E.R. 274); it does not relieve a court before which the issue of sovereign immunity arises of the responsibility of examining all the relevant circumstances. So far as authority throws light on the problem, the law has been D comprehensively reviewed in the respective judgments of Lord Denning M.R. and Stephenson L.J. There is nothing to be added to their exposition. Earlier instances of the problem and of its solution may offer guidance but cannot answer the particular case. I propose only to indicate what are the features which lead me to the conclusion that the Central Bank of Nigeria ought not to be accorded the status of a department of the govern- E ment of that country. It is, in the first place, a statutory corporation whose personality, powers and legal attributes are determined by the Central Bank of Nigeria Act 1958 and the amending enactments which followed. The totality of that legislation represents the intention and objectives of those who created and moulded it for the performance of its contemplated functions. If it was designed as a department of state, many titles indicative of that status come readily to mind. What was conferred F upon it was the title of a bank. Nowhere in that legislation is it called anything but a bank; and not a "Federal" or "National" or "State" bank but a "Central" bank. The 52 sections of the principal Act and the several amending orders and enactments contain no direct indication that the bank is a department of the government and there are many indications which deny it that status. The very name has a commercial G ring. Its powers do not identify it with the government and in some respects preclude identification with the government. For example by section 18 it is provided:

> "the bank shall have the sole right of issuing notes . . . throughout Nigeria and neither the Federal Government nor any state government shall issue currency notes."

H This is an instance of explicit differentiation between the role and status of the bank on the one hand and of the government on the other. Again by section 4 it is declared that a principal object of the bank is "to act as banker and financial adviser to the Federal Government." This in my view must envisage the bank's function in this regard as independent of and external to the immediate realm of government. It would have been simple enough for the Act to have made it a principal object of the bank to discharge the functions of the department of commerce and finance

in matters assigned to it; but this is not what it does. When therefore section 4 goes on to provide that another principal object of the bank is to issue legal currency and to safeguard the internal value of that currency it does not simply because the subject matter is a function of government thereby confer on the bank a governmental status. It merely delegates that function to the bank as its agent in that regard; and in its capacity of agent the bank is subject to a very tight control. Again while power is conferred on the bank to change the parity of the Nigerian pound it can exercise that power only with the approval of the Federal Executive Council.

These are hardly indications of executive power having been vested in the bank. Rather do they exhibit the bank as having only the status of an agent for the government in certain matters. There are other similar indications in the Central Bank of Nigeria Act 1958 which in my opinion reinforce the view that the bank has a status outside the government and separate from it.

Apart from these matters there is an important practical consideration. A consequence of the doctrine of immunity is that in protecting sovereign bodies from the indignities and disadvantages of adverse judicial process, it operates to deprive other persons of the benefits and advantages of that process in relation to rights which they possess and which would otherwise be susceptible of enforcement. Those who contemplate entering into transactions with bodies which may be in a position to claim sovereign immunity are entitled at least to the opportunity of assessing any special risk which may arise. How can they know that such a risk lurks in dealing with a body which assumes a guise and bears a title appropriate to a commercial or financial institution? Readily recognisable individual sovereigns are now rare. Departments of state are impersonal and faceless. Institutions which share in the government of a state carry no visible hallmark of sovereign status. The least that the interests of justice require is that the intention to invest an institution which is not manifestly part of government with the status of government should be declared and overt. There is no rule of law which demands this; but where the issue of status trembles on a fine edge, the absence of any positive indication that the body in question was intended to possess sovereign status and its attendant privileges must perforce militate against the view that it enjoys that status or is entitled to those privileges. This is especially the case where the opportunity to define the status of the institution concerned in clear and express terms has existed from the very inception, or indeed conception, of that institution—as in this case.

The evidence before Donaldson J. below included the affidavit of Mr. Adamu Ciroma who is the governor of the bank. His evidence was directed principally to the issue of a title to the assets held by the bank in this country. It is of interest to note that he repeatedly refers to the bank in one connection or another, as "the agent of the government." When he mentions instances of the bank's delegated powers in relation to public affairs he does not omit to lay emphasis on the overriding control and supervision of those matters by the Federal Executive Council. So also Professor Nwabueze in an affidavit which was not before Donaldson J. develops the same theme. He avers that "the control of the bank by the Federal Military Government, Federal Executive Council and Federal Commission for Finance is nearly complete." He asserts that

A the bank "is an agency or arm of the government" and adds that "its status cannot be determined simply by reference to English institutions and legal concepts." Now it is true that the constitution and powers of a Nigerian corporation must be viewed in the light of the domestic law of Nigeria. But its status in the international scene falls to be decided by the law of the country in which an issue as to its status is raised. In
B civilised states that law will derive from those principles of international law which have been generally accepted among such states. As I understand the tenor of Professor Nwabueze's affidavit he suggests that the bank was under the thumb of the military government and its executive councils. It is clear enough that the bank was the subserving agent of the government in a variety of activities but this is not in my judgment adequate to constitute it as an organ or department of government. I
C cannot find in the constitution of the bank or in the functions it performs or in the activities it pursues or in all those matters looked at together any compelling or indeed satisfactory basis for the conclusion that it is so related to the Government of Nigeria as to form part of it. Accordingly I would hold that the bank is not entitled to the immunity which it claims.

D If this view is wrong there still exists a further obstacle which the bank has to overcome before it can claim to be entitled to immunity from suit in respect of the proceedings instituted by Trendtex.

There has been put before the court a wealth of material comprising decisions of foreign courts and the writings of international jurists which tends to show that over the last half-century there has been a shift from the concept of absolute immunity to a narrower principle which excludes
E ordinary mercantile transactions from the ambit of sovereign immunity notwithstanding the sovereign status of a party to those transactions.

Here again I can add nothing to Lord Denning M.R.'s and Stephenson L.J.'s recapitulation and analysis of the impressive body of international authority. I am content to say that it convinces me that the preponderant contemporary rule of international law supports the prin-
F ciple of qualified or restrictive immunity which takes account not only of the sovereign status of a party but also of the nature of the transaction in respect of which the issue of immunity arises. If the English courts are free to apply this current concept to the present proceedings the inescapable result would be that even if the bank were held to be a government department this status would not avail to confer upon it immunity from suit in respect of their subject matter.

G The question does, however, arise as to whether this court is free to fall into line with and to follow this modified concept even if it be the case that it has achieved such substantial acceptance as to be recognised as the operative rule of international law.

It is perhaps right to consider first whether the narrower principle is in better conformity with contemporary international relationships
H than the doctrine of absolute immunity. It seems undeniable that it is. So long as sovereign institutions confined themselves to what may in general terms be described as the basic functions of government a total personal or individual immunity from suit was unobjectionable since the area in which it operated had its own inherent limits. The comity of nations was aided by such a doctrine confined as it was, broadly speaking, to acts which could be properly described as an exercise of sovereign power. The radical changes in political and economic and sociological

concepts since the first world war have falsified the very foundations of the old doctrine of sovereign immunity. Governments everywhere engage in activities which although incidental in one way or another to the business of government are in themselves essentially commercial in their nature. To apply a universal doctrine of sovereign immunity to such activities is more likely to disserve than to conserve the comity of nations on the preservation of which the doctrine is founded. It is no longer necessary or desirable that what are truly matters of trading rather than of sovereignty should be hedged about with special exonerations and fenced off from the processes of the law by the attribution of a perverse and inappropriate notion of sovereign dignity.

In the conditions of international relations which now prevail the restrictive principle which has emerged is manifestly in better accord with practical good sense and with justice. This is indeed the motive force which has brought about its establishment in place of the old rule. Can this court not merely recognise the new principle but also adopt and apply it?

Lord Denning M.R. has given an affirmative answer to this question. Stephenson L.J. considers that this court is precluded from giving effect to the new principle. I am in agreement with the view expressed by Lord Denning M.R. for reasons I shall endeavour to explain.

The grounds upon which Stephenson L.J. bases his judgment in this regard is that as long ago as 1880 in *The Parlement Belge*, 5 P.D. 197 this court held that the absolute doctrine of sovereign immunity was the recognised and accepted principle of international law and that it was accordingly to be adopted so as to form part of the law of England; and it has remained ever since so that the decision continues to bind this court. Thus runs the argument. It is important, however, to recall that in giving the judgment of the court in that case Brett L.J. said, at p. 205:

> "The . . . question really raises this, whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign. *Whether it is so or not depends upon whether all nations have agreed that it shall be, or . . . whether it is so by the law of nations.*"

This last passage seems to me to make it plain that what is to be adopted into English law and applied in the English courts is the current principle in regard to which "nations have agreed that it should be so by the law of nations." If those words of Brett L.J. were spoken for the first time today in relation to the issue of sovereign immunity they would result in the adoption and application of the restrictive principle contended for by Trendtex.

However, the argument continues in this way. When once a rule of international law has been recognised and adopted and applied by an English court a transformation of the English law is brought about whereby the adopted rule becomes part of the corpus of English law. Thenceforth it cannot be changed save by a decision of a higher court than that which first applied it or else by legislation. This was the view expressed by a majority of the Court of Appeal in *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan* [1975] 1 W.L.R. 1485. Lord Denning M.R., who on this point differed from Lawton and Scarman L.JJ., enunciated at pp. 1490–1491 four exceptions to the principle of

A sovereign immunity which he suggested were recognised or were becoming recognised. The fourth of those exceptions was that, and I quote from his judgment, at p. 1491:

> "a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts."

B Lawton L.J. demurred. He did not agree that such innovations were tenable or could derogate from the established rule as to absolute sovereign immunity. He said, at p. 1493:

> "It was submitted on behalf of the plaintiffs that since 1924 the views of jurists all over the world about the immunity of sovereign states which engage in trade have changed; and that in many parts
> C of the world courts have decided that states engaging in trade should lose their sovereign immunity when so doing. We have to concern ourselves *with the law of this country.* It may be that at some future date the House of Lords will consider the three cases to which I have referred . . . it is most important that rules of this kind should not be altered save by the appropriate judicial or legislative
> D body."

The three cases of which Lawton L.J. was speaking were *The Parlement Belge*, 5 P.D. 197; *The Porto Alexandre* [1920] P. 30 and the *Compania Mercantil Argentina* v. *United States Shipping Board* (1924) 131 L.T. 388. All three were decisions of the Court of Appeal in which the principle of absolute immunity was recognised and applied. Scarman L.J. agreed with
E Lawton L.J. He said, at p. 1493: "In my opinion we are precluded by authority from accepting the submission made to this court on behalf of the plaintiff shipowners" and he went on to say, at p. 1495, that it had been submitted:

> "that we should take account of the developing consensus of juristic and judicial opinion all over the world in favour of what may briefly
> F be called the commercial exception to the absolute character of the doctrine of sovereign immunity. I do not think myself it is open to this court *to go further than the journey already taken in the House of Lords and the Court of Appeal . . . a rule of international law, once incorporated into our law by decisions of a competent court, is not an inference of fact but a rule of law. It therefore becomes a part of our municipal law and the doctrine of stare decisis applies.*"

G

The question underlying the difference of opinion was not material to the ultimate decision of that appeal; but the views thus expressed by Lawton and Scarman L.JJ. must command respectful attention. It is with diffidence that I venture to suggest that there may be a flaw in the reasoning which led to their conclusion as to the application of the principle of stare decisis. If it were correct that once a rule of international law has
H been duly recognised and properly applied by an English court it is thereafter an integral and permanent part of English law then no court could afterwards change it. Perhaps not even the House of Lords, on the assumption that the original application of the principle was right and in any case not until an appeal was carried there; and this would remain the position whatever alterations of the international rule might come about. The principle originally applied might not be amenable to review or revision save by the legislature. The rule enshrined in *The*

Parlement Belge, 5 P.D. 197 might survive inviolable in English jurisprudence even if discarded and discredited everywhere else in the world, unless and until Parliament intervened. The strange result would follow that eventually current international law would have to be introduced into English law by statute unless the opportunity to apply it became available to the House of Lords.

This reductio ad absurdum carries the suggestion that there must be a flaw in the argument which leads to the incidence of stare decisis. May it not be that the true principle as to the application of international law is that the English courts must at any given time discover what the prevailing international rule is and apply that rule? This is not the same process as applying foreign law in our courts for that only comes into question when for a particular reason the proper law relating to the matter before the court is that foreign law. In the case of international law it is always part of the law to be applied irrespective of any intention or agreement of the parties in suit. This, so it seems to me, is the true distinction and not that the one is immutable as a rule of law while the other is always subject to investigation as a question of fact.

What *is* immutable is the principle of English law that the law of nations (not what *was* the law of nations) must be applied in the courts of England. The rule of stare decisis operates to preclude a court from overriding a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule. The judgment in *The Parlement Belge*, 5 P.D. 197 cannot be a binding authority as to what form the doctrine of sovereign immunity would take a century after the judgment was delivered. As Brett L.J. said, at p. 205: "it depends upon whether all nations have agreed." When they have agreed to a different effect the old rule loses its validity. It is supplanted in international law (and therefore also in English law of which it forms a part) by the new rule which derives its force from, and only from, that agreement of which Brett L.J. spoke.

This view would appear to be in accord with the dictum of Lord Mansfield C.J. in *Heathfield* v. *Chilton*, 4 Burr. 2016, that "the law of nations will be carried as far in England as anywhere." So also Lord Lyndhurst in 1853, "The law of nations according to the decisions of our greatest judges is part of the law of England." This is hardly consonant with the idea that what was the law of nations persists as part of English law when it has ceased to be part of international law.

Lawton L.J. expressed concern as to the possible prejudice which might result to those engaged in international trade if changes in international law brought about ipso facto corresponding changes in the law of England. But even the law of England changes quite apart from what may be happening to international law. Moreover, changes in rules of international law do not come about abruptly; and changes will not be recognised in an English court without convincing support. Those engaged in world commerce will not be insensible to the incidence of such changes over the years. Lastly there must be a greater risk of confusion if precepts discarded outside England by a majority (or perhaps all) of civilised states are preserved as effective in the English courts in a sort of judicial aspic. I would adopt what Lord Denning M.R. said, ante, p. 365H, namely that "international law knows no rule of stare decisis." I would

A add that this remains the case even when a particular aspect of international law is being looked at as part of the law of England.

In my judgment, therefore, even if the Central Bank of Nigeria is part of the government of that country, it is not immune from suit in respect of the subject matter of the present action. In coming to this conclusion I should make it clear that I regard the intrinsic nature of a transaction rather than its object as the material consideration in determining whether B entering into that transaction is a commercial activity or an exercise of sovereign authority.

There remains the issue as to the injunction. Mr. Ciroma's evidence is to the effect that all funds held by the bank within the jurisdiction of the English courts belong to the Nigerian Government. If the bank is to be regarded as part of that government yet not immune from suit (and a C fortiori if it is not so regarded) it is a reasonable corollary that those funds should be preserved within the jurisdiction so long as there is a possibility that the action may survive and succeed. I am much encouraged to this view by the brash intimation given to Trendtex in Lagos in October 1975 that they would not receive any payment. I would continue the injunction, and I would allow the appeal.

D

Appeal allowed with costs in Court of Appeal and below with a certificate for three counsel.
Application of bank dismissed.
Leave to appeal.
Injunction extended to cover amount in issue and past and future costs.

E

Solicitors: *Theodore Goddard & Co.; Hedleys, Botterell, Roche & Temperley.*

A. H. B.

F

G

This page will be re-issued in the next part.

H

EXHIBIT G TO HOENIGER AFFIDAVIT - DECISION IN NADA v. CENTRAL BANK OF NIGERIA, DISTRICT COURT (LANDGERICHT) OF FRANKFURT/MAIN, WEST GERMANY, DATED AUGUST 25, 1976

PJ-16

Translation of the official and complete transcript of the Frankfurt/M. District Court's judgement of 25th August 1976 in the matter Youssef M. Nada Establishment v. Central Bank of Nigeria (File No. 3/8 O 14/76)

District Court Frankfurt/M.
File No. 3/8 O 14/76

Announced on 25th August 1976
signed Naundorf
as Court's clerk

Judgement with reservation

IN THE NAME OF THE PEOPLE

in the matter Youssef M. Nada Establishment .....

v.

Central Bank of Nigeria .....

the District Court - its Chamber for Commercial Matters - in Frankfurt am Main has
by its presiding judge at the District Court Drüeke and the lay judges Melber and Dr. Koch decided on the basis of the oral hearing of 7th July, 1976 as follows:

The defendant is adjudged to pay to the plaintiff
12.692.559,15 US-Dollars plus 5 % interest from
1.008.172,83 US-Dollars from 30th September, 1975, from further
2.117.578,79 US-Dollars from 29th October, 1975, from further
5.560.253,36 US-Dollars from 23rd January 1976, from further
958.689,58 US-Dollars from 15th March, 1976 and from further
2.047.864,59 US-Dollars from 2nd June, 1976.

For the remaining part the claim is dismissed.

The defendant has to pay the costs for the proceedings.

20 - p.2

It is reserved for the defendant to claim its rights in the subsequent action.

The judgement is provisionally executable.
The defendant may, however, stay execution by putting up security in the amount of 13.100.000,- US-Dollars and the amount of 475.000,- DM which may be provided also by an irrevocable guarantee of Deutsche Bank AG unless the plaintiff puts up security in the same amount.

Facts

On February 12th, 1975, the Ministry of Defence of the Republic of Nigeria entered into a written agreement with "Youssef M. Nada, Asat Trust Reg., 8 Obera House, Altenbachstr. 534, Vaduz/Liechtenstein" covering the supply of 240,000 tons of cement to Nigeria, at the price of US $ 59.95 per ton, i.e. at a total price of US $ 14,388,000 plus demurrage costs. On March 11th, 1975, the defendant opened, in favour of the above seller, an irrevocable documentary letter of credit, which should be payable at the plaintiff's bank, Creditanstalt-Bankverein, Vienna. At the end of the letter of credit reference is made to the Uniform Rules and Usage for Documentary Letters of Credit in the 1962 Revision (brochure 222 of the International Chamber of Commerce). An enclosure to the L/C says that, in addition to the purchase price stated, demurrages "without any limit" are to be paid against presentation of the specified documents - charter parties, time sheets issued by the beneficiary and copies of the beneficiary's cable to the Ministry of Defence stating the expected time of arrival of the respective ship.
In conformity with the purchase agreement of February 12th, 1975, made out in the English language, and the translation presented to the court by the plaintiff, it says:

Text of paragraph (1 IX).

20 p

The defendant's accompanying letter of March 11th, 1975, to the Deutsche Bank Ag in Frankfurt/Main says:

> "In consideration of your opening the credit, please debit our account and advise accordingly with the amounts of payment effected thereunder with your commission and charges on receipt of relevant documents."

By letter of March 25th, 1975, the Deutsche Bank advised the defendant that the equivalent of each L/C amount would be debited the the defendant's DM account with the Deutsche Bank. By the defendant's letter of April 14th, 1975, to the Deutsche Bank the L/C conditions were altered to the effect that also part-payments for demurrage should be allowed against presentation of the time sheets issued by "Nada". By letter of April 23rd, 1975, the Deutsche Bank notified to "Nada" that the L/C was payable in Frankfurt/Main until October 26th, 1976, and by letter of June 6th, 1975, the Deutsche Bank informed "Nada" of the fact that they were authorized to pay on presentation of the documents required under the L/C. In each of the above letters of the defendant and the Deutsche Bank the respective addresses, indicated in the purchase agreement and in the L/C of March 11th, 1975 for the seller and the beneficiary, were used. In the following period, the L/C was performed in such way that the plaintiff endorsed the documents to the Creditanstalt, which forwarded them to the Deutsche Bank, Frankfurt/Main, and the Deutsche Bank checked the

documents and arranged for the remittance of the respective amounts by the European-American Bank, Bank and Trust Company, New York, to the Creditanstalt. By means of 17 ships, which arrived at Lagos in the period between April 27th and September 1st, 1975, the plaintiff supplied nearly 140,000 tons of cement. The purchase price for this part delivery was paid against presentation of the documents. Moreover, the demurrage costs of US $ 4,100 per day and ship, charged by the plaintiff for the period until September 10th, 1975, were paid against presentation of the time sheets issued by the plaintiff by 5 remittances totalling US $ 4,788,3[illegible].74 in the period between August 6th and September 19th, 1975.

Because of a congestion of the Lagos port, which had increased meanwhile, the Nigerian Ministry of Transport issued on August 9th, 1975, regulations, according to which suppliers and/or freighters were to inform Nigerian port authorities at least two months in advance of the sailing of ships to Nigeria by giving numerous details, and port authorities were to authorize the shipment or fix other dates. The notification says that ships of those shipping companies and agents that will not keep to these regulations will not be cleared. The regulations applied to ships which had sailed after August 18th, 1975 and/or arrived after September 18th, 1975. The plaintiff was informed about this by a telex of the Nigerian Ministry of Defence of August 26th, 1975. By letter of August 30th, 1975, the plaintiff protested against this measure, and asked for the sailing permission for at least 3 of its ships, which were just being loaded. Apart from this, the plaintiff asked the Ministry of Defence by letter of September 1st, 1975, to call upon the defendant to prolong the validity period of the L/C up to June 30th, 1977. By letter of September 2nd, 1975, and cable of September 8th, 1975, the Ministry of Defence refused the required permission

and informed the defendant to the effect that these matters would be considered, when the present agreement would be renegotiated shortly. As a result of the request for the approval for loading another nine ships, subject to the required term of two months, expressed by the plaintiff in its letter of September 4th, 1975, the chairman of the committee for the maintenance of the Lagos port notified that until further notice no shipments were allowed to be effected. On September 17th, 1975, the plaintiff received a telex of the Nigerian Ministry of Defence, which says that after September 8th, 1975, all ships loaded with cement will be denied landing and unloading, and that ships arriving after that date will be denied entrance to Nigerian territorial waters by force, if necessary.

By telex of September 23rd, 1975, the Deutsche Bank informed the Creditanstalt of the fact that the defendant had stopped demurrage payments against presentation of the specified documents, and would effect such payments only if the documents had previously been certified by the defendant. By letter of September 24th, 1975, the Deutsche Bank informed "Nada" of the fact that the defendant had altered the conditions of the L/C to the effect, that the specified documents for demurrage payments had to be certified by the defendant by written notice. The plaintiff protested against this measure by letter of September 25th, 1975, and asked to give the Deutsche Bank instructions for payment in accordance with the documentary letter of credit, by September 30th, 1975. On October 2nd, 1975, the Deutsche Bank returned the documents presented by the Creditanstalt for demurrage payments.

The plaintiff had its demurrage accounts for the period from September 11th to December 31st, 1975, in accordance with the list presented by it as enclosure 27 to the statement of claims, submitted to the Deutsche Bank by the Creditanstalt on January 12th, 1976, requesting them to pay the total amount of US $ 4,947,689.2o arrived at. By letter of January 13th, 1976, the Deutsche Bank refused payment by reason of the instructions given to them by the defendant. For the period until February 29th, 1976, the plaintiff had its accounts - according to enclosure 1 to the pleadings of March 12th, 1976 - for further demurrage costs to the amount of US $ 1,958,689.58 presented to the Deutsche Bank by the Creditanstalt on March 4th, 1976. The Deutsche Bank refused payment by letter of the same date. For the demurrage costs computed by it for the subsequent periods from March 1st to March 31st, 1976, April 1st to April 3oth, 1976 and May 1st to May 15th, 1976 - for the ships "Fos" and "Elli II", however, only until April 3oth, 1976 - to the total amount of US $ 2,o47,864.59 the plaintiff had its documents sent to the Deutsche Bank by letters of April 27th, May 7th and May 2oth, 1976 through the Creditanstalt; the Deutsche Bank refused payment by letters of April 29th, May 1oth and May 24th, 1976.

Upon the plaintiff's application, the attachment of the defendant's assets was ordered by decree of October 21st, 1975, because of a claim to the amount of US $ 15,119,ooo plus 5 % interest since October 1st, 1975, and a lump sum for costs of DM 33o,ooo. Upon the defendant's objection, the decree was confirmed by the judgment of the Chamber of December 12th, 1975, because and to the amount of a claim of the plaintiff of US $ 12,573,2o8 plus 5 % interest since October 1st, 1975 and a lump sum for costs of DM 265,ooo and dismissed for the remaining part.

In the trial by records the plaintiff applies for the defendant being adjudged to pay the demurrages computed by the plaintiff for the period until May 15th, 1976 - for the ships "Fos" and "Elli II", however, only until April 3oth, 1976 - to the amount of US $ 8,954,243.37 and damages to the amount of US $ 938,63o and US $ 2,835,ooo.

The plaintiff has stated that on November 5th, 1975 it succeeded in making an amicable settlement with the owner of the ships "Nikolaous A", "Eleni A", "Dalia A", "Alekakos" and "Marina", Messrs. Capt. Garassimos A. Agoudimos, Piraeus, Greece, on the dead freight to be paid by it for the ships, which had been chartered by it, but which were no more loaded with cement, because of the defendant's refusal to pay. The plaintiff committed itself to pay the amount of US $ 938,63o and paid this amount to the shipowner in accordance with the agreement of November 5th, 1975. Moreover it succeeded, according to its statement, in making a contract with Iksir Holding Company Ltd., Chiasso, on the sale of the 1oo,ooo t of cement not supplied to Lagos, on November 1oth, 1975. The contract provided for a price of US $ 3o per ton for 6o,oco tons of cement to be supplied to Tripolis, and a price of US $ 34 per ton for 4o,ooo tons to be supplied to Jeddah. Consequently, the total price of the hedging sale amounted to only US $ 3,16o,ooo, instead of US $ 5,995,ooo according to the price of US $ 59.95 agreed with the Nigerian Ministry of Defence, so that in so far the plaintiff suffered - as it states - a loss of US $ 2,835,ooo. It only saved insurance premiums to the amount of US $ 35,314.22 for the shipments to Tripolis and Jeddah, which were covered by the purchaser in the framework of the contract of November 1oth, 1975.

The plaintiff is of the opinion that the defendant is subject to German jurisdiction, because it is a legally independent organisation, and the claims raised against it have not resulted from a sovereign act, but from the opening of a documentary L/C under private law, in the framework of the banking business. According to the plaintiff's opinion the court appealed to is competent, because the defendant holds assets in the district of the court. The legal relationship between the plaintiff and the defendant is governed by the law prevailing at the place of payment of Frankfurt/Main, that means German law. As a party to the supply agreement and as beneficiary of the L/C the plaintiff is, as it says, the creditor of the payment claims from its own rights. If and as far as in the papers not the form of the business but "Youssef M. Nada" or "Messrs. Youssef M. Nada" is stated, these are abbreviations referring to it. Otherwise it would have become creditor by virtue of the assignment by Nada of October 2oth, 1975, which is admissible under the prevailing UR (1962 revision). According to the plaintiff's opinion the defendant owes the agreed demurrage to the amount of US $ 4,1oo per day and ship, as paid until September 1oth, 1975. Moreover, it is liable to pay damages, because it has refused to meet its contractual obligations under the L/C and as a result it -the plaintiff- has suffered the loss claimed.

The plaintiff applies for

the defendant beeing adjudged to pay to the plaintiff US $ 12,727,873.37 plus 5% interest p.a. from

US $ 1,oo8,172.83 since September 2oth, 1975
US $ 2,117,578.79 since October 29th, 1975
US $ 5,6o5,567.68 since pendency (23-1-76)
US $ 1,958,689.58 since pendency (15-3-76)
US $ 2,o47,864.59 since pendency (2-6-76),

the defendant's application beeing dismissed pursuant to section 713 para 2 Civil Procedure Law,
as makeshift,
the defendant beeing permitted to put up security before execution.

The defendant has raised beforehand the objections of the want of inland jurisdiction and competence of the court.

It applies for
the action beeing dismissed,
as makeshift,
the defendant beeing reserved the right to claim its rights in the subsequent proceedings, and execution under a provisional judgement beeing provisionally stayed up to the final decision in the subsequent proceedings against a security, which may also be provided by an absolute guarantee of the Deutsche Bank AG Frankfurt/Main.

The defendant pleads as follows: The defendant is not subject to Germann jurisdiction, because the general rule of immunity applies to the defendant as foreign government organ. In the present case there is no inland relation, so that the view taken formerly by the Supreme Court of the Reich, according to which a state is entitled to unlimited immunity, is applicable. Also the London High Court of Justice has decided to this effect in the judgment on a parallel case of March 26th,1976, a copy of which has been presented. Apart from this, the defendant refers to Canaris' legal expert opinion of November 16th, 1975, presented in the attachment proceedings, and to the statements of Mertens in AG 1976,49 ss.

The criteria on which the decision of the Federal Constitutional Court (E 16, 27 ss.) is based, which are inland relation, no problems of reciprocity, no public interest to the contrary and applicability of German law to the underlying facts, are not given in the present case. Because of the requirements and restrictions in fact and in law, to which the defendant is subject, it refers to the affidavits of Mr. Ogundere and Mr. Ijewere presented in the attachment proceedings. International competence is not given, because section 23 Civil Procedure Law is for historical, teleological and legal-policy reasons not applicable to the relationship between a foreign creditor and foreign organ exercising sovereign power. A venue of property is not founded, because execution upon its assets existing in the Federal Republic of Germany is unlawful. These assets consist partly of ommercially inv ated public funds of the Nigerian State, which are immune. The action is inadmissible in the trial by records. The plaintiff has not proved by documents that the beneficiary under the L/C, the merchant Nada, has presented the required locuments, i.e. time sheets plus data from the statements of facts, charter parties and copies of the telexes with the estimated time of arrival of the ships. The defendant disputes that the plaintiff has submitted L/C-conform documents. None of the charter parties presneted to the Deutsche Bank are the original charter parties, but charter parties which have been subsequently issued for the purpose of deceit, n order to produce the impression that demurrage costs of US $ 4,1oo per day have been agreed and are usual. It moreover disputes the genuineness of the documents

presented by the plaintiff as a proof for the alleged agreements of November 5th and 10th, 1975 and the charter parties allegedly concluded. German law is not applicable to the L/C under dispute, since the place of payment agreed upon in the underlying transaction is Vienna. Therefore, Austrian, Swiss or Nigerian law is possibly applicable. The plaintiff has no ability to sue. The contracting party of the underlying business and beneficiary of the L/C is the natural person Youssef M. Nada. The assignment of the claims by Nada to the plaintiff is not effective under the applicable German law and the applicable version of the Uniform Rules. Even if the pure payment claim under the L/C is assignable, the plaintiff could demand only simultaneous performance against presentation of the beneficiary's proper documents. As a precaution, it claims in so far a lien also against the plaintiff. The plaintiff cannot plead delay in acceptance. The Deutsche Bank has not confirmed to the plaintiff that the documents have been properly submitted. The demurrage clause of the underlying transactionincorporated in the enclosure in the L/C has founded only an obligation to pay demurrages of 41 cen per ton and day. This interpretation of the clause is not in contradiction to the previous correspondence exchanged between the parties. In any case, there is no financial obligation exceeding the demurrages which the seller has to pay to the freighter. The amount of demurrages claimed by the plaintiff is completely unusual. The requirement to present the charter parties serves only the purpose to proof by documents the cost-s incurred by the seller. At least for the final accounts the charter party must be presented. An essential part of the statements of facts presented by the plaintiff contains wrong data. Although they base on the ships beeing in the roads

of Lagos/Apapa, the ship "Fos" has left the roads of Lagos/Apapa on February 1st, 1976 at the latest, "Panomeritis" on September 10th, 1975, "Kanaris" on March 19th, 1976, "Naysika" before March 31st, 1976 and "Elli II" on April 13th, 1976. According to its information the ship "Fos" has been finally unloaded on March 3rd, "Kanaris" on March 30th and "Elli II" on April 14th, 1976. It is not liable to pay damages. The L/C serves only the purpose of securing the purchase price claim. An obligation of the bank to make payment cannot arise without presentation of L/C-conform documents. Therefore, unjustified refusal to pay by the bank is only possible, when the requirement as to presentation of conform documents has been met. The plaintiff cannot have suffered a damage because of recourse for dead freight. It is not credible that already in August the plaintiff has concluded charter parties for 5 ships, although by letter of August 30th, 1975 Mr. Nada asked for sailing permission for 3 ships only and by letter of September 4th, 1975 the plaintiff asked for sailing permission for 9 ships, which were expected to arrive between November 25th, 1975 and January 5th, 1976, and finally, on October 29th, 1975, Nada executed an affidavit to the effect that he could divert a certain number of ships, but that for four 10,000 t ships he must pay dead freight to the amount of US $ 23, that, however, two of these 5 ships had not been mentioned in the correspondence. Nor is it credible that the allegedly agreed freight rate for the ships of Mr. Agoudimos is US $ 23 per ton, although Nada has not aggreed more than US $ 21 for any other ship an the market for the shipowners has been so badthat the 5 ships are said to have been in the roads for 375 days altogether. Therefore, it is completely unlikely that nevertheless the plaintiff should have paid the full freight and Agoudimos should have waived moreover any further claims, which are not obvious. The agreement of November 5th, 1975 has been made only pro forma in order to cause damage to the defendant. It disputes the genuineness of the four charter parties for the five ships of Agoudimos presented in copies. The charter party copy for the ship "Alekakos" is wrong

in its contents because it shows a tonnage of 5o6o tons, although the total tonnage of the ship is 3,912 tons only. Agoudimos' ship "Dalia A" has by no means not been employed until the end of October 1975, but has been on route with freight from September 29th to October 28th, 1975. Similarly incredible is the alleged hedging sale of November 1oth,1975. It can hardly be assumed that the prices for cement on the world market have decreased to such an extent. The freight charges for transportation to Trip-olis or Jeddah, respectively, should hardly be as high as for freight to Lagos. The agreement of demurrages of US $ 4,1oo per day in attempted accordance with the purchase agreement of February 12th, 1975 is wrong. Also the agreement of November 1oth, 1975 has only been made pro forma, in order to cause damage to the defendant. If German law, which the plaintiff quotes as basis for the claimed damages, is applicable, the plaintiff can demand a pecuniary compensation only in DM.

Regarding the further details of the parteis' pleadings concerning the substantiation of their contrary legal conceptions, reference is made -in order to complete the facts- to the parties' written pleadings including the enclosures and the records of the attachment proceedings -3/8 O 186/75-, which were subject of the oral hearing.

Pursuant to the order of May 26th, 1976, evedence was taken by interrogation under oath of the plaintiff's board member Youssef Mustafa Nada. Reference is made to the interrogation records of May 26th and June 16th, 1976.

20-A-5

Grounds of the judgment:

The action is admissible and also founded in the main.

German jurisdiction and local competence of the court are given, because for its civil act, the opening of a L/C in the framework of the banking business, the defendant does not enjoy immunity in the Federal Republic of Germany, and because pursuant to s. 23 Civil Procedure Law any action for pecuniary claims against a person not resident within the country falls within the competence of that court in the district of which that person holds assets. The Chamber substantiated this already in detail in the preceding attachment proceedings, so that we may refer to these grounds. The objections against the acceptance of jurisdiction and competence made by the defendant and the considerations of Mertens (in AG 1976,5o ss.) as well as the judgment of the London High Court of Justice of March 23rd, 1976, were not able to make the Chamber give up their legal conception, which is based on the decisions of the Federal Constitutional Court (in E 15, 25 ss. and 16, 27 ss.). The Court has not to consider nor to examine in the judgment of the legal situation between the parties of this lawsuit, whether the decision to be taken is in the public interest. What matters only in this respect is that because of the property of the defendant, which uncontestedly exists at the place of jurisdiction and which is not withdrawn from execution, in the present case the "inland relation" and thus the competence of the Court pursuant to s. 23 Civil Procedure Law are given.

Pursuant to section 592 Civil Procedure Law the action is admissible in the trial by records, because the facts, on which the advanced pecuniary claim is based, can be proved by documents, as far as this is required under these circumstances.

As beneficiary of the defendant's L/C of March 11th,1975 the plaintiff has a legal claim from its own right. Already in the attachment proceedings the Chamber stated that, considering the facts, the plaintiff, as firm of the merchant Youssef M. Nada, is the trading enterprise in the name of which its representatives had negotiated and corresponded with the Ministry of Defence of Nigeria, and that this had been recognizable also for the Ministry of Defence. The performance bond of January 17th,1975 given before the conclusion of the supply agreement shows in the letter-head the word "Establishment" and says, therefore, that the plaintiff wanted to assume the liability. The proforma invoice of December 17th,1974, the supply agreement of February 12th,1975 and correspondingly the defendant's documentary L/C of March 11th, 1975 do not show that part of the firm's name, which describes the plaintiff's legal form, but they refer to its Liechtenstein representation and express thus that the business partner and beneficiary was to be Nada's trading enterprise. Apart from this, merchants usually do business not in their own names, but on behalf and for account of their enterprises founded for that purposes. Accordingly, the plaintiff issued all "Unloading Time Sheets" and "Unloading Statements of Fact" submitted for the accounting of demurrages on its business paper and issued invoices directly to the Ministry of Defence.

The Creditanstalt-Bankverein, too, informed the plaintiff as beneficiary of the letters of the Deutsche Bank AG, by addressing their letters to the plaintiff with the addition "Establishment". If and as far as in the correspondence presented by the parties Mr. Nada is mentioned, his name or person had to be taken -as matters stand- as abbreviation or representative of the plaintiff. Apart from this, the defendant did not set forth any reason from which an interest of Mr. Nada might result not to conclude this large-scale business with the Ministry of Defence for "his" firm and to settle it through it.
Otherwise the plaintiff would be able to sue due to the precautionary assignment of any possible claims under the L/C by Mr. Nada on October 2oth, 1975. Under German law, which is applicable according to the opinions of both parties, the assignment of the pecuniary claims is admissibly after, but also before presentation of the documents, and not excluded under the UR in the applicable version of 1962. The Chamber substantiated this already in its judgment of March 17th, 1976 in a parallel attachment order (3/8 O 22o/75), so that reference may be made to this.

The pre-condition for the arisal and maturity of the claims advanced by the plaintiff for payment of the demurrages computed by it, which is presentation of L/C-conform documents, has been fulfilled. The Creditanstalt presented the documents on behalf of the beneficiary of the L/C to the Deutsche Bank. The defendant has not disputed presentation as such, but only the conformity of the documents with the L/C conditions and the conformity of their contents with the facts. But in consideration of the facts, it can be regarded as proven that the time sheets of the seller, which alone, according to the L/C conditions amended by the defendant by letter of April 14th, 1975, are required for

part-payments were submitted on the basis of data from the statement of facts. The defendant has not disputed the presentation of such time sheets by the letters of the Creditanstalt for the period from September 11th, 1975 to May 15th, 1976. In their letters the Creditanstalt specified the respective documents submitted as time sheets of beneficiaries and statements of facts and referred to the conformity with the defendant's L/C. The Deutsche Bank did not contradict to this, but explained the rejection by stating in their letters that the documents did not comply with the further conditions -unilaterally- made by the defendant. Moreover, the defendant has admitted that the plaintiff presented together with the last account for each ship unloaded meanwhile also a copy of the charter party. The plaintiff has convincingly refuted the defendant's assumption that the charter parties presented had been made up for deceit purposes because of the demurrage claims, by the reasons given by it for the issue of the charterparties, which were submitted by the letters of the Creditanstalt of September 19th and 24th, 1975, and which did not correpond to that presented later. Just as little has the defendant proved that the plaintiff's statements of facts on which the accounts are based are not correct. According to its own statement, those ships were unloaded upon the orders of the responsible Nigerian authorities, which according to the defend ant's statement had previously left the roads of Lagos/Apapa. Since apart from this the plaintiff presented also in this lawsuit the documents required under the L/C conditions and served them to the defendant, the defendant has no lien with

respect to the plaintiff's payment claim for want of "acceptance" of the documents. The plaintiff has met its obligation, the defendant has received the documents giving rise to the claim for payment of demurrages according to its L/C and is therefore not entitled to continue refusing payment.

The plaintiff's claim for payment of the demurrages computed by it on the basis of US $ 4,1oo per ship and day is also founded in terms of amount. Already in the judgment taken in the attachment proceedings the Chamber has stated that, even if the parties' letters of December18th and 19th, 1974 are drawn into consideration, the wording of the L/C cannot justify the defendant's interpretation to the effect that only 41 cents per ton were agreed. The Ministry of Defence expressed neither in their letters of December 18th and 19th 1974, nor in the agreement of February 12th, 1975, that the amount of the demurrage should depend on the size of each ship, but had offered at the beginning the amount of US $ 3,5oo per day and ship and then, upon the plaintiff's objection by letter of December 19th, 1974, that according to the 5o cents per ton shipped stated in its proforma invoice of December 17th, 1974 this amount corresponded to a tonnage of 7,ooo tons, that they asked, however, for a demurrage of US $ 5,ooo, because of the fact that presumably they would use larger ships, agreed to an amount of US $ 4,1oo, without restricting this stipulation to the effect that nevertheless only 41 cents per ton and for ships of more than 1o,ooo tons on the other hand not more than US $ 4,1oo should be payable. Therefore, the plaintiff could understand the offer of the Ministry of Defence in the sense that it should receive the lump-sum of US $ 4,1oo, irrespective of the size of

the ships, and thus the excess costs of larger ships claimed by them should be balanced. By accepting without objection the accounts made up by the plaintiff on the basis of US $ 4,1oo per ship and day and the respective vouchers of the Deutsche Bank the defendant has expressed that these documents were in conformity with the L/C. The defendant's defence is, therefore, in contradiction to the defendant's behaviour hitherto and seems to be abusive in so far. Apart from this, the plaintiff justly claimed, by referring to the jurisdiction and the literature quoted by it and the letters of other parties concerned presented by it, that normally the demurrage is freely agreed upon and is to be paid irrespective of the costs really incurred. Moreover it presented declarations of 3 banks which say that according to the international banking usage the addition "not exceeding" in an L/C is regarded as not written and that thus the full amount must be paid. Finally the plaintiff's claim is not abusive, bacause at an average size of the ships used of 8,23o tons it does not claim more than the 5o cents originally demanded per ton, and according to the presented confirmations of the owners of 1o ships it paid US $ 4,1oo per day for each ship. Therefore, it is irrelevant whether this amount is higher than the demurrages which are usually agreed -as is stated by the defendant, however disputed by the plaintiff with reference to the amount of 5o cents per ton agreed also in L/Cs of other banks which were presented by it.

The defendant's further objections as to the amount of the demurrages claimed by the plaintiff are also unfounded. According to the L/C conditions the plaintiff

can demand part-payments on the basis of the time sheets issued by it. The defendant, on the other hand, must furnish proof, if despite its obligation to pay under Art. 8 of the Uniform Rules (1962 version, vide also Zahn, Zahlung und Zahlungssicherung im Außenhandel, 5th edition, 1976, page 107) it states the documents, which in their outward make-up comply with the L/C conditions, to be incorrect without checking them for the correctness of their contents. It has, however, not furnished proof for the statement that, contrary to the later dates given by the plaintiff, the ships "Fos" and "Elli II" had been unloaded before April 30th and the ship "Kanaris" had been unloaded before May 15th, 1976, which are the dates up to which the plaintiff claims demurrages for these ships. Apart from the fact that the defendant's further statement that, in addition to the ships "Panomeritis" and "Naysika", also the ships "Kanaris" and "Elli II" had sailed off at an earlier time, is in contradiction to the unloading on March 30th or April 14th, 1976, respectively, as stated by it, it has not disputed that by order of the Nigerian port authorities several ships had to make for other ports. The plaintiff has refuted the defendant's statement that the ship "Naysika" has left the roads without order, by presenting a publication of the port authorities of May 6th, 1976, according to which the ship landed in the port on that day. The diversion instructions of the Nigerian authorities for ships which were already waiting for unloading in the roads of Lagos, but which were not unloaded within the periods stated, cannot discharge the defendant from its payment obligation under the L/C. Thus the court had to find for the plaintiff with respect to the enforced demurrage claim.

The damage-claims raised by the plaintiff are also founded in the main. Because of the refusal to make further payments according to its obligation under the L/C declared ba the defendant already by telex of September 19th, 1975 and communicated to the Creditanstalt by telex of the Deutsche Bank of September 23rd, 1975, the plaintiff may claim damages for nonperformance pursuant to section 326 German Cicil Code, without the appointment of a date having been necessary after the request for payment by letter of September 25th, 1975, because the defendant had expressed by the reasons given for the stoppage of payments that it would refuse performance under the L/C also in the time to come, as long as the plaintiff did not fulfill the new conditions of Nigerian authorities, to which it was not obliged nor prepared. The fact that in the absence of a special settlement the L/C is subject to German law as the law of the place of payment, was already substantiated by the Chamber in the judgment taken in the attachment proceedings, to the grounds of which reference is, therefore, made in so far. As a result of its obligation to the plaintiff assumed by the opening of the L/C, the defendant has not only to pay the amounts due under the L/C, but also to make good the damage done to the plaintiff by the nonperformance of this obligation.

By presenting the notarially certified copy of the amicable settlement made with Messrs. Capt. Gerassimo A. Agoudimos on November 5th, 1975, showing the signatures of Mr. Nada and Mr. Agoudimos, which were approved and certified by a notary on March 1st, 1975, the plaintiff has proved by document pursuant to s. 416 Civil Procedure Law that it had to pay to the owner of the 5 ships chartered

by it for the transportation of the cement not accepted by the Nigerian Ministry of Defence US $ 938,630 for dead freight and that it really paid this amount. It has proved that it was obliged to do so by presentating the 4 charter-party copies showing the signatures of Agoudimos certified by the consulate, since according to these it had to pay -on the event of the cancellation of the contracts- the agreed freight rate of US $ 23 per ton and another US $ 5 each per ton for the way to the loading port and the ceasing gain on the way back to the shipowner, who waived these amounts of US $ 5.- each in the amicable settlement and claimes only the amount for dead freight resulting from a total weight of load of 40,810 tons and the freight rate of US$ 23. The defendant, on the other hand, has not proved that the charter parties presented by the plaintiff had subsequently been made up for deceit because of the alleged dead freight.. In the interrogation under oath Mr. Nada confirmed that the four charter parties dated July 9th and 20th and August 8th, 1975 had been negotiated by him with Agoudimos, and had "naturally" been made before the amicable settlement of November 5th, 1975, on the dates stated, and that it had been serious contracts. He also refuted the defendant's conclusions from the contents of the telex of August 12th, 1975 and the letters of August 30th and September 4th, 1975, by explaining convincingly why the plaintiff had announced to the Nigerian Ministry of Defence not all of the ships mentioned in the amicable settlement of November 5th, 1975, but also some others. He also explained why in his affidavit of November 21st, 1975 he had stated only four ships of 10,000 tons each. The plaintiff gave convincing reasons for the amount of the freight rate agreed with Agoudimos, and to the register data quoted by the defendant it replied by means of a drawing that after structural changes the ship "Alekakos" could reach the tonnage stated by Agoudimos and accounted with him. Finally, Mr. Nada

declared that he did hot know whether the ship "Dalia" had carried out other transports in the period between September 2nd and the end of October 1975, as stated by the defendant; he had made the amicable settlement with Agoudimos on November 5th, 1975, due to the latter's claims under the charter parties. Considering the facts, the damage claim for dead freight raised by the plaintiff is, therefore, founded, because the plaintiff suffered this loss as a result of the defendant's unlawful refusal to make further payment due under the L/C against presentation of the documents for further cement shipments and demurrages.

The plaintiff can also demand compensation for the short proceeds of US $ 2,835,ooo from the hedging sale of the remaining cement deliveries less the insurance premium of US $ 35,314.22 saved by it, i. e. US $ 2,719,685.78, because the plaintiff suffered this loss also from the defendant's refusal to pay the purchase price for the 1oo,ooo tons of cement not accepted owed under the L/C. By preseting the contract with Iksir Holding Company Ltd. of November 1oth, 1975, the bank guarantee of November 14th, 1975 and the credit notes for the payments of the purchaser, the plaintiff proved that it had suffered the loss claimed. The defendant, on the other hand, did not furnish evidence for a contributory fault of the plaintiff in the accrual of the damage and for lower freight costs, evedence with lay with it. Mr. Nada convincingly pointed out that it had been difficult for the plaintiff to find another purchaser for the considerable quantity of cement not accepted, and that the prices had fallen because of the world market prices caused by Nigeria. Therefore, it

could not be found out whether the plaintiff might have achieved a higher price in the hedging sale. By means of evidences on the amount of comparable freight rates, which were paid late in 1975 and early in 1976, Mr. Nada showed that on the average for future shipments of the remaining quantity to Lagos the plaintiff should have paid no higher freight rates than the US $ 19 per ton paid on the average in the hedging sale, after it had previously incurred costs between US $ 19 and 23 per ton for the freight to Lagos.

Thus the action had to be sustained because of the plaintiff's demurrage claim to the amount of US $ 8,954,243.37 and its damage claims to the amount of US $ 968,630 and 2,799,685.78 as well as the interest claim substantiated pursuant to sections 352 and 353 of the Code of Commerce, by adjudging the defendant to pay the US$ amount due under the L/C and pursuant to section 249 of the German Civil Code for compensation. Since the plaintiff suffered the loss claimed in US $ and the loss can be compensated by payment of the damage pursuant to section 249 German Civil Code, it may remain undecided whether a compensation pursuant to section 251 Civil Code would be payable in DM only. For the remaining part the claim was to be dismissed in respect of the increased claim because of the saved insurance premiums of US $ 35,314.22 diminishing the claimed damage, and in respect of the increased interest claim also from a further fractional amount exceeding the founded principal claim, which obviously was computed wrongly.

Pursuant to section 599 para 1 Civil Procedure Law it had to be reserved for the defendant to claim its rights in the subsequent action.

The secondary decisions on the costs of the proceedings and the provisional enforceability of the judgment are based on sections 91, 92 para 2, 708 item 4 and 713 para 2 Civil Procedure Law.

Pursuant to section 108 Civil Procedure Law the securities for the main amount and the interest had to be fixed in US $ whereas for the costs they had to be fixed in DM, because the judgment is executionable in so far and the advantages or disadvantages which may result for the parties from any future changes in the par values cannot be foreseen and can, therefore, not be considered in the valuation of the mutual securities.

Drüeke Melber Dr. Koch

EXHIBIT H TO HOENIGER AFFIDAVIT - AWARD OF ARBITRATOR IN IPITRADE INTERNATIONAL v. NIGERIA DATED APRIL 25, 1978

PJ-44

A W A R D

in the case RT/DB No. 2949
IPITRADE INTERNATIONAL c/ MINISTRY OF DEFENCE, for and on behalf of the FEDERAL MILITARY GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA

Claimant: IPITRADE INTERNATIONAL, Société anonyme,
38, Boulevard des Capucines
75002 PARIS, France

represented by: LAW OFFICES OF SAMUEL PISAR,
68, Boulevard de Courcelles,
75017 PARIS, France

Defendant: THE FEDERAL REPUBLIC OF NIGERIA
represented by: its FEDERAL MILITARY GOVERNMENT,
represented by: its MINISTRY OF DEFENCE,
LAGOS, Nigeria

Sole arbitrator: Dr. Max Brunner,
33 Burgunderstrasse,
CH-4051 BASEL, Switzerland

Certified true copy
Paris, 26th April 1978
Yves Derains
Secretary General
Court of Arbitration

I. Proceedings

1.1. The contract of March 17, 1975, which is at the basis of this dispute, was signed for and on behalf of IPITRADE and for and on behalf of the FEDERAL MILITARY GOVERNMENT of the FEDERAL REPUBLIC OF NIGERIA. The government, as executive authority of the Federal Republic of Nigeria, acted on behalf of the said Republic, even if the contract does not say so explicitly, and the contract is binding upon it. The defendant in this case is de iure the Federal Republic of Nigeria, being a juridical person, whereas the government as such lacks this capacity. An award, if it has any sense, must be enforceable; it would not be enforceable against the government.

1.2. The said contract contains the following arbitration clause:

"The construction, validity and performance of this contract shall be governed by the Laws of Switzerland and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with the Rules at the date thereof."

1.3. By letter, dated May 12, 1976, addressed to the Secretariat of the Court of Arbitration of the ICC, the Claimant requested arbitration on its dispute with the Defendant, stating its case and submitting documents in proof of its allegations.

1.4. By letter, dated July 6, 1976, addressed to the Secretary General of the Court of Arbitration of the ICC, the Federal Ministry of Justice of the Federal Republic of Nigeria informe the Court of Arbitration that the Federal Military Government did not feel legally bound to submit to the jurisdiction of the said Court of Arbitration, relying legally on the defence of Sovereign immunity.

Certified true copy
Paris, 26th April 1978
Yves Derains
Secretary General
Court of Arbitration
INTERNATIONAL C.C.

1.5. A sovereign country can, like a private person, corporation or company, enter into business transaction with another party The contract in dispute is such an ordinary business transaction, a sales and purchasing contract between parties of equal reciprocal rights. The Defendant voluntarily agreed thereby that the contract be governed by the laws of Switzerland, as quoted in 1.2. above, and voluntarily agreed that al disputes in relation to the contract be submitted to the arbitration of the International Chamber of Commerce in accordance with its Rules. According to Swiss law the Defenda is bound by the obligations it voluntarily entered into.

The obligation to submit to arbitration in case of a dispute is one of them, and Sovereign immunity does not dispense from it.

There can be no doubt under Swiss law that the Court of Arbitration of the International Chamber of Commerce and the arbitrator appointed by it have jurisdiction in this dispute.

1.6. On December 15, 1976, the Court of Arbitration appointed the above-mentioned Max Brunner as sole arbitrator and designated Basel, Switzerland, as the place of arbitration.

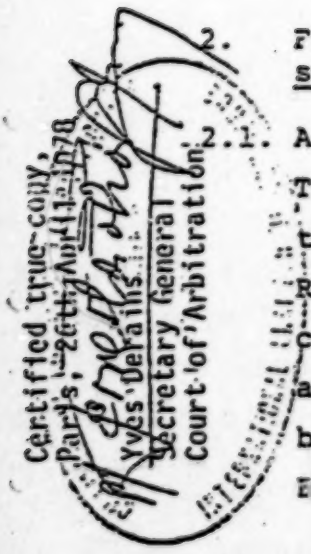
1.7. On January 26, 1977, the arbitrator submitted to the Claimant and to the Defendant a first draft of the Terms of Reference, asking them for their comments. Whereas the Claimant suggested a few minor alterations the Defendant did not react. The arbitrator incorporated these suggestions, which the Claimant had also transmitted to the Defendant, into the final Terms of Reference and, upon instruction from the Court of Arbitration, submitted them for approval, signed by the Claimant (April 4, 1977) and by himself (April 14, 1977). They were approved by the Court of Arbitration on May 11, 1977. According to its Rules the said Court invited the Defendant to sign the Terms of Reference also. The Defendant did not react, and after the time limit granted by the Court to do so, the Court authorised the arbitrator to proceed with the case.

Certified true copy
Paris, 26th April 1978
Yves Derains
Secretary General
Court of Arbitration
INTERNATIONAL CHAMBER OF COMMERCE

With his letter of November 23, 1977, addressed to the Claimant and to the Defendant, the arbitrator requested additional information and documentary proofs with regard to Claimant's allegations, asking the Claimant to send copies directly to the Defendant and granting to the Defendant the necessary time limit to comment on them after reception. Again, the Defendant did not react.

On December 29, 1977, the arbitrator summoned the Claimant and the Defendant to appear before him on February 10, 1978, at 10.30 a.m. for the final hearing, with the agenda: Clarification of certain points of the subject matter and pleadings by the parties. The hearing was intended to take place in Paris, but the arbitrator, by his letter of January 9, 1978, addressed to the Claimant and to the Defendant, changed the place to Basle, at the offices of the Basel Chambe of Commerce. Only the Claimant appeared at the hearing. Copy of the minutes of the said hearing were addressed to the Claimant and the Defendant on February 14, 1978.

All communications by the arbitrator to the Defendant had been made by registered air mail. There is no doubt that it received them all.

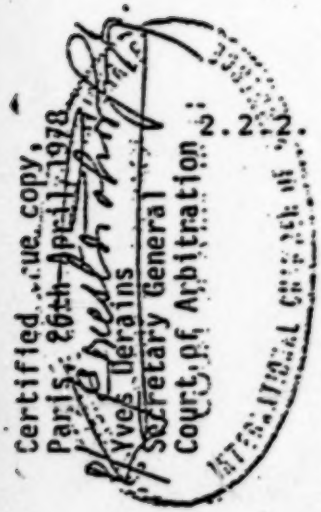


2. Facts, as established by the arbitrator on the evidence submitted by the Claimant

2.1. As the Defendant did not collaborate in the drawing up of the Terms of Reference, the arbitrator first of all established that the "Summary of facts", contained therein, is correct. Reference is made to it. It is to be noted, however, that contrary to the contract the letter of credit was not confirme and that the Banque Nationale de Paris, where payments were to be made, could only do so on instructions from the Central Bank of Nigeria.

2.2. In view of its obligations under the contract with the Defendant the Claimant entered into two contracts with Kollerich & Cie. S.A. in Lausanne (Switzerland), both dated August 25, 1975.

2.2.1. According to the first contract, Kollerich agreed to sell to the Claimant, and the Claimant agreed to buy from Kollerich 240'000 metric tons, 10% more or less at Claimant's option, of Portland cement at a price of US-Dollars 28,- per metric ton to be shipped not later than September 6, 1975, at the rate of 20'000 metric tons per month, 10% more or less at Kollerich's option. The contract contains a performance guarantee, by which the Claimant guaranteed to accept and lift the monthly quantities contracted within the time limit specified in the contract, failing which Claimant would pay to Kollerich US$ 5,- per metric ton per month on any unlifted quantity for the first two months and thereafter US$ 3,- per metric ton for each additional month during which such quantities would remain unlifted. The penalties were payable monthly, the first payment beeing due 30 days after the end of the month during which the defaulted quantity should have been uplified; the maximum penalty per metric ton was limited to US$ 20,-.



2.2.2. By the second contract the Claimant concluded with Kollerich a charter agreement by which Kollerich was to ship 240'000 metric tons, 10% more or less at Kollerich's option, of cement from European ports to Lagos/Apapa, shipments to be made at the rate of 20'000 metric tons per month, plus or minus 10% at Kollerich's option. The freight was to be US$ 24,- per metric ton, and the Claimant was to pay to Kollerich demurrage of US$ 4'100,- per day on each vessel individually from the time when the laytime expired, payable every 15 days calculated from the said time. In case of cancellation of anyone of the shipments provided for by the contract, Claimant was to indemnify Kollerich by paying the sum of US$ 10,- per metric ton for the first 80'000 tons cancelled, and the sum of US$ 5,- per metric ton for any cancelled quantity above 80'000 metric tons.

2.3. The first vessel, EUROSAILOR, sailed from Drepanon (Greece) to Lagos on September 7, 1975, with a cargo of 6'400 tons of cement, to Lagos. The Defendant was duly informed of this departure by cable on September 8, 1975. The vessel arrived in Lagos Roads on September 29, 1975, and readiness for discharge was at once tendered to the port authorities. Unloading, however, was delayed, and according to Kollerich's debit note of October 20, 1975, to the Claimant, demurrage began to become due as from October 5, 1975, 23.06 hrs. It lasted until January 6, 1976, 12.00 hrs., when the vessel could leave Lagos, i.e. 92 1/2 days and 54 minutes at US$ 4'100,-- per day = US$ 379'403,75. Kollerich debited this amount to the Claimant for periods of 15 days each, the Claimant debited the corresponding amounts to the Defendant and presented its invoices to the Banque Nationale de Paris (= BNP), where, according to the letter of credit, they should have been paid on sight on the following dates for the following amounts:

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Paris, 26th April 1978
Yves Derains
Secretary General
Court of Arbitration

		US$
October	27, 1975	61'500,--
November	6, 1975	61'500,--
December	3, 1975	61'500,--
December	11, 1975	153,75
December	11, 1975	61'500,--
December	29, 1975	61'500,--
January	15, 1976	61'500,--
May	13, 1976	10'250,--
		379'403,75

The BNP refused payment.

On the other hand, the Defendant paid for the 6'400 tons of cement, of which it took delivery.

2.4. The second vessel, UNIVERSAL PRINCESS, sailed from Scegedin (Poland) to Lagos on September 21, 1975, carrying 8'530,6 tons of cement. The Defendant was informed on September 21, 1975, by cable of the departure. The vessel arrived in Lagos Roads o

October 10, 1975, and readiness of discharge was tendered the same day to the port authorities. Unloading again was delayed and, according to Kollerich's debit note to the Claimant of December 4, 1975, demurrage began to be due as from October 18, 1975, at 06.44 hrs. It lasted until December 2, 1975, 06.44 hrs i.e. 45 days at US$ 4'100,-- per day = US$ 184'500,--. The Claimant presented its corresponding invoice on December 10, 1975, to the BNP for payment, but the bank refused payment.

On the other hand, the Defendant paid for the 8'330,6 tons of cement of which it took delivery.

2.5. The third vessel, PROTOAPOSTOLOS, sailed from Dansk (Poland) to Lagos on September 29, 1975. The Defendant was again informed by cable of the departure. The vessel arrived in Lagos Roads on October 16, 1975, carrying 6'000 tons of cement. Readiness of discharge was again tendered to the port authorities, and unloading was again delayed. According to Kollerich's invoice to the Claimant, demurrage began to become due as from October 26, 1975, at 08.00 hrs. and lasted until September 3, 1976, 08.00 hrs., i.e. 313 days at US$ 4'100,-- per day = US$ 1'283'300,--. According to Kollerich's corresponding debit note, the Claimant presented its invoices for payment on sight to the BNP on the following dates for the following amounts:

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Yves Derains
Secretary General
Court of Arbitration

		US$.
December 3, 1975		61'500,--
December 17, 1975	2 invoices of $ 61'500	123'000,--
December 31, 1975		61'500,--
January 15, 1976		61'500,--
April 28, 1976	4 invoices of $ 61'500	246'000,--
July 9, 1976	6 invoices of $ 61'500	369'000,--
September 16, 1976	4 invoices of $ 61'500	246'000,--
March 28, 1977		114'300,--
		1'283'300,--

Again the bank refused payment, but again, the Defendant paid for the 6'000 tons of cement of which it took delivery.

2.6. The vessel EUROSAILOR was on its way to Lagos when the Claimant received a cable from the Defendant's Ministry of Defence, on September 15, 1975, informing it that no vessel carrying cement would be accepted after September 8, 1975, for berthing and discharge at any Nigerian port, irrespective of whether such vessels were in the process of being loaded or already sailing. Nevertheless, the Defendant took delivery of the cargos shipped with EUROSAILOR, arriving in Lagos Roads on September 29, 1975, and of the cargos of UNIVERSAL PRINCESS and of PROTOASPOSTOLOS, which had sailed after September 15, 1975.

2.7. Not so with regard to the fourth vessel, ASTYANAX, which sailed from Gdynia (Poland) to Lagos on October 16, 1975, with a cargo of 10'350 tons of cement, and which arrived in Lagos Roads on November 5, 1975. The Defendant did neither let the cargo to be unloaded, nor did it pay for the 10'350 tons of cement which it had bought from the Claimant. The Claimant did present its invoice, amounting to US$ 621'000,-- (10'350 tons at US$ 60,-- per ton) to the BNP on October 17, 1975, but the bank refused payment. Kollerich had to dispose of the merchandise which it could not deliver to the Defendant, and according to its rights under the charter contract with the Claimant, it sold it to a third party in Panama for US$ 726'525,--. While crediting this amount to the Claimant, he debited it at the same time with US$ 538'200,-- for the cement sold to it (10'350 tons at $ 52,-- per ton), plus US$ 383'708, for demurrage, the balance against the Claimant amounting to US$ 195'383,75. Apart from this loss the Claimant, not being paid by the Defendant, lost the prepaid freight to Lagos in the amount of US$ 248'400,-- for 10'350 tons at US$ 24,-- per ton, plus its gross profit on the said tonnage of US$ 8,-- per ton = US$ 82'800,--.

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Paris, 26th April 1978
Yves Derains
Secretary General
Court of Arbitration

2.8. On October 31, 1975, the Claimant cabled to the Defendant that it considered the non-payment of the ASTYANAX cargo as a unilateral breach of the contract by the Defendant, that it had therefore suspended the loading of a fifth vessel and that it charged the Defendant with the entire responsibility for the consequences, taking all necessary measures in order to safeguard its interests.

2.9. On November 1, 1975, the Claimant received a cable from the Defendant, relieving all cement suppliers with immediate effect of their obligations under their performance bonds.

2.10. Consequently, no further shipments were made to Lagos, and consequently Kollerich, basing itself on the contracts of August 25, 1975, with the Claimant, debited the Claimant with the following penalties:

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Court of Arbitration

2.10.1. Penalties for cancelled purchase:

To uplift	240'000 tons
Uplifted	30'350 tons
Cancelled	209'650 tons at a penalty of US$ 20,-- per ton = US$ 4'193'000,--. $ 20,-- was the contractual penalty if the merchandise was not uplifted within six months after the month in which this should have been done.

2.10.2. Penalties for cancelled freight for 209'650 tons = US$ 1'448'250,--, i.e. $ 10,-- per ton for the first 80'000 tons and $ 5,-- per ton for the remaining quantity, according to the charter contract of August 25, 1975.

3. Request of the Claimant:

Reference is made to the Terms of Reference.

3.1. By its letter of December 23, 1977, addressed to the arbitrator the Claimant reduced its original claims with regard to

demurrage on the vessel PROTOAPOSTOLOS to US$ 1'283'300,--, with regard to lost freight on the vessel ASTYANAX to US$ 248'400,-- and with regard to lost profit on the ASTYANAX cargo to US$ 82'800,--.

3.2. On the other hand, by the same letter, the Claimant increased its claims with regard to demurrage on the vessel EUROSAILOR by US$ 10'250,--, with regard to penalties due to Kollerich for cancelled purchases by US$ 34'000,-- and for cancelled freight by US$ 63'000,--, and it added a claim of US$ 195'383,75 with regard to the loss suffered by it on the resale of the ASTYANAX cargo. By its letter of February 15, 1978, addressed to the arbitrator, the Claimant withdrew the additional claims herein mentioned.

3.3. The arbitrator has therefore to consider the following remaining requests of the Claimant:

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Court of Arbitration
CHAMBRE DE COMMERCE INTERNATIONALE

3.3.1. to find that Defendant has breached its contract with Claimant,

3.3.2. to hold that, as a consequence, Defendant must pay to Claimant the following amounts:

3.3.2.1. Penalties due by Claimant under its contracts with cement suppliers for cancelling remaining contracts, in the amount of US$ 4'620'000,--,

3.3.2.2. Penalties due by Claimant for cancelling freight chartered for cement deliveries, in the amount of US$ 1'500'000,--,

3.3.3. Demurrage due at the rate of US$ 4'100,-- per day per vessel for as long as the vessels remained in Lagos Roads with undischarged cargo, as follows:

EUROSAILOR	US$	369'153,75
UNIVERSAL PRINCESS	US$	184'500,--
PROTOAPOSTOLOS	US$	1'283'300,--
Total demurrage	US$	1'836'953,75

3.3.4. US$ 248'400,-- equal to the cost of freight for 10'350 tons of cement delivered on the ASTYANAX, plus US$ 82'800,-- for loss of profit on this cargo.

3.3.5. Interest on the unpaid amounts listed under 3.3.3. and 3.3.4 above at the rate of 6% per annum.

3.3.6. US$ 1'760'000,-- representing loss of profit by Claimant on the cement remaining to be delivered under the contract.

3.4. To decide that the cost of the arbitration - including Claimant's attorney's fees - shall be borne fully by Defendant in view of the wholly innocent posture of Claimant in this case.

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Yves Derains
Secretary General
International Court of Arbitration

Conclusions of the arbitrator

With regard to request 3.3.1.: According to the contract with the Claimant, the Defendant was obliged to take delivery of 240'000 tons of cement, plus or minus 10% at the option of the Claimant, and to pay US$ 60,-- per ton. According to the facts established by the arbitrator, it took delivery of only and paid for only 20'930,6 tons. Under Swiss law, this failure to perform its obligations constitutes a breach of contract, unless the Defendant has a valid excuse for its non-performance. It offered no excuse at all to the arbitrator.

According to the contract with the Claimant, the Defendant, having been duly advised of the departure of each vessel from European port and its readiness to be discharged after arrival in Lagos, should have paid demurrage which accrued for delayed unloading. The arbitrator has established the fact that

Kollerich debited the Claimant with US$ 1'847'203,75 demurrage on the three vessels EUROSAILOR, UNIVERSAL PRINCESS and PROTOAPOSTOLOS, that the Claimant in turn debited the corresponding amount to the Defendant, and that the Defendant refused to pay it. The refusal to comply with its contractual obligations is, according to Swiss law, a breach of the contract unless the Defendant had valid excuses not to comply. It offered no excuse at all to the arbitrator.

It follows that Claimant's request 3.3.1. is granted. As a consequence of the breach of contract the Defendant must, according to Swiss law, indemnify the Claimant, as follows:

With regard to request 3.3.2.1.: Penalties due by the Claimant under its contracts with cement suppliers for cancelling the remaining contracts, in the amount of US$ 4'620'000,--.
The Claimant had only one contract with one supplier, the contract of August 25, 1975 with Kollerich, as mentioned under 2.2.1. above. As a consequence of the Defendant's breach of its contract with the Claimant the latter was unable to fulfil its own obligations towards Kollerich and became liable for penalties. It is obvious under Swiss law that the Defendant has to indemnify the Claimant for its loss resulting from its penalty obligations. As mentioned under 2.10.1. above, Kollerich debited to the Claimant penalties amounting to US$ 4'193'000,-- based on a cancelled tonnage of 209'650 tons at US$ 20,-- per ton. While the penalty unit of $ 20,-- is correct, the tonnage to which it is to be applied, is not 209'650 tons but 184'719,4 tons. The Claimant uplifted and paid for 31'280,6 tons - the cargo of the four vessels shipped to Lagos -, and it would have met its obligations if it had uplifted 216'000 tons = 240'000 tons less 10%. That leaves 184'719,4 cancelled tons, on which penalty is due, and the amount of penalties is therefore US$ 3'694'388,--. The arbitrator grants the request of the Claimant to this extent.

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Yves Derains
Secretary General
Court of Arbitration

The arbitrator wishes to add that the said figure is not binding upon Ipitrade and Kollerich with regard to their respective dealings but determines the sum with which the Defendant has to indemnify the Claimant.

With regard to request 3.3.2.2.: Penalties due by Claimant for cancelling freight chartered for cement deliveries, in the amount of US$ 1'500'000,--.

As a further consequence of the Defendant's breach of its contract with the Claimant the latter was unable to use the freight it had chartered from Kollerich, according to the contract mentioned under 2.2.2. above, to its full extent. To the extent it could not do it became liable under the said contract to pay penalties to Kollerich, and to that extent the Claimant has a valid claim against the Defendant for indemnification. The debit note of Kollerich to the Claimant, which Kollerich terms as final, is again based on lost freight for 209'650 tons and amounts to US$ 800'000,-- with regard to the first 80'000 tons and to US$ 648'250,-- for the remainder, as mentioned under 2.10.2. above.

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Yves Derains
Secretary General
Court of Arbitration

Kollerich based its debit note on chartered freight for 240'000 tons, thus disregarding that it had an option of 10% plus. As the Claimant shipped 31'280,6 tons to Lagos, the freig lost by Kollerich amounted to 208'719,4 tons, and accordingly the penalties amount to US$ 800'000,-- on the first 80'000 tons and to US$ 643'597,-- on the remainder, giving a total of US$ 1'443'597,--. The arbitrator grants the Claimant's request to this extent. Again, he points out that this figure is only binding with regard to the indemnity which the Defendant owes t the Claimant.

With regard to request 3.3.3. concerning demurrage.
As mentioned under 2.3., 2.4. and 2.5. above Kollerich debited to the Claimant demurrage for delayed unloading of the vessels

EUROSAILOR amounting to US$ 379'403,75
UNIVERSAL PRINCESS amounting to US$ 184'500,--
PROTOAPOSTOLOS amounting to US$ 1'283'300,--
The delay was the responsibility of the Defendant. According to its contract with the Claimant, demurrage was for the account of the Defendant and payable to the Claimant, which owed them to Kollerich, on sight of its corresponding invoices when presented to the Banque Nationale de Paris. They remained unpaid; the Defendant still owes the aforementioned amounts to the Claimant. It is noted, however, that the Claimant limits its request with regard to demurrage for EUROSAILOR to US$ 369'153,75, whereas the other requests correspond to Kollerich's debit notes.

The arbitrator grants the request 3.3.3. to its full extent.

With regard to request 3.3.4. concerning freight paid for ASTYANAX and loss of profit on the vessel's cargo.
As mentioned under 2.7. above, the ASTYANAX cargo of 10'350 tons of cement could not be delivered to the Defendant due to the Defendant's refusal to accept the merchandise. The Defendant, also in breaching its contract with the Claimant, refused to pay the latter's invoice, amounting to US$ 621'000,-- (10'350 tons at US$ 60,-- per ton). The Claimant had prepaid the freight to Lagos, amounting to US$ 248'400,-- (US$ 24,-- per ton). It had also paid for the cement shipped, US$ ~~52~~ 12,-- per ton = US$ ~~538'200~~ 124'200,--. As its invoice to the Defendant remained unpaid, the Claimant suffered a loss of US$ 248'400,-- on freight and a loss of profit of US$ 8,-- per ton = US$ 82'800,--. According to Swiss law its request 3.3.4. is fully justified and therefore granted by the arbitrator.

As also mentioned under 2.7. above, the Claimant suffered a further loss of US$ 195'383,75 on the ASTYANAX cargo, but it did not include it in its request.

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Paris, 26th April 1978
Yves Derains
Secretary General
Court of Arbitration

With regard to request 3.3.5. concerning interest on the amounts of US$ 1'836'953,75 (demurrage on the three vessels), US$ 248'400,-- (freight ASTYANAX) and US$ 82'800,-- (loss of profit on the ASTYANAX cargo), at the rate of 6% p.a.

Demurrage was payable to the Claimant on the dates specified in 2.3., 2.4. and 2.5., the other amounts on October 17, 1975, when the Claimant presented its invoice for the ASTYANAX cargo to the Defendant's bank (see 2.7. above). According to Swiss law, the payments to the Claimant are overdue since these dates because the invoices were payable on presentation to the bank on sight and no further reminder was necessary.

Summed up, interest is therefore due since

			US$-
October	17, 1975	on	331'200,--
October	27, 1975	on	61'500,--
November	6, 1975	on	61'500,--
December	3, 1975	on	123'000,--
December	10, 1975	on	184'500,--
December	11, 1975	on	61'653,75
December	17, 1975	on	123'000,--
December	29, 1975	on	61'500,--
December	31, 1975	on	61'500,--
January	15, 1976	on	123'000,--
April	28, 1976	on	246'000,--
July	9, 1976	on	369'000,--
September	16, 1976	on	246'000,--
March	28, 1977	on	114'800,--
			2'168'153,75

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Secretary General
Court of Arbitration

According to article 104 of the Swiss Code of Obligations, the interest rate in case of delayed payment is 5% p.a. If both parties to a contract are merchants, the creditor may claim interest at the usual discount rate applied by banks at the place where payment is due, if the said discount rate is higher than 5%. The discount rate is the one applied by private banks (see Guhl; Merz, Kummer: "Das Schweizerische Obligationsrecht" 6th edition, page 227). In the opinion of the arbitrator (he can quote no author on the subject) it is also the discount

rate to the national currency at the place of payment, in casu to French francs, not to US$. It is notorious that the usual discount rate of private banks for French francs was never below 6% p.a. in Paris since October 17, 1975.

An interest rate of 6% is only applicable if both parties are merchants in the sense of article 104 CO. The Swiss law defines the notion of merchant indirectly. A merchant is somebody who has registered his business establishment under its firm in the Register of Commerce. The Swiss Confederation, its Cantons and Municipalities are as such not registerable, and if they act through organizations with a distinct legal status and their ow firm, it is the organization as such which must be registered, for instance Cantonal hospitals or Cantonal banks (see jurisdiction of the Swiss Federal Court in ATF 57 I 315 and 80 I 383). If these principles are per analogiam applied to the present case, the Defendant is obviously not a merchant. The Swiss law would, however, admit its qualification as a merchant if it were to be considered as such under the laws of the Federal Republic of Nigeria. The Claimant did neither allege nor prove that this was so.

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Yves Derains
Secretary General
Court of Arbitration

The applicable interest rate ist therefore 5% per annum. Claimant's request 3.3.5. is granted to this extent.

With regard to request 3.3.6., concerning the Claimant's loss of profit: As a consequence of its breach of the contract, the Defendant has to indemnify the Claimant for its loss of profit. At the option of the Claimant the Defendant should have taken delivery of and paid for 264'000 tons of cement (240'000 plus 10%). The Defendant took delivery of only 20'930,6 tons and paid for them (see 2.3., 2.4. and 2.5. above). The loss of profit suffered by the Claimant is therefore to be calculated on 243'069,4 tons. The loss per ton is equal to the difference between the price which the Defendant had agreed to pay =

US$ 60,--, and the purchasing price of the Claimant = US$ 28,-- plus freight to Lagos = US$ 24,--, i.e. US$ 8,--. The loss of profit amounts therefore to US$ 8,-- on 243'069,4 tons = US$ 1'944'555,20. This amount includes the loss of profit on the ASTYANAX shipment of US$ 82'200,-- dealt with under 3.3.4. above, so that the remaining loss amounts to US$ 1'862'355,20. The Claimant has limited its request to US$ 1'760'000,--. It is granted.

With regard to request 3.4. concerning the cost of the arbitration including the Claimant's attorney's fees:

The Claimant has substantially won its case, and if follows that the Defendant has to bear the cost of the arbitration. It is true that the amount awarded to the Claimant remains roughly 10% below the amount requested by it, but the difference is due to the fact only that the arbitrator's calculation of the penalties for cancelled purchase and freight differs from the cautions estimate of the Claimant as well as from Kollerich's debit notes to it. This is merely a matter of calculation, not of substance, and cannot lead to a different repartition of the costs of the arbitration.

The Defendant has also to bear the normal legal costs incurred by the Claimant. According to a statement of Claimant's Counsel submitted to the arbitrator at the hearing of February 10, 1978 they amount to a fee of French francs 500'000,-- and Counsel's expenses of French francs 50'000,--. These amounts do by no means exceed the official tariff applicable with regard to lawyer's fees of Basle lawyers engaged in law suits before a Basle Court of Justice. As the place of the arbitration is Basle, the arbitrator examined the said amounts under the Basle rules and found them not to exceed the norm. The Defendant has therefore to pay to the Claimant French francs 550'000,-- for its legal costs.

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Paris, 26th April 1978
Yves Derains
Secretary General
Court of Arbitration

5. Award

The Federal Republic of Nigeria, represented by its Federal Military Government, guilty of having breached its contract, dated March 17, 1975, with Ipitrade International S.A., Paris, is condemned:

1. to pay to Ipitrade International S.A., 38, Boulevard des Capucines, Paris, France,

1.1. an amount of US$ 9'066'138,75.

1.2. Delay interests at five percent per annum on the following amounts from the following dates until paid:

on US$	331'200,--	since October 17, 1975
on US$	61'500,--	since October 27, 1975
on US$	61'500,--	since November 6, 1975
on US$	123'000,--	since December 3, 1975
on US$	184'500,--	since December 10, 1975
on US$	61'653,75	since December 11, 1975
on US$	123'000,--	since December 17, 1975
on US$	61'500,--	since December 29, 1975
on US$	61'500,--	since December 31, 1975
on US$	123'000,--	since January 15, 1976
on US$	246'000,--	since April 28, 1976
on US$	369'000,--	since July 9, 1976
on US$	246,000,--	since September 16, 1976
on US$	114'800,--	since March 28, 1977

1.3. Its legal costs amounting to French francs 550'000,--.

2. To bear the costs of this arbitration, amounting to..... as f 50'000.—

As far as the requests of Ipitrade International S.A. exceed the aforementioned amounts, they are rejected.

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Paris, 26th April 1978
Yves Derains
Secretary General
Court of Arbitration

Basel, April 25, 1978

The arbitrator

EXHIBIT I TO HOENIGER AFFIDAVIT - ARTICLE IN NOVEMBER 1978 ISSUE OF EUROMONEY ENTITLED "THE EXTRAORDINARY NIGERIAN JUMBO"

PJ-3

COVER STORY

The extraordinary Nigerian jumbo

It is the deal of the year, the financing that had everything. This was the second jumbo financing for the Federal Republic of Nigeria. It was also the second within a year. The first jumbo, for $1 billion, was signed in January, having run into major problems over pricing and the information memorandum.

The second jumbo was also to be a billion; more, if the loan was well received. Six of the largest banks in the world agreed to underwrite $500 million. The price and the fees were more generous than on the first jumbo, in spite of the sharp fall in spread since and Nigeria's tiny debt.

It should have been oversubscribed. Instead, it ran into almost unbelievable problems. The cover story, written by editor Padraic Fallon, is an account of those problems, and the questions they posed for the Euromarkets.

The argument was taking place over 3,000 miles of telephone cable. In London, the syndication officers of six of the largest banks in the world were huddled around a desk in the offices of First Chicago Limited. On the desk was a squawkbox, a conference telephone. Talking heatedly into the other end, in Lagos, was U. K. Bello, deputy permanent secretary at the Nigerian Ministry of finance. The Nigerian was telling the banks that any fresh funds dribbling in for his country's jumbo loan should be added to the $750 million that the banks had either underwritten themselves or drawn like a tooth from the reluctant Eurodollar market, and not be used to help the banks increase their meagre selldown ratio. "When we said No, that the aim from day one had been to achieve a better selldown of the loan than last time, we were accused of being on the side of Nigeria's enemies in the cement dispute," said a lead manager present.

Yet another stumbling block had appeared in a deal which, in the words of another of the lead managers, had been in danger of breaking down completely with the lead managers threatening to withdraw their commitment to underwrite $500 million.

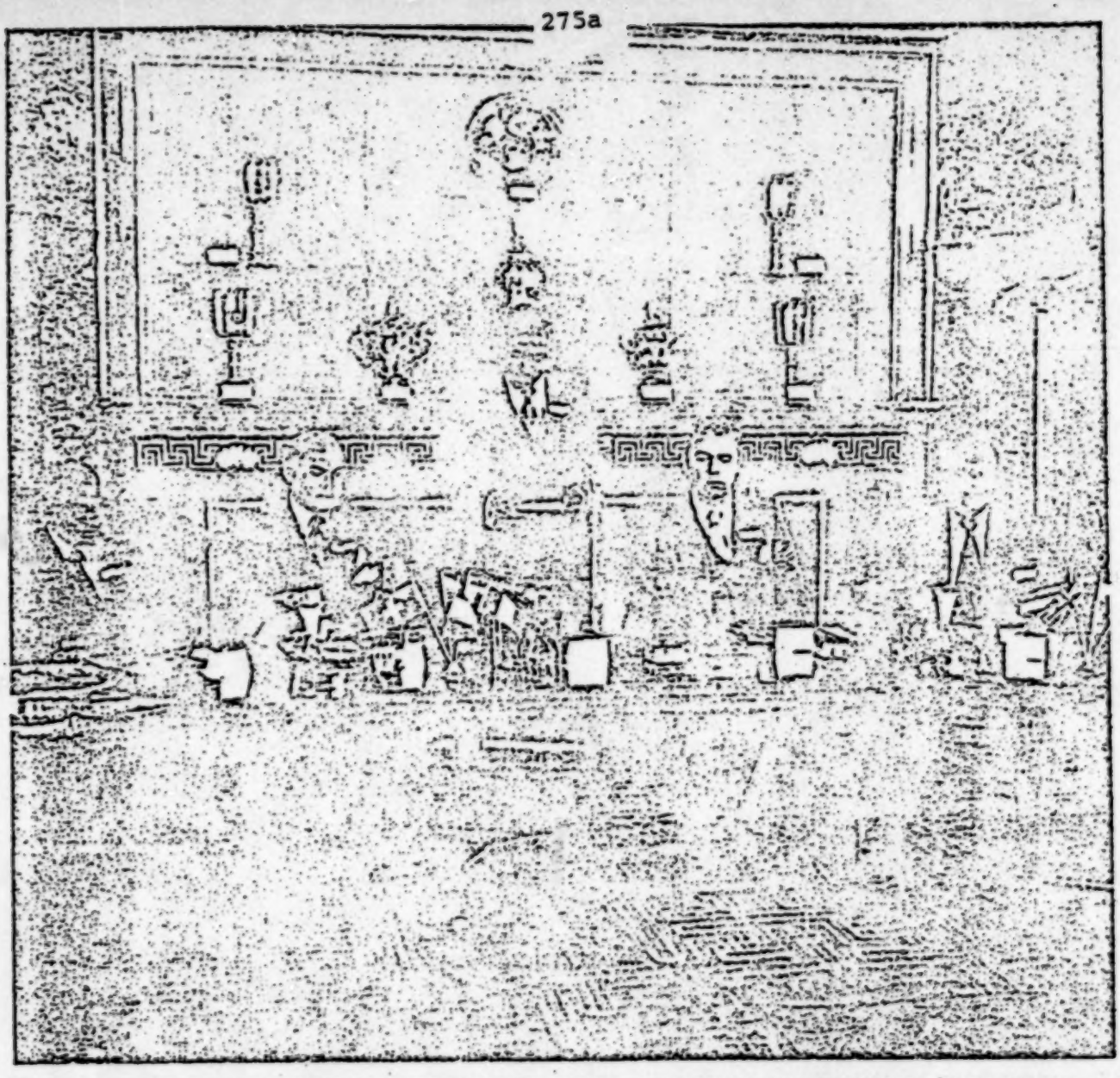
This deal had everything: an intermediary whose job was never properly defined, but who was supposed to represent the new rôle of the investment banks; a parallel financing in Deutschemarks whose existence was apparently not known to some of the lead managers when the mandate was awarded and which destroyed the loan's chances of success; immense confusion among international banks over Nigeria's projects; charges of misrepresentation on both sides; serious legal hitches; threats and counter-threats; countless meetings; problems with the information memorandum; frantic visits to Frankfurt and a hurried visit by the Nigerian Solicitor-General to London; and, overriding everything, a feeling among the Nigerians that the alien banks, as they are called in Nigeria, did not understand the sensitivities of a Black African borrower.

It began so differently. All concerned were determined to avoid the problems that Nigeria's first jumbo loan ran into a year ago (*Euromoney*, November 1977), when a poor price (1% over seven years, with ¼% management fee), and serious problems with the information on outstanding litigation over the cement cases led to a small selldown of only 15%. It did not augur well for relations between Nigeria, a country still intensely conscious of its relatively recent colonialist past and struggling with the sudden bonanza of an annual $12 billion in oil export revenues, and the foreign banks who probably failed to appreciate the sensitivities of the other side.

This time, it was to be different. And, to begin with, it was. There was none of the knife-edge competition for the mandate that characterized the last loan, although Chase Manhattan (one of the three joint lead managers last time) and First Chicago were jockeying for the prime position of being Nigeria's main bank; Chase reportedly asking to be the agent bank which would have given it a central position in Nigerian dollar financings, and First Chicago said to be seeking a key liaison position through its interest in International Merchant Bank in Lagos, which it got, and which was to be the most important channel of communication throughout the deal.

But there had been a sharp change in Nigeria's fortunes. The big spending days were over. Imports had risen sixfold in five years, compared with a fourfold increase in the value of oil exports, while non-oil exports less than doubled. Last year's trade surplus of $2.1 billion was down sharply on the $7 billion surplus that Nigeria ran in 1974. It is widely believed that the surplus this year would be smaller, or even non-existent, if Nigeria had not decided to increase oil production to capacity and sell its crude at large discounts. The overall balance of payments slipped into deficit in 1976, a deficit that increased to $686 million in 1977. And while few, if any, expected Nigeria to run a large surplus while it was committed to a major development plan, the rapidity of the change was disquieting.

The country's reserve position showed an even greater change. Reserves reached a peak of $5.8 billion in December 1975. From there on it was down, down, to $1.87 billion in August. What was more, the Nigerians had been strongly diversifying their reserves (*Euromoney* cover story, October 1978); initially away from sterling (54% of reserves in 1972, cut to 18% by the end of 1976); and, more recently, away from the dollar (24% at the end of 1976, cut to 18% by February this year). Nigeria's own explanation for the drop in reserves: "The combined effect of a significant decline in oil exports in the first quarter of this year, and over-inventorying by importers in anticipation of restrictive fiscal measures", adding: "Exports of crude oil have improved and payments with respect to the inventories have in large measure taken place. It is therefore expected that the international reserve level will stabilize in the second half of the year as the increased receipts from oil exports begin to flow in." Those comments are drawn from the draft information memorandum, which projects crude production at 1.9 million b/d in the first quarter of 1979, compared



Made it at last: the signing ceremony of Nigeria's first jumbo deal, for $1 billion, at Fishmongers Hall in London last January. On his feet is Nigerian Commissioner of Finance, Major-General James Oluleye, flanked by Chase Manhattan executives Otto Schoeppler (left) and Frank Stankard (right). On the extreme left is Mallam Musa Bello, Permanent Secretary of Finance; on the extreme right, Governor Vincent of the Central Bank. The next signing will be different: it'll be on a boat on the river Main in Frankfurt.

with 1.65 million b/d in the first quarter this year. Optimistic? Not necessarily, because projected average take per barrel does not go up by as much.

Most of the other measures taken by Nigeria's military government this year have suggested a growing cash shortage. Some of them smacked of panic. During the summer, for example, Nigeria abruptly dropped double taxation agreements with nine countries, including Britain, its largest supplier (West Germany is catching up fast), and slapped levies on foreign airlines, shipping companies and construction corporations. Earlier, in the April budget, government spending had been chopped in recognition of a drop of a fifth in projected revenues, but the economy still showed many of the signs of a superheated importer. General James Oluleye, Nigerian Commissioner of Finance, said in a recent speech: "We have been running down our foreign exchange reserves in order to finance current consumption. We can therefore justly, but shamefully, be called a nation of importers." One of the more bizarre symptoms of this import craze: Lagos traffic controls allow only cars with odd-number licence plates one day, even numbers the next.

It was against this background — an ambitious Third Development Plan with grandiose projects, an import boom and a slump in demand for oil — that an event took place that was to cause Nigeria and its bankers a great deal of embarrassment, and ruin the prospects for the success of its next jumbo loan.

In October last year, the Nigerians awarded a turnkey project to a German consortium headed by GHH, and including Brown Boveri and Lurgi, for the construction of the Delta Steel Plant at Aladja, Warri, in the south-west of the country. The plant will use direct reduction technology, drawing on the natural gas flared off from the oilfields nearby. The Warri project, as it came to be known, was to be the biggest headache of all. At the time, however, it was a relatively straightforward operation, because the Nigerians were paying for it in cash.

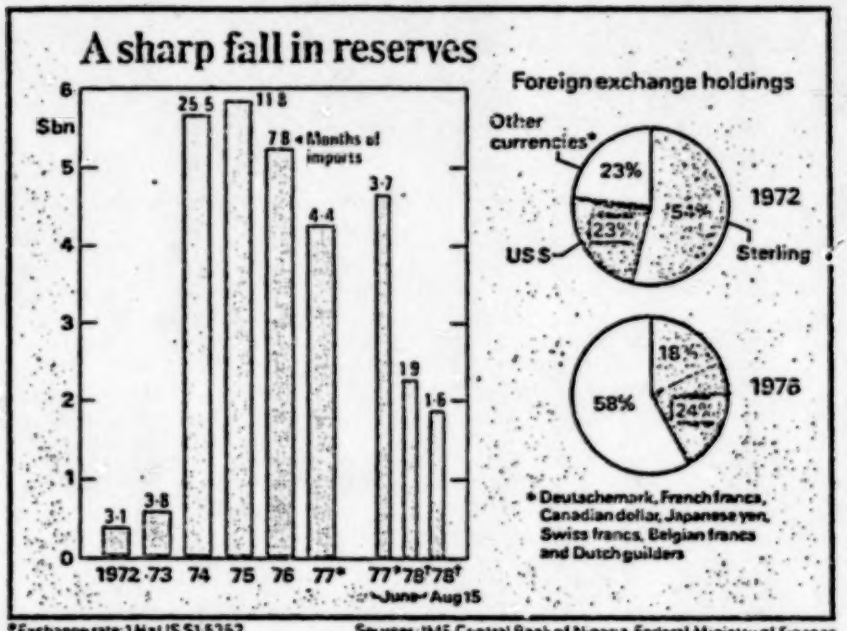
Then came the drop in Nigeria's first quarter oil exports, and the fall in

reserves (banking sources report heavy sales by the Nigerian central bank of prime quality dollar paper and *schuldscheindarlehen* earlier in the year). In April this year, therefore, the Nigerians renegotiated the project. Instead of cash, it was to be paid for by a DM750 million project financing from a syndicate of 12 German banks led by Deutsche Bank, and including Dresdner Bank. To say the least, the change in the basis for financing the project was not widely known. Yet.

The total cost of the project was to be DM2 billion. Later in the year, when West German Chancellor Helmut Schmidt visited Nigeria, it was announced that Hermes, the German export credit agency, would provide a DM1.2 billion export credit. Said a German banker: "That set a precedent; first, because it is not the usual practice to give an export credit when a contract has been renegotiated, and second, DM1.2 billion is the largest single credit ever granted by Hermes." The effect was to take the pressure off Nigeria's dwindling reserves, and to provide the German banks with the opportunity to do what they really like doing: finance their customers' projects, instead of granting all-purpose credits to the developing world.

From here on, one of the mysterious figures in international banking was to play a strange rôle in the Nigerians' negotiations with banks in the West. Offered such conflicting advice when they came to the Euromarkets for the first time a year ago, the Nigerians hired First Boston (Europe) to advise them on their borrowings. At the time, the decision was hailed as a great new departure for the undercapitalized investment banks. The Nigerians had one major example of this before them: the decision by the Indonesians to hire Kuhn Loeb, Warburg's and Lazard Freres to advise them on their borrowings after the Pertamina affair. The appointment of First Boston (Europe), made midway through the syndication of Nigeria's first jumbo a year ago, came too late to affect the first loan. But not the second.

The man at First Boston advising Nigeria was Yawand-Wossen Mangasha, one of the strangest figures in international banking. Mangasha (Wossen to his friends) is an Ethiopian, a former deputy governor of the Ethiopian central bank, who during the negotiations for the latest Nigerian jumbo financing acquired an undeserved reputation for arrogance among the lead managers of the loan.



*Exchange rate: 1N = US $1·5352
†Exchange rate: 1N = US $1·5500

Sources: IMF, Central Bank of Nigeria, Federal Ministry of Finance

Mangasha, shy, bespectacled, is an African's African with a strong faith in the future of Africa and a corresponding feeling that westerners do not understand the growing pains of the dark continent. His own recent history is startling.

In 1974, Mangasha and his boss, the governor of the Ethiopian central bank, were at an IMF Committee of 20 meeting in Washington. During the meeting Mangasha and his boss heard that the 44-year reign of Emperor Haile Selassie had ended in a bloody revolution and a left-wing regime. Mangasha decided to stay. The governor went home. He is, reportedly, still in prison, and so, strangely enough, is his successor. Mangasha, with the help of his friends in Addis Ababa, got his wife and children out of the country and into America, spending a few months staying with friends in Florida before he was hired for First Boston by his old Harvard classmate, Minos Zombanakis.

To First Boston, Mangasha's attraction probably lay in his contacts among Black African central bankers and finance ministry officials. In at least one sense, those contacts and knowledge paid off for First Boston: they landed the Nigerian contract for the bank. Mangasha's rôle was to advise Nigeria on both its borrowings and on the management of its reserve assets. In return First Boston was reportedly paid an annual fee of less than $50,000 — plus the commission on the sale or purchase of securities by the central bank. With the sale of large amounts of high-grade securities by Nigeria as it ran down its reserves, the commission income to First Boston is believed to have run into millions of dollars.

But apart from his disputed rôle in the loan negotiations, another event was to put Mangasha's future, and the future of that commission income, in doubt. That was the absorption by Credit Suisse White Weld of most of the international business of First Boston, and the change of name to Credit Suisse First Boston which meant that First Boston (Europe), Mangasha's main employer, no longer existed. Where would the Nigerian contract go?

Mangasha was one of the few First Boston (Europe) executives that Credit Suisse First Boston offered to hire. CSFB asked him to be vice-chairman. Mangasha has decided not to take it. The Nigerians, deeply suspicious of the rôle that the Swiss banks play in selling gold for the South African government, wrote to Mangasha in no uncertain terms telling him that if he moved to Credit Suisse First Boston his relationship with the Nigerian government would be terminated. That's left the Ethiopian in a quandary: since First Boston's African business is to be vested in Credit Suisse First Boston, it's meant that he cannot continue as he has. Late last month, Mangasha was still pondering his own future, and that of the Nigerian contract.

When the Nigerians realized, within months of signing their first jumbo financing, that the renegotiation of the Warri contract on a project financing basis was not going to be enough and that some of the projects in the plan would

Enter Wossen Mangasha, to be accused of arrogantly summoning the lead managers to his office

'Bello could have insisted on 1%, and the managers would still have gone in'

grind to a halt if they didn't borrow more, Mangasha was summoned to Lagos. He was told to sound out the banks for a possible $1 billion syndicated Eurodollar financing. According to some sources, Mangasha protested that this was too much and too soon after the first jumbo financing. He may not have protested loudly enough.

Back in London, he made a tactical error that upset banking etiquette. Instead of visiting the banks individually, or arranging for the interested banks to meet him on neutral ground, he asked them to come to his own office. To the bankers who came, it smacked of an arrogant summons. According to a former colleague, it was not. "Wossen's the opposite of arrogant, but he only feels comfortable on his own ground."

At the meeting, Mangasha told the banks that Nigeria wanted to raise another $1 billion. Could they do it, and on what terms?

It was soon to become apparent that Nigeria was prepared to concede relatively generous terms in order to get its funds. "When that became obvious, we talked ourselves into believing that it would be easy to get to a billion, fully underwritten" admitted a lead manager later. When a letter came from the Nigerian Ministry of Finance asking for tenders, six banks therefore offered to put together a financing of $1 billion over eight years, the first four years at a spread of 1%, the rest at 1¼%. The management fee was ¾%, the lead managers' praecipium ¼%.

The terms looked very generous. The spread on the last Nigerian jumbo was a flat 1% throughout (and could even have been ¾% if the Nigerians had accepted a bid from one of the three banks that was to lead manage the financing), and the management fee ½%. Spreads have fallen sharply over the last year, so sharply that Nigeria would apparently have been justified in demanding much tighter terms — even taking into account the deterioration in its reserves since. The country had no debt servicing to speak of, if it chose to re-enter the market on more generous terms, $1 billion might be only a starting point. The selldown might be so great that $1.2 billion would be possible.

Somewhat to the banks' surprise, Nigeria accepted the terms without demur. Six lead managing banks — First Chicago Limited (running the books); Chase Manhattan Limited (loan agreement); Citicorp (information memorandum); Dresdner Bank (signing arrangements); National Westminster Bank (agent); and Midland Bank (publicity arrangements) — agreed to underwrite $500 million between them, with Dresdner and NatWest each underwriting $100 million, the remaining four $75 million each.

"Bello (the Nigerian deputy permanent secretary of finance) got us round a big table and told us we had the mandate" said a lead manager later. "The spread was not an issue. Bello could have insisted on 1%, and the managers would still have gone in. We expected major support from banking pockets — in London, Frankfurt, Paris and so on. We'd offer positions of $25 million to co-managers (Banque Nationale de Paris and Société Générale were in as managers underwriting $50 million each), get to a billion, then sell down about a third, and go for more, maybe a billion one, even a billion two if we could get another ten banks in at $25 million apiece."

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So this time it was to be different: better terms, a better selldown than on the first jumbo when the managers shed only 15% from their books, and a wider geographical spread of banks that would do much to improve Nigeria's standing in the markets. "The broad aim was to get a lot of banks in," said one lead manager. "I thought that the willingness of the Nigerian government to accept a higher spread was symbolic, a sign of courage," noted another.

It seemed an excellent strategy, and it probably was. Bello, noted another manager, was "sensible and pragmatic." Preparing the information memorandum and loan documentation would be much easier, with the headaches ironed out by the first jumbo. The announcement was made to the press on July 7. The managers were ready to go to market.

It was then that the shock came. "The market just didn't want to know," said a manager after the syndication had begun. "We were very surprised," said another, "to get negatives from German, Swiss and French banks. The Japanese just weren't interested. So we began to dig, and we soon found out why."

Warri was the prime reason. The German banks, which the managers had relied upon to provide major support, were already committed to financing the GHH consortium for the steel production plant. And the project had obvious

General James Oluleye: We can justly, but shamefully, be called a nation of importers

advantages, in the sense that it was a financing where the banks had tight control over disbursements: if the agreed stages of the project had not been reached, the German banks could simply withhold further funds. Warri meant that DM750 million had already been put aside by the Germans for Nigerian risk; they just didn't want to know about a general Eurodollar credit.

The more the managers dug, the worse it got. Soon the managers discovered that banks throughout the world had lined up funds for corporate customers who hoped to land projects all over Nigeria, and which had been negotiated not with the Nigerian Ministry of Finance (the only body that can actually authorize official loans from abroad) but with the Ministry of Industry and even with local state officials. The Japanese banks, for example, were prepared to provide lines of finance for petrochemical projects, Bank of America was reportedly behind a major telecommunications project being negotiated by ITT, and so on. "It meant," said a manager, "that there was more money committed to Nigeria than Nigeria could possibly use. That was the crazy part of it." Said another: "With elections coming up next year, every would-be politician had been negotiating with the big men who came in from

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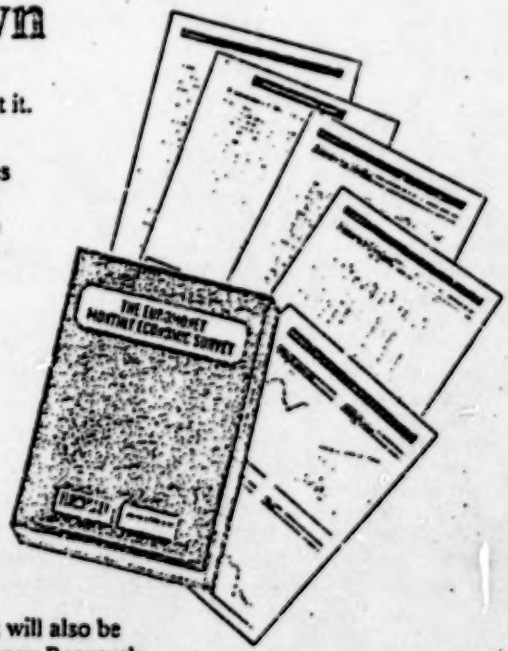

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* Countries covered — Australia, Belgium, Canada, France, West Germany, Italy, Japan, Netherlands, South Africa, U.K. and U.S.

overseas to build a factory in their home town."

The first intimation that there were big blocks of finance already committed to Nigeria came when the managers began following up the invitation telexes. "Until then we hadn't been aware that the banks who'd have been prime customers in syndication had already latched on to their own customers" admitted a manager. The odd part about that was that at least some of the managers sitting around the table with Bello when the mandate was awarded had certainly known of Warri; Dresdner Bank for one, as it is also in the Warri financing. "We certainly felt that everyone else there knew," said Dresdner afterwards. But at least one manager said that it did not. "Neither Dresdner nor Nigeria revealed that there was a major German financing, and that there had been since April," said that manager, claiming: "Bello was very directly asked whether there were project financings in the market. His answer was inaccurate. It's unfair to say he misled us, but it was inaccurate." Another admitted: "If we'd made a few calls into the market when the mandate was awarded, we'd have uncovered those blocks. We'd have sat down with Bello and gone for half a billion."

By then Mangasha had been pushed to the side in the negotiations between the managers and the Nigerians, which now took place directly between First Chicago's Lagos merchant bank and the Ministry. The task now was to unlock some of those funds committed to projects, releasing them into the Eurodollar credit.

To do that the Nigerians had to convince banks everywhere that only the Finance Ministry, and not the rival Industry Ministry, had the power to authorize foreign loans, and that in future loan negotiations would be centralized through the Finance Ministry. The managers drafted a letter that the Nigerians signed which was incorporated in the draft information memorandum. It was dated August 3.

The letter pointed out that the Ministry of Finance had given an undertaking that Nigeria would not re-enter the floating rate Eurocurrency credit market before January next year, and went on:

> "It had been reported to the Ministry of Finance by the management group that a number of banks have not taken any final decision to participate in Nigeria's $1 billion syndication because some of their customers are competing to secure or have secured government contracts for which the banks might be called upon to provide finance . . . To avoid any misunderstanding we feel it necessary to reiterate that the Federal Government attaches the highest priority to the financing of these and other projects through the syndicated loan which it is presently raising. We would like to stress that we attach much value to seeing the $1 billion loan well placed and accepted by the market, in view of the important rôle such a loan plays in the financing of Nigeria's capital budget and consequently in the financing of your customers' projects." Warri was a "possible" exception to this.
>
> It went on: ". . . the Federal Ministry of Finance is solely responsible for negotiating and concluding any agreement for external borrowings or guarantees for all public sector borrowings by both Federal and State governments and their agencies. In the case of state credits, it is necessary to point out that their external borrowings are limited only to export credits and project loans procured on their behalf by the Federal Government from the World Bank or regional development banking institutions such as the African Development Bank." The letter ended with the Ministry of Finance calling on those banks that had made commitments to ministries or government agencies to finance projects to "transfer such amounts to the $1 billion syndicated loan presently being arranged."

It didn't work. Either the banks did not believe that Nigeria would shun project-related loans, or they still did not think that Nigerian risk was attractive enough to entice them into the syndicated loan. The managers kept the books open, a few more banks drifted into the management group, but on September 12, the managers had to announce that the loan had been cut to $750 million. A fresh letter, confirming that the $750 million would be used for projects only was incorporated in the information memorandum. The cut in the amount was a bad blow to Nigeria's prestige. But there was worse to come.

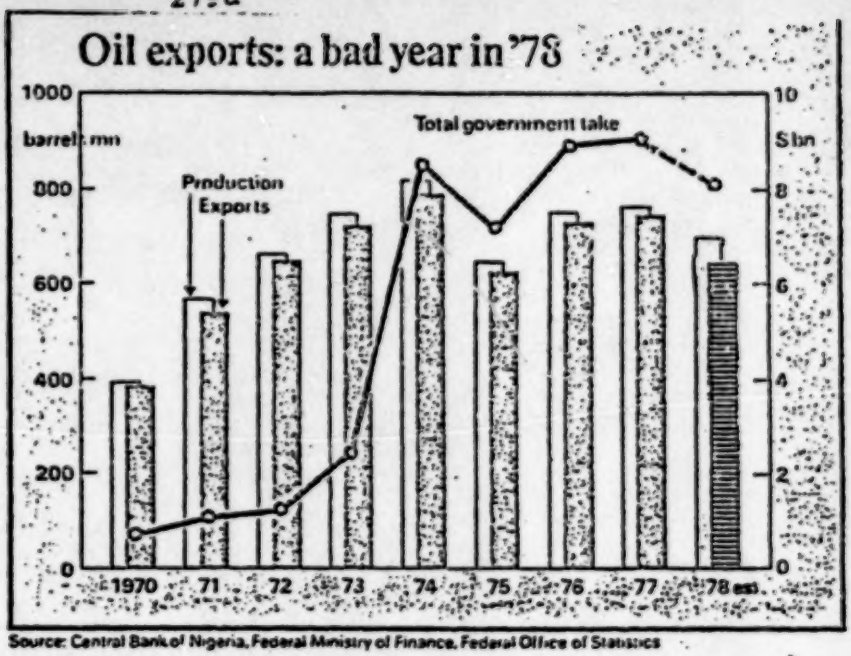
In the meantime, an obvious way of saving face presented itself: if the German bank financing for Warri could be incorporated in the Eurodollar loan, there could still be a signing ceremony with a magical billion-dollar tag. "That," said a lead manager, "would have made everyone very happy." The Nigerians, led by S. A. Musa, Permanent Secretary at the Ministry of Finance, set out to bring the Germans in.

The obstacle was that the Warri project financing would no longer be a project financing. It would simply be part of the overall credit. The German banks would not be able to control the flow of funds into the project. "The Germans are happy to incorporate the Warri funds into the syndicated credit, but the money *must* be earmarked for the project," said a German banker at the time.

For weeks, the negotiations got nowhere. The managers of the syndicated loan kept the books open after the official closing date of October 3, attracting sufficient funds in to achieve a small selldown until, finally, Musa made his move.

When he moved, he moved quickly. On the night of Friday, October 6, Wossen Mangasha was staying at the Algonquin Hotel in New York. A telephone call told him to be on the next flight to Frankfurt. Musa had arrived in Europe.

Mangasha flew into Frankfurt, teamed up with Musa and together, the Africans went to the meeting with the managers of the Warri project financing.



Source: Central Bank of Nigeria, Federal Ministry of Finance, Federal Office of Statistics

'It's unfair to say that Bello misled us, but he was inaccurate'

The lead managers' faith was shattered in a Paris courtroom

Everyone present at that weekend meeting in Frankfurt knew it would be a tough meeting, and it was. But at the end, Musa and Mangasha emerged smiling. The Germans had agreed to incorporate the Warri financing in the jumbo. A week later, the news was handed to the daily newspapers, where it was hailed as a coup for the Nigerians.

The reality was a little different. "Musa told the Germans that there would be no Warri deal at all unless the banks came in" an eyewitness reported. "He left the German banks with no choice." Said a German banker: "We had the impression that while the threat wasn't actually made, the Nigerians would withdraw their deposits from the German banks and pull everything out if we didn't go in."

But the Germans didn't give in easily. At the same meeting they had managed to extract a promise from the Nigerians that there would be a side-letter to the German banks, promising that the German funds would be channelled exclusively into Warri. Also mooted was a segregated account into which the German funds would be placed, from which they would be disbursed on a project basis by the Nigerian Central Bank and Deutsche Bank, creating what one manager called "a sort of sub-agency". The Germans were merely putting the Nigerians on their honour; the side-letter would have no legal standing whatsoever. As far as the loan agreement would be concerned, the German banks would be in exactly the same legal position as the participants in the original jumbo loan.

Could Musa have made good his threat? Probably not without doing Nigeria an immense amount of damage. Part of the funds for Warri were actually needed to pay German contractors for work already done, such as site clearing. But in German bankers' eyes, the project had already gone too far down the road to cancel the German contracts and begin again. So why give in? "We'll get the side-letter" said one German manager, "and that, while it will not have any legal standing, will be just as effective as any loan agreement."

In the midst of the negotiations with the Germans, an event took place in a Paris courtroom that was to shatter the lead managers' faith in the accuracy of the information provided to them by the Nigerian Ministry of Finance, information that was incorporated in the draft placement memorandum.

The last section of the memorandum dealt with the cement litigation, one of the problems that plagued Deutsche Bank when it compiled the memorandum for Nigeria's first jumbo. Most of the lawsuits, said a statement on page 80 of the draft for the latest jumbo, have been settled. It listed seven suits that were still pending or being settled, including Nigeria's possible liability for each, and then moved on to the arbitrations "pending or being settled". There were two. The first, the smoking gun that was to cause more headaches than practically any other aspect of the financing, stated simply:

> "Ipitrade International Inc. against Federal Republic of Nigeria. Amount claimed is FF4 million (approximately $820,000). Award has been made by the International Chamber of Commerce,

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The connection with Jean-Baptiste Doumeng

Ipitrade, the company which is trying to collect on its sale to the Nigerian government, is part of a ramifying Communist trading empire run, according to the purest capitalist principles, by France's communist millionaire Jean-Baptiste Doumeng. A 50% share of Ipitrade is held by Interagra, the agricultural import-export company which Doumeng has built up into France's largest food trading organization, specializing in sales to the Soviet Union and Eastern Europe.

In 1972, Doumeng negotiated the sale of one million tons of wheat to Russia, hungry for foreign produce following a harvest failure. This was followed by 120 thousand tons of butter in 1973, over 100 thousand tons of meat in 1974 and, in 1976, a cut-price sale which shocked consumers in the Common Market countries, a further 50,000 tons of Europe's butter mountain. The communist millionaire scoffed at criticism. Teaching his capitalist grandmothers to suck eggs, he pointed out that it was a matter of elementary economics that produce should be sold rather than maintained expensively in stock.

A longstanding customer of the Soviet Banque Commerciale pour l'Europe du Nord, Interagra has been accused in the past of operating with funds from Moscow. This may have been true during its early history. Its subsequent commercial success has been such that it has certainly now been living on its own fat profits for many years free from the need of cash injections from the Soviet Union.

Interagra is the key holding company in the Doumeng organization — a closely-meshed pattern of some 30 agricultural cooperatives of which the leading member is the Union Cooperative Agricole du Sud-ouest, based in Toulouse. Doumeng and Ucaso each hold 35% of Interagra and their combined turnover was said to be $2 billion in 1976.

Among Doumeng's most spectacular successes is the model beef cooperative in south-west France. Europe's biggest factory ranch, it fattens over 10,000 head of cattle each year and the technology for six similar ranches has been sold, for a reported price of $6 million per unit, to the USSR, Romania, Czechoslovakia and Zaire.

Successfully running with the hare while hunting with the hounds, Doumeng managed to import a million hectolitres of Algerian *vin ordinaire* in 1972, when French winegrowers in the south-west were being encouraged by the Communists to demonstrate against such cheap foreign purchases.

The self-taught Doumeng, who revels in the "red millionaire" label, was born the son of poor peasants in south-western France. The legend, which he never contradicts, has it that as a 12-year-old shepherd boy he took works of political economy with him to while away the long hours in the upland pastures. During the Second World War he did an undercover quartermaster's job, running the supply-network for the local resistance. Post-war scarcity found him ready to meet the challenge. Inaugurating what was to be a long career in East-West trade, he requisitioned a train to import the surplus resulting from a bumper potato harvest in Czechoslovakia. This operation, it is said, produced the profit on which he founded the beginnings of his empire.

In 1952, he went to Moscow for a trade conference and has since figured in virtually every major East-West agricultural trade deal. Neither too proud, nor too dogmatic to hobnob with millionaires of other persuasions, he regularly rubs shoulders at board meetings with some of Europe's most prominent hereditary capitalists. He holds 15% of the stock of the Banque Stern, the merchant banking organization, of which Rothschilds own 30%.

Stocky, grizzled and with no pretensions to sartorial elegance, Doumeng has adopted a life-style closer to that of a Hollywood millionaire of the 'thirties than a paid-up member of the French Communist Party. But, in spite of the luxurious villa and the swimming pool, the gargantuan gourmet spreads and the other trappings of luxury, he is said to hand over half his considerable income to the party's funds.

Paris. The Cement Contracts Negotiating Committee has agreed to meet with Ipitrade to work out payments."

The statement was dynamite. Within weeks of it being written, a French court was to slap an attachment order on Nigerian funds in France, effectively blocking the French banks from taking part in the jumbo. "As far as the loan is concerned, the French banks are now impotent" said a resigned manager.

Ipitrade (see box) had shipped cement to Nigeria in 1975 against irrevocable letters of credit from the Nigerian Central Bank. The letters of credit were then apparently cancelled after the shipment had been made. Ipitrade went to the International Chamber of Commerce in Geneva, invoking the arbitration procedure, and was awarded $10 million for breach of contract. When Nigeria did not pay, Ipitrade finally applied to the Tribunal de Grande Instance in Paris which in turn blocked Nigerian bank accounts in France.

It was a terrible blow to the loan. For one thing BNP and Société Générale were in for $50 million each, so if the French banks were to be excluded it would mean that the loan would probably need to be cut by $100 million — if it went ahead at all. But worse again was the fact that the Nigerians had apparently not provided the whole picture when listing outstanding litigation in the information memorandum. To the management group, it put a question mark over the rest of the information on the outstanding lawsuits.

They took drastic action. On Tuesday, October 17 they sent a strongly-worded telex to Lagos, demanding that the Nigerians instruct their lawyers to provide the fullest information on all outstanding litigation. The telex demanded that (1) the lead managers be authorized to get testimony on outstanding litigation from Nigeria's counsels, (2) that the information relating to litigation on page 80 of the information memorandum be amended, (3) that all outstanding appeals be settled before signing, and (4) that if any bank had an attachment order placed on it, all the other banks in the loan should have the option to pull out of the loan. The last demand was to be softened because, in the words of one manager "it was too hard, too destructive."

Allen & Overy, the lead managers' solicitors, were instructed to obtain written testimony on the cement litigation from Nigeria's lawyers in the centres where litigation was taking place. That demand brought a remarkable response; the Nigerian Solicitor-General arrived in

London three days later to meet the managers and their lawyers.

"The whole thing is so unnecessary," a lead manager pointed out. "Nigeria could have settled all these years ago. Instead it's chosen to fight. We've advised them throughout that they must avoid having Nigeria's sovereign name dragged through the courts. The amounts are so small, but they're putting a billion-dollar loan at risk. They're convinced that Ipitrade is some sort of Russian-backed organization" (see page 22).

On Tuesday, October 24, the banks assembled at First Chicago for the 12th or 13th managers' meeting (most syndications only require two or three).

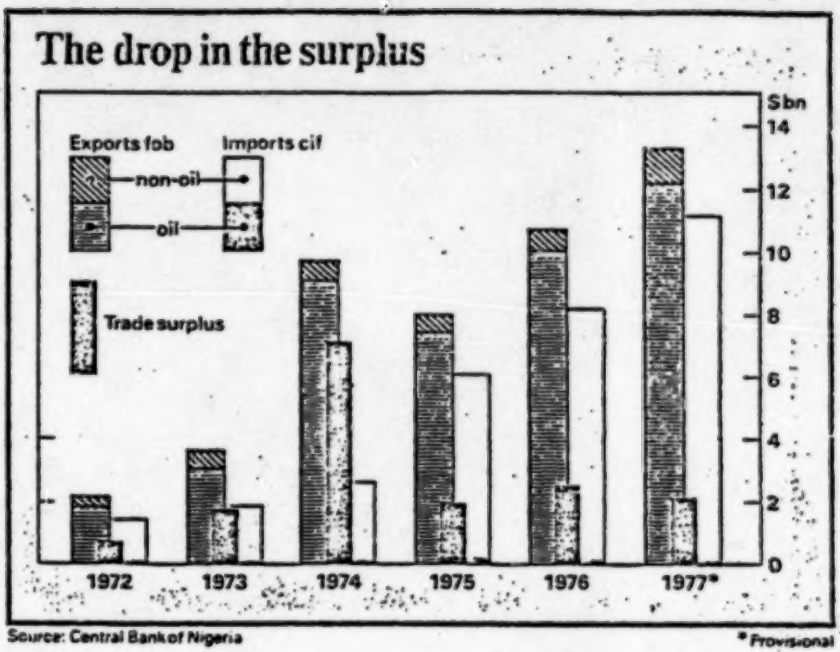
They were told that the Ipitrade suit appeared to be settled. The lead managers were given a formal declaration from the Nigerian Solicitor-General that the case had been resolved. The managers were later to be told by representatives from Ipitrade that the French company had issued a dispatch certificate to the Paris court, lifting the attachment order. The managers breathed a mighty sigh of relief.

The Nigerians had apparently also reached another critical decision: they had decided to relinquish the legal defence of sovereign immunity in the remaining litigation over the cement cases. They had taken the welcome decision to fight the cases in the open. "They hated being the test case for sovereign immunity" said a banker close to the Finance Ministry, in a reference to the Trendtex case (*Euromoney*, October 1977).

As we went to press, the loan was moving nearer to a signing date. Both sides agreed that it would tempt fate to name a date; the managers were feeling greatly relieved that not a single bank had left the management group; and the selldown was approaching $100 million. It was even possible, said one manager, that there would be a last minute burst of enthusiasm from the Japanese banks, but the loan amount appeared to be staying at 750 million, plus the German tranche whose value was increasing daily with the rise of the Deutschemark. There could, one of the managers believed, even be a signing early this month. It appeared to be all over.

What of Mangasha, and the new rôle for the investment banks in advising borrowers that the appointment of First Boston was supposed to herald? It's plain that Mangasha was given no discretionary negotiating powers whatsoever by the Nigerians. His own assessment was that he had merely opened the negotiations on the Nigerian's behalf, bringing everyone together, acting as a courier between Lagos and London (he travelled back and forth an estimated 10 or 11 times during the negotiations) advising the Nigerians on the terms and conditions that they might expect, and helping to bring in the Germans.

Was his advice good? More to the point, was it taken by the Nigerians?



Mangasha, naturally enough, shuns such a sensitive question, but it is believed in some quarters that he felt that $1 billion was too much, and that half that amount would have been more appropriate. The managers of the loan certainly did not take a charitable view of him. "He was a structural irrelevancy" said one. "During the earlier stages of the negotiations we communicated directly with him," said another, "but we discovered that a lot of what we told him did not appear to be passed on to the Nigerians. Pretty soon we started communicating directly with Lagos". Another added: "It's hard to say that he played any rôle at all."

A former colleague defended him: "He's the little guy who was able to pull the deal together again. After all, it was Wossen Mangasha and the Nigerians, not the lead managers, who brought the German banks along. And he was very central to the early negotiations."

And the future of Nigerian financing in the Euromarkets? The first jumbo financing did not go well, but it had the problems that banks might reasonably expect from a newly-rich developing country coming to the Euromarkets for the first time. The experiences with second jumbo financing, however, do not augur well for future Nigerian deals. "Can we rely on their creditworthiness after this?" asked a lead manager rhetorically.

There remained other unanswered questions. Why did Nigeria go for a jumbo? "They added up all the project requirements, deducted Warri, and found that half-a-billion just wasn't enough," said a banker closely involved in the earlier deal. "They even considered a yen parallel financing at one stage." Most agreed with that assessment.

Why did the Nigerians not wipe the slate clean of the cement lawsuits before coming to the market? "Because they think differently," the same banker explained. "There's a huge gap between Africa and the established banking community. In Africa, they take these things personally. They felt that, whatever the position in international law was, they'd been screwed by the foreign cement suppliers, and they weren't going to let them get away without a fight."

Why did the Japanese banks, hitherto ready takers of big credits in spite of the recent restraints placed upon them by the Ministry of Finance in Tokyo, not go in with a rush? "Four reasons" replied a Japanese banker. "One, Nigeria has borrowed too much, too quickly. Two, the credit is too big for a single borrowing. Three, Japanese banks do not know Nigeria — or any other country in Africa. And four, the proposal to centralize its borrowings means that the banks will not be able to see that the funds are used for specific projects. That means that Japanese exports for the projects cannot be financed directly by Japanese banks. So we wouldn't be directly helping our customers."

Looming over everything was the deep suspicion with which the Nigerians appeared to regard foreign bankers and suppliers. The cement dispute is blamed for much of that. A lead manager explained: "It made everyone in Lagos afraid to act in favour of any foreign supplier. No official wanted to be accused of giving anything away." Another banker who had worked closely with the central bank commented: "The Nigerians think they're the victims of an international conspiracy. They feel misunderstood and misrepresented." Perhaps it was a clash of cultures, as much as anything else, that produced the impasse over Nigeria's second jumbo financing. □

EXHIBIT J TO HOENIGER AFFIDAVIT - EXCERPTS FROM TESTIMONY OF GEORGE W. RYAN IN NATIONAL AMERICA CORP. v. FEDERAL REPUBLIC OF NIGERIA AND CENTRAL BANK OF NIGERIA, 420 F. Supp. 954, 956-57 (S.D.N.Y. 1976)

training, how frequently would they come?

A Well, I don't know. I mean, I know they have --

Q Besides training, would they come over here themselves to deal with you on any --

A They might periodically.

Q How frequently ?

A I don't know. I mean, I take them in the class of all the other visitors we have from Central Banks, and I really can't single out how frequent.

Q The way in which you list the Nigerian funds in your bank, would you give us how its titled? What is the name of the account?

A The Federal Government -- presently?

Q Yes.

A The Federal Government of Nigeria.

Q What was it in '75 and '76?

A In '75 it was in the name of the Central Bank of Nigeria.

Q And in '76?

A I believe in February of '76 the account in the name of the Federal Government of Nigeria was established.

Q When in 1976 you transferred funds from the Federal Reserve to Morgan, did you transfer funds out of

the Federal Republic of Nigeria for the account of the Central Bank of Nigeria as it was maintained at Morgan?

A Assuming it was after February?

Q Yes.

A It would have been out of the Federal Government account on our books, and I don't know whether it went to the Central Bank account or what account it was in Morgan, if in fact there were accounts.

Q Other than the change in the name from Central Bank to the Federal Republic of Nigeria, were both of those accounts ostensibly the same?

A Yes.

THE COURT: What purpose was served by changing the name of the account, if you know?

THE WITNESS: I don't know. I mean, I can speculate but I don't know.

Q Over at the building that the Federal Reserve maintains here in the financial district, you keep bullion, do you not, gold?

A That's correct.

Q But all the money that is accumulated there, that is not all physically present, is it?

A That's correct.

Q With respect to the Government of Nigeria,

EXHIBIT K TO HOENIGER AFFIDAVIT - LETTER FROM WARSHAVSKY & HOFFMAN TO BERTHOLD H. HOENIGER, ESQ. DATED NOVEMBER 1, 1979

WARSHAVSKY & HOFFMAN
30 ROCKEFELLER PLAZA
NEW YORK, N.Y. 10020

STEPHEN D. HOFFMAN
SUZANNE M. WARSHAVSKY
DAVID W. COHEN

TELEPHONE (212) 247-0350

November 1, 1979

Berthold H. Hoeniger, Esq.
505 Park Avenue
16th Floor
New York, New York 10022

Re: Verlinden B.V. v. Central Bank of Nigeria

Dear Bert:

During our recent telephone conversation I advised you that the Central Bank of Nigeria ("CBN") instructed Morgan Guaranty Trust Company of New York to place in interest bearing time deposits the funds which CBN had previously instructed Morgan Guaranty to hold pursuant to Judge Weinfeld's order. You advised me that you had no objection to the funds being placed in time deposits.

Best regards.

Sincerely,

Steve

Stephen D. Hoffman

SDH:jh

EXHIBIT L TO HOENIGER AFFIDAVIT - MORGAN GUARANTY OFFICE MEMORANDUM DATED OCTOBER 27, 1975

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

OFFICE MEMORANDUM

To: Messrs. Lewis T. Preston - Executive Vice President
William E. Pike - Chairman, Credit Policy Com.
Carl S. Samuelson, Jr. - Vice President

Date October 27, 1975

From: Paul W. Fitzpatrick, Ralph J. Eunche, Jr. & Arthur J. Brown

Subject: CENTRAL BANK OF NIGERIA

At the present time, we have five confirmed letters of credit outstanding for the Central Bank of Nigeria totaling $70,761,907.95. Of these credits, three totaling $67,240,000 cover shipments of cement. (See attached list.) In addition, we have advised (without responsibility on our part) letters of credit totaling $199,994,015.90 of which $164,266,405.26 cover cement.

Over the last several weeks, we have received the following instructions from the Central Bank: (These apply only to cement credits.)

1. All invoices must be certified by supplier.
2. No demurrage charges are to be paid without shippers having certification from the Nigerian Ports Authority.
3. No ships carrying cement are to leave for Nigeria without prior approval of the Central Bank.

All of the above seem to us to be amendments to existing letters of credit, and therefore require the consent of the various beneficiaries. Most beneficiaries are obviously reluctant to accept the proposed amendments without suitable compensation.

With regard to the advised credits, our role is to comply with the instructions from the Central Bank without responsibility on our part. Consequently, if documents are presented, we will only pay if the three above amendments are complied with.

As to the confirmed credits, if beneficiaries submit documents which comply with the original credit and refuse to accept the amendments, we are obliged to pay and then seek to reimburse ourselves from the Central Bank of Nigeria's account at the Federal Reserve Bank of New York. (This is our usual procedure.) It is possible that the Central Bank will refuse to allow us to reimburse ourselves because documents do not comply with the above amendments. The three confirmed cement credits which are presently outstanding were originally opened in May 1974. Since that time, none of these credits have been utilized. All three of the beneficiaries are unsubstantial businesses; and we think it very unlikely that they will be able to find shippers willing to ship to Nigeria under the present circumstances, particularly since none of these credits cover demurrage payments.

We think it is increasingly likely that one or more of the beneficiaries of an advised credit may institute legal action against the Central Bank, and may try to attach assets of the Central Bank which we hold. At the present time, we have a $9,349,021 current account and a custody account with securities totaling $243MM.

MORGAN GUARANTY ... ...

OFFICE MEMORANDUM

To: Messrs. Lewis T. Preston - Executive Vice President
William E. Pike - Chairman, Credit Policy Com.
Carl S. Samuelson, Jr. - Vice President

Date October 27, 1975

From: Paul W. Fitzpatrick, Ralph J. Bunche, Jr. & Arthur J. Brown

Subject: CENTRAL BANK OF NIGERIA

We have telexed the Central Bank and advised them that there seems to be an increasing possibility of legal action being instituted in New York against them, and suggested that they engage first rate legal counsel.

P.W.F. R.J.B. A.J.B.

CONFIRMED LETTERS OF CREDIT

Beneficiary	Commodity	Expiry	Balance Outstanding
Nix International	Cement	Dec. 31, 1975	$26,250,000
Chikafis International	Cement	July 31, 1976	14,490,000
Tri Ex Enterprises	Cement	Oct. 31, 1976	26,500,000
TOTAL CEMENT CONFIRMED CREDITS			$67,240,000
GTE International	Telephone Equipment	Dec. 31, 1976	689,814
Harris Corp.	Satellite Tracking Station	Dec. 31, 1976	2,832,093
TOTAL NON-CEMENT CONFIRMED CREDITS			$3,521,907
TOTAL CONFIRMED CREDITS			$70,761,907

ADVISED LETTERS OF CREDIT

TOTAL $199,994,015.90
OF WHICH $164,266,405 COVER CEMENT

EXHIBIT M TO HOENIGER AFFIDAVIT - MORGAN GUARANTY MEMORANDUM FOR CREDIT FILES DATED 10/11/78

Memorandum for Credit Department Files

(Give full detail)

Regarding CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

From Mr. Arthur J. Brown, A.T., 3/15

10/11/78

Mr. A. Ogedegbe
Director of Foreign Operations

MG 120

The above was the guest of Paul Fitzpatrick and the writer for lunch today. This was our first meeting with Ogedegbe and he is clearly an impressive individual and is the one to talk to about investments, and letters of credit and in fact most of the business we can expect to do with Central Bank of Nigeria in the future.

Although the Central Bank feels that it should not be performing many commercial banking functions, they will nevertheless continue with this sort of business first because of commercial banks limited capacity and second because of their traditional function as banker for the Nigerian Government. The Central Bank of Nigeria's ability to get L/C's opened without confirmation is very importa to the government's effort to combat inflation.

We should be hearing more from Ogedegbe's office in about two months with regard to installation of the direct telex in our Cable Department.

We discussed the courier service (International Air Courier) in detail explaining the type of material to be handled and Ogedegbe said we would hear from him shortly on this matter.

We had the opportunity to mention that should Central Bank of Nigeria have the need to liquidate any of their government investments in the future, they could come to us for our suggestions with regard to any repurchase type of agreeme which would be available to them. Ogedegbe seemed very interested in this, he made some notes and said that he would contact us should the need arise.

Ogedegbe asked if we were having any difficulties. I mentioned the fact that they had not been receiving some of the registered mail which we had sent to them. He promised to investigate in Lagos and to telex any suggestions they mi have. Ogedegbe mentioned the long letter which was sent to us by his reconciliat manager. I told him we had replied already on several points and were in the proc of compiling several corrected statements which would be sent out this week.

Ogedegbe said that he could not foresee any quick settlements to the remaining cement cases still pending in New York. It seems to him that there is stalemate between National American Corporation and the Government of Nigeria. H said Nigeria is willing to wait it out since they are not too upset as the attach funds are earning interest for them and they look upon these attached funds as pa of the reserves they would be holding in dollars anyway.

Ogedegbe said that Adegbayemu, their Principal Legal Officer, has taker retirement in order to go into politics. He also said that Usman Nagogo was no longer Director of Personnel but is now in Administration.

I talked about our willingness to continue to provide training and I al mentioned the discussions we had with Vincent and Otiti regarding our having

Memorandum for Credit Department Files

FORM 45-4-315
M. G. T. CO. OF N.

(Give full details)

Regarding .....

.....

From M

someone (Sellge) give a lecture or two when their training school conducts an international banking program.

The main purpose of this visit seems to have been merely a courtesy call on us and the Federal Reserve Bank of New York. As an aside, Ogedegbe presented our Custody Department with $10,000,000 in Japanese Development Bank 8 1/2% bonds due 3/15/80 which Central Bank of Nigeria had sold to Yamichi International (Europe) Limited, London and which Yamichi wanted deposited in their account with us.

A.J.B.

cc: R.B. Wagner, S.V.P.
J.J. Sperling, Economists

EXHIBIT N TO HOENIGER AFFIDAVIT - TELEXES
FROM CENTRAL BANK TO MORGAN GUARANTY

...NK NG 22/10/79

TO MORGAN GUARANTY TRUST COMPANY OF NEW YORK NEW YO
WIRE & CABLE DEPT.
KNUSA

45 FUNDS - WE HAVE INSTRUCTED FEDERAL RESERVE BANK TO PAY YOU DLRS.4,360,000 X UPON RECEIPT PLEASE CREDIT FUNDS TO OUR ACCOUNT X THE PURPOSE OF THIS TRANSFER IS TO COMPLY WITH A COURT ORDER WHICH REQUIRES US TONKEEP A MINIMUM BALANCE X OF D RS.4,360,000 ON OUR ACCOUBTXWITH YOU PENDING THE DETERMINATION TF A SUIT I PLEASE ENSURE THAT THE BALANCE ON OUR ACCOUNT DOES NOT FALL ZELOW DLRS.4,360,000 HENCEFORTH X

TEST NO. 45337 - TESTED ON DLRS.4,360,000 --
CENTRAL BANK OF NIGERIA+++S
667240A MGTFX UN
21350 CEBANK NG

1) Mr Pervice Tel 424
2) Art Brown Urgent!
3/15

66T240A MGTFX UW
66T240A MGTFX UW
21350 CEBANK NG 23/10/79
TO MORGAN GUARANTY TRUST COMPANY OF NEW YORK NEW YORK

#

49/FUNDS - OUR 45/FUNDS OF OCTOBER 22, 1979 FOR DOLLARS 4,360,000.00 TRANSFERRED FROM FEDERAL RESERVE BANK OF NEW YORK X PLEASE INVEST FUNDS IN A SPECIAL 30 DAYS TIME DEPOSIT ACCOUNT X VALUE OCTOBER 24, 1979 X

TEST NO. 48451 ++
CENTRAL BANK OF NIGERIA+++@
66T240A MGTFX UW
21350 CEBANK NG

Fagan

TEST VERIFIED

3/11

13/2/79

045522

MORGAN GUARANTY TRUST COMPANY OF NEW YORK
TELEGRAM

MORGAN GUARANTY TRUST COMPANY OF NEW YORK
TRUST COMPANY
1979 OCT 23 P 4:55
WIRE & CABLE DEPT.

RECVD ALL WELL?RRRRRRRRRRRRRRRRRRRRRRRRRR

MOM+
YES SIRS THANK YOU+
OK TKS

Best Copy Available

RCA OCT 26 12078

232087B MGTX UR

232087B MGTX UR

21350 CEBANK NG 26/10/79

TO MORGANBANK NEW YORK

ATTENTION A J BROWN

54/FUNDS - FURTHER TO OUR 48/FUNDS OF OCTOBER 23 WE HAVE INSTRUCTED FEDERAL RESERVE BANK OF NEW YORK TO PAY YOU DOLLARS 870,000.00 VALUE OCTOBER 26 1979 X UPON RECEIPT INVEST FUNDS IN THE SPECIAL 30 DAYS TIME DEPOSIT ACCOUNT X THIS IS IN ADDITION TO DOLLARS 4,360,000.00 IN SAME ACCOUNT TO MEET JUDGE WEINFIELD'S ORDER OF OCTOBER 12 1979 X ADVISE DIRECTOR OF FOREIGN OPERATIONS X

TEST NO 54534 ++

CENTRAL BANK OF NIGERIA+++

EXHIBIT O TO HOENIGER AFFIDAVIT - LETTER FROM MORGAN GUARANTY TO JAMES G. SIMMS, ESQ. DATED NOVEMBER 16, 1979

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 WALL STREET, NEW YORK, N.Y. 10015

New York November 16, 1979

ARTHUR J. BROWN
Assistant Vice President

KISSAM, HALPIN & GENOVESE
RECEIVED
NOV 16 1979 by
HAND

James G. Simms, Esq.
Kissam, Halpin & Genovese
120 Broadway
New York, New York 10005

Dear Mr. Simms:

I hereby confirm that Morgan Guaranty Trust Company of New York ("Morgan Guaranty") has received from the Central Bank of Nigeria, three telexes, dated 22/10/79, 23/10/79, and 26/10/79. Copies of these telexes are attached to this letter. These telexes advised Morgan Guaranty that it would receive a total of $5,230,000 to comply with Judge Weinfeld's Order of October 12, 1979 and instructed Morgan Guaranty to invest these funds in a special thirty-day time deposit account.

I hereby further confirm that, pursuant to the telexes, Morgan Guaranty has received $5,230,000 from the Federal Reserve Bank of New York and that Morgan Guaranty has invested the funds in thirty-day time deposit accounts. At the expiration of each thirty-day period, the funds will be invested in new thirty-day time deposit accounts, and the interest earned will be remitted to the Federal Reserve Bank of New York for the account of the Central Bank of Nigeria. Morgan Guaranty will hold the funds pursuant to the instructions of the Central Bank of Nigeria contained in the telexes and pursuant to such instructions as Morgan Guaranty may receive from the Central Bank of Nigeria in the future.

Sincerely,

Arthur J. Brown

AFFIDAVIT OF BERTHOLD H. HOENIGER, ESQ., FOR PLAINTIFF, IN OPPOSITION TO MOTION TO DISMISS THE COMPLAINT AND FOR RELIEF FROM ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VERLINDEN B.V., : Index No. 79 Civ. 1150(E.W.)

Plaintiff,

- against - : AFFIDAVIT ON BEHALF OF PLAINTIFF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

CENTRAL BANK OF NIGERIA, :

Defendant.

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

BERTHOLD H. HOENIGER, being duly sworn, deposes and says:

1. I am the attorney for plaintiff herein and am personally familiar with the matters hereinafter set forth. I make this affidavit in opposition to defendant's motion to dismiss the action for alleged lack of subject matter and personal jurisdiction (based on purported sovereign immunity and the act of state doctrine), and for summary judgment on the ground that plaintiff failed to commence shipment within 45 days after its receipt of the letter of credit, thus rendering the letter of credit unavailable and in effect null and void before any possible repudiation by defendant CBN. Defendant also seeks a third type of relief, namely, vacatur of this Court's order dated October 12 and filed October 15, 1979.

2. I have previously submitted to this Court my affidavit of December 6, 1979, in opposition to the third branch of relief sought by defendant. I respectfully ask this Court to consider that affidavit together with my present affidavit and the affidavits of Mr. Verlinden and Mr. Verlinden's bank, which are being submitted

in opposition to the motion to dismiss and the motion for summary judgment. Since much of the essential background is contained in my December 6, 1979 affidavit, it will not be repeated here. However, for the sake of continuity, the additional exhibits annexed to the present affidavit by Mr. Verlinden, the bank, and myself, will commence with exhibit P, so as to preserve continuity with plaintiff's exhibits. Plaintiff's exhibits A through O are annexed to my affidavit of December 6, 1979.

PAPERS AND EXHIBITS BEFORE THIS COURT ON THIS MOTION

3. For the sake of good order, I list herewith the papers thus far which this Court will have before it on the defendant's three-branched motion.

IN SUPPORT OF THE MOTION

A. Simms affidavit of November 12, 1979, with 15 exhibits (hereinafter "Simms Exh. _") as follows:

1. Complaint.
2. Letter of Credit.
3. Cement Contract.
4. Foreign Sovereign Immunities Act of 1976.
5. Legislative history.
6. Uniform Customs and Practice for Documentary Credits.
7. Jolaoso affidavit.
8. Nigerian Decree #40, 19 December 1975.
9. Cable of 9/30/75 from CBN to Verlinden.
10. Morgan letter of 9/30/75 to Verlinden.
11. Magistrate Schreiber's recommendation in the consolidated East Europe/Nikkei/Chenax actions.

12. Koebel affidavit.

13. Order of this Court dated October 12 and filed October 15, 1979.

14. Telex dated 10/22/79 from CBN to Morgan.

15. Telex dated 10/26/79 from CBN to Morgan.

B. Koebel affidavit of 11/12/79, with seven exhibits (hereafter "Koebel Exh. _") as follows:

1. Letter of Credit.

2. Letter dated 7/7/75 from Morgan to Slavenburg's Bank.

3. Cable dated 7/9/75 from Morgan to Slavenburg's Bank.

4. Texex dated 7/11/75 from Verlinden to Morgan.

5. Uniform Customs and Practice for Documentary Credits.

6. Letter dated 9/29/75 from Slavenburg's Bank to Morgan.

7. Letter dated 9/30/75 from Morgan to Verlinden.

C. Reply affidavit, if any, to be hereafter served by defendant.

IN OPPOSITION TO THE MOTION

A. Hoeniger affidavit of December 6, 1979, with exhibits A through O as follows:

A. Letter dated 5/27/75 from CBN to Chenax.

B. Letter dated 7/14/75 from CBN to East Europe.

C. Letter dated 2/12/75 from CBN to Morgan.

D. Nigeria's Confidential Information Memorandum, September 1978.

E. Judge Haight's opinion and order in the Reale action dated 1/19/79.

F. U.K. Court of Appeal decision in Trendtex.

G. Decision of the Frankfurt, West Germany District Court in Nada.

H. Ipitrade arbitration award.

I. Article from Euromoney.

J. Portion of minutes of National American trial (Ryan testimony).

K. Letter dated 11/1/79 from Warshavsky & Hoffman to B.H. Hoeniger.

L. Morgan office memo, 10/27/75.

M. Morgan office memo, 10/11/78.

N. Three telexes from CBN to Morgan, dated 10/22/79 (same as Simms' exh. 14), 10/23/79, and 10/26/79 (same as Simms' exh. 15).

O. Letter dated 11/16/79 from Morgan to J.G. Simms.

B. My present affidavit and the affidavit of Mr. Frans Verlinden and of Mr. Verlinden's bank, with exhibits P through R as follows:

P. Morgan deposition in Reale, pp.36,39,46-47.

Q. Judge Pierce's order dated November 6, 1978, in the East Europe/Nikkei/Chenax actions, adopting and So Ordering Magistrate Schreiber's report and recommendations.

R. Judge Pierce's order dated June 18 , 1979 in the East Europe/Nikkei/Chenax actions.

S. Telex or cable from Morgan to Verlinden's bank dated September 2, 1979.

T. Cable dated September 1, 1975 from Nigeria's Ministry of Defence to Verlinden.

C. The pre-trial deposition testimony of Morgan, taken by me in 1979 and last week, together with exhibits 1 through 76 for identification marked on said deposition and the prior deposition of Morgan.

4. Additionally, this Court will have before it defendant's memorandum of law in support of its three-branched motion, dated November 9, 1979, and any reply memorandum hereafter served by defendant; plaintiff's memorandum dated December 5, 1979, in opposition to vacatur of this Court's order of October 12, 1979; and plaintiff's memorandum dated January 16, 1980, in opposition to defendant's motions to dismiss and for summary judgment.

THE MOTION TO DISMISS

5. The facts relevant to the motion to dismiss have been set forth in my prior affidavit and in the affidavits of Mr. Verlinden and Mr. Verlinden's bank. The applicable law is discussed in plaintiff's memorandum in opposition to the motions to dismiss and for summary judgment. I therefore confine myself in this section of this affidavit to correcting, under oath, some of the more egregious misstatements made by Mr. Simms in his affidavit of November 12, 1979.

6. Contrary to the assertions of the Simms' affidavit, ¶11, the repudiation of CBN's irrevocable letter of credit occurred by means of three cable or telex instructions from CBN to Morgan dated September 15, 19 and 30, 1975. By these instructions, CBN unilaterally, and without the assent of Verlinden, amended said letter of credit -- and th 13 similar other letters of credit advised by Morgan pursuant to Nigerian cement contracts -- so as to impose additional conditions which

rendered further payment by Morgan under said letters of credit virtually impossible. (Koebel deposition testimony in Reale, annexed as Exhibit P.)

7. Contrary to the Simms assertions, these instructions and amendments had their intended effect and target in New York; their purpose was to make it impossible for Morgan, the advising and paying bank designated by CBN, to honor the letters of credit. As shown in the accompanying memorandum, that was precisely the holding of a unanimous New York Court of Appeals in Zeevi v. Grindlays Bank (Uganda) Limited , 37 N.Y.2d 220 (1975); and the U.S. Supreme Court apparently found no constitutional problem whatever with the decision by the New York Court of Appeals, for it denied certiorari at 423 U.S. 866 (1975).

8. The Simms affidavit asserts, in ¶16, that Morgan is an "independent entity" and therefore cannot be an agent of CBN. This is nonsense. Principal and agent are always two independent, but related, entities. The accompanying memorandum of law indicates that the activities of Morgan in the United States on behalf of CBN were such, both in nature and extent, that there would be ample precedent for finding that Morgan was and is CBN's agent, and that CBN, through such agency, carried on a commerical activity in the United States out of which this action arises, within the meaning of the first clause of 28 U.S.C. §1605(a)(2). Judge Goettel's finding in National American that CBN was not "doing business" in New York relates to the long-arm provisions of the N.Y. CPLR, since National American was decided under pre-Immunities Act law. "Doing business" may well be different from "carrying on a commercial activity" under the Act.

9. In ¶22 of the Simms affidavit, there is an intentional implication that Judge Pierce, in the East Europe/Nikkei/Chenax

actions, left open the jurisdictional issue, and is still considering the same. Nothing could be further from the truth. By order dated November 6, 1978, Judge Pierce adopted and So Ordered the recommendation of Magistrate Schreiber.* When defendants' their motions to dismiss having thus been denied, answered, they pleaded the same defenses of lack of subject matter and personal jurisdiction in their answers. These affirmative defenses were stricken by Judge Pierce by order dated June 18, 1979 (Exhibit R). No evidence of any kind was received in the three week trial, held during September 1979, relating to the issue of personal or subject matter jurisdiction, sovereign immunity, or the act of state doctrine. Precisely the same disposition was made by Judge Haight in the Reale action (plaintiff's Exh. E).

10. The so-called "ports embargo" referred to in the Simms affidavit, ¶28, was a regulation issued by the Nigerian Ports Authority in August 1975. This is precisely the kind of regulation by a ports authority which the Second Circuit, in Victory Transport v. Comisaria General, 336 F.2d 354, 362-63 (2d Cir. 1964), cert. denied, 381 U.S.934 (1965), suggested does not rise to the dignity of a governmental act deserving recognition as an act of state. There was no formal decree by the Nigerian Government until it issued Decree No. 40 on December 19, 1975, long after the repudiation by CBN of its irrevocable letters of credit (see Simms Exh. 8).

11. Finally, the Simms affidavit asserts that Magistrate Schreiber's recommendation in East Europe/Nikkei/Chenax is the only holding thus far that the precise conduct by CBN here in suit comes within the exception of the third clause of §1605(a)(2),

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* Exhibit Q.

and is therefore not immunized from judicial jurisdiction by sovereign immunity or the act of state doctrine. Nothing could be further from the truth.

This Court, in National American, in proceedings to justify the attachment, upheld the attachment of Nigerian funds and found that there was no sovereign immunity. 420 F.Supp. 954, 956-57 (S.D.N.Y. 1976).

Likewise, in his decision after trial, Judge Goettel came to the same conclusion. 448 F.Supp. 622, 639-42 (S.D.N.Y. 1978), aff'd,597 F.2d 314 (2nd Cir. 1979).

Both this Court and Judge Goettel of course applied pre-Immunities Act law. It was the purpose of the Immunities Act, as clearly shown by the legislative history, to restrict the concept of sovereign immunity. Thus, such holdings under the pre-Act law have even greater precedential bite under the Act. Further, Judge Goettel, in lengthy considered dictum, held that under the Act, there would likewise be no sovereign immunity.

As previously seen, in Reale, Judge Haight entered an identical order (plaintiff's Exh. E).

In Ipitrade International v. Nigeria, 465 F.Supp. 824 (D.C. 1978), the U.S. District Court for the District of Columbia likewise denied Nigeria's claims of sovereign immunity in another of the cement contract cases.

12. Further, as set out in my affidavit dated December 6, 1979, at ¶6, precisely the same result has been reached under the laws of Great Britain (Trendtex), of Switzerland (Ipitrade), and of West Germany (Nada). Indeed, there is to my knowledge not a single jurisdiction which has upheld the claims of Nigeria or CBN to immunity with respect to the 1975 cement contract and letters of credit and their breach and repudiation. To my knowledge, every single forum to which such claims have been

presented, whether in the United States or in other civilized countries, has rejected that attempt to escape judicial jurisdiction and therewith the merits. The defendant's attempt to have this Court reach a conclusion rejected by every other tribunal which has considered the issue requires no further discussion.

13. As shown by the annexed affidavit of Verlinden's bank, Central Bank apparently has no funds or other property in the Netherlands, nor a correspondent banking relationship with any Netherlands bank. Thus, it is not subject to suit in the Netherlands. Quite obviously, it is not as either a practical or legal matter subject to suit in Nigeria, since its claim to sovereign immunity would almost certainly be upheld by the Nigerian courts. Indeed, there has been no suggestion by CBN that it is suable in any other forum. Thus, New York is not only the logical forum for this dispute, but, to my knowledge, the only available one throughout the entire world. If the CBN motion to dismiss on jurisdictional grounds were granted, it would of course in theory not operate as an adjudication on the merits. As a practical matter, however, because of the lack of any other available forum, it would put an end to any hope that plaintiff has of obtaining a hearing and determination on the merits. Its practical result would be to forever foreclose the plaintiff from asserting its claim against CBN.

THE MOTION FOR SUMMARY JUDGMENT

14. In early November 1979, Morgan for the first time came up with the theory that the Verlinden letter of credit became unavailable (i.e., that it lapsed unused) prior to any possible repudiation by CBN, because Verlinden failed to commence shipments within 45 days of its receipt of the letter of credit.

The letter of credit was received, so this theory holds, on July 11, 1975. Shipments had to commence within 45 days thereafter, i.e., not later than August 25, 1975. Documents showing such initial shipment had to be presented not later than 30 days after August 25, i.e., by September 24, 1975. No such documents were presented by September 24, 1975, or indeed at any time. Thus, as of September 24, 1975, the letter of credit was no longer available at Morgan, and presentments thereafter made to Morgan would not have been honored or paid by Morgan in the absence of an amendment or authorization by CBN. No such amendment or authorization by CBN was ever received by Morgan. This theory is set forth in the affidavit signed by Mr. Koebel of Morgan on November 12, 1979, but prepared by Mr. Simms. (Morgan EBT, pp.180 - 181 .)

14. Of course, Morgan is not a disinterested witness. CBN is a good and valued customer, whose business generates a profit in the range of $600,000 annually for Morgan. (Morgan EBT, p. 95 .) As between Verlinden and Morgan, Morgan would prefer to see CBN win this action. (Morgan EBT, pp. 119-120.)

15. This Morgan theory is certainly fresh, and indeed still warm from the oven. Nonetheless, upon analysis it turns out to have a few flaws.

16. First, the letter of credit, as received by Verlinden from Morgan on July 11, 1979, was so internally inconsistent that Morgan would not have paid presentments thereunder in given circumstances. The inconsistency in the letter of credit (Simms Exh. 2) consists of the fact that at the top of page 2, the letter of credit states that shipments may originate "From Any European Port, " whereas in the appendix to the letter of credit, item 3 provides that insurance by the seller shall be from one of eight named ports (one in Romania and seven in Spain).

Thus, if Verlinden or Verlinden's supplier, Interbuco, had decided to obtain and ship cement from West Germany, East Germany, Ireland, Poland, Italy, Turkey, The Canary Islands, Greece, or any other of the various countries or locales which are traditional sources of cement and from which the ocean transport of cement to Nigeria is economically practical, Morgan would not have paid presentments with bills of lading and insurance certificates from any ports other than the eight ports named in item 3 of the appendix. Morgan EBT, pp. 130-132 and 177-178. Thus, the letter of credit as received by Verlinden on July 11, 1975 was in a practical, real-world sense ineffective and unavailable. This internal inconsistency did not even start to be cured until Morgan air-mailed unsigned advice of an amendment to Verlinden on August 22, 1975, presumably received by Verlinden some three or four days later, which eliminated the eight named ports from item 3 of the appendix and substituted therefor "any European ports". (Plaintiff's Morgan deposition Exh. 25 for id.) A signed version of this amendment was not mailed by Morgan until September 17, 1975, and hence not received by Verlinden until September 20 or 21, 1975. (Plaintiff's Morgan deposition Exhs. 67 and 69.) Thus, from this standpoint alone, Verlinden did not receive an effective, available letter of credit until September 20 or 21, 1975.

17. Second, as of July 1975, it was reported by Lloyds, BIMCO, and other authorative sources, that cement vessels were incurring waiting times of up to 150 days in Lagos before their cargoes were discharged. See plaintiff's Morgan deposition Exh. 39 for id. Yet the demurrage clause in the letter of credit, as set forth in Item 4 of the appendix, stated merely that demurrage was payable at the rate of $3,500 per day per vessel, but not with what frequency. It is clear that shipowners would not be prepared to charter vessels to sail to Lagos unless they knew that demurrage would be paid every two weeks, or on some other regular and periodic basis. Otherwise

the shipowners would have been in the position of having to finance all the costs of operating, maintaining and crewing the vessels five months or more without any reimbursement. See Morgan EBT, pp.120- 25 . Accordingly, shipowners would not have chartered vessels on the basis of the letter of credit as received by Verlinden. Yet the demurrage clause was not amended to state that demurrage would be paid every two weeks until August 1975, by means of Morgan's unsigned letter of advice of such amendment dated August 21, 1975, again presumably received by Verlinden three or four days thereafter. See Morgan EBT, pp. 126-30, and plaintiff's Morgan deposition Exhibits 23 for id. Until the demurrage clause was thus amended at the end of August 1975 -- actually about September 20 or 21, 1975; see ¶18, below -- the letter of credit as received by Verlinden was likewise commercially ineffective and unavailable in any real world sense.

18. Finally, Morgan, as CBN's chosen correspondent and agent, sent out both the August 21 and the August 22, 1975 amendments unsigned. Morgan EBT pp.165-66 . Signed duplicates of these amendments -- which were required to render Verlinden's letter of credit commercially effective and available -- were not mailed out by Morgan until September 17, 1975. See plaintiff's Morgan deposition exhs. 67 and 69; Morgan EBT, pp. 165-66.

19. Thus, CBN and its correspondent and agent, Morgan, did not supply plaintiff with a commercially effective and available letter of credit until approximately September 20 or 21, upon plaintiff's receipt -- finally -- of the signed Morgan amendments of August 21 and 22, 1975. As between plaintiff, CBN and Nigeria, it is obvious that the 45-day period within which to commence shipment did not even start to run until September 20 or 21, 1975.

20. Mr. Koebel, in his affidavit, is very careful not to state any contrary conclusion. The affidavit is most carefully drawn to avoid any comment, either direct or by implication, on the duties and obligations between CBN and plaintiff. The affidavit confines itself strictly to stating that Morgan, as the advising bank for this letter of credit, would have interpreted the same mechanically and literally, and would not have honored presentments made after September 24, 1975, or presentments not showing an initial shipment by August 25, 1975, in the absence of authorization from CBN. The affidavit most carefully does not address itself to the issue whether, in law and equity, CBN would have been required to give such authorization, since its own actions and that of its correspondent and agent, Morgan, had prevented the letter of credit as originally received by Verlinden from being available and effective. Thus, the affidavit really begs the issue here, since this is an action not by Verlinden against Morgan, but rather by Verlinden against CBN.

21. As between Verlinden and CBN, it is clear that CBN cannot avail itself of a delay in the commencement of shipment which it itself, directly and through its correspondent and agent in the transaction, Morgan, brought about. Indeed, had the whole question not become moot because of the unilateral amendments by CBN on September 15, 19 and 30, 1975, whose purpose and effect was to shut off all further payments under the cement letters of credit, there is no question that CBN would have been required to authorize the payment of all presentments by Verlinden, otherwise proper, showing that shipment had commenced within 45 days of September 20 or 21, 1975, i.e., by approximately November 4 or 5, 1975. See N.Y. Uniform Commercial Code §§1-203, 1-201(19) and 2-104(1)and(3), discussed in plaintiff's memorandum

of law, and codifying the duty of good faith in the performance and enforcement of obligations.

22. In short, the Morgan theory of unavailability clearly has no application to the rights and duties between plaintiff, Verlinden, and defendant, CBN.

23. As set out in Mr. Verlinden's opposing affidavit, on or about September 1, 1975, Verlinden received a cable from Nigeria's Ministry of Defence, "requiring" Verlinden to suspend the chartering and loading of vessels for a period of three months, and advising Verlinden that all cement imports had been suspended by Nigeria for such three months period. Clearly, the time to commence shipment under the CBN letter of credit -- issued pursuant to Nigeria's cement contract with Verlinden, and effecting the payment term thereof -- was thereby likewise extended for three months. Any other result would be not only absurd, but monstrous.

24. Finally, it is clear that in early September, 1975, Morgan itself considered the Verlinden letter of credit as being fully available and effective. By cable or telex to Verlinden's bank dated September 2, 1975 (plaintiff's Exh. S), Morgan on that date made a firm offer, valid until October 3, 1975, to confirm CBN's letter of credit in favor of Verlinden if Verlinden paid the confirmation charges and such payment was received by Morgan on or before October 3, 1975. This is wholly inconsistent with the newly developed theory that the Verlinden letter of credit had become unavailable by reason of Verlinden's failure to commence shipment by August 24, 1975. Indeed, it would be difficult to find a more graphic commentary on the validity of Morgan's newly-developed theory than Morgan's own conduct, as above set forth, during the relevant period.

25. Thus, the undisputed record facts and documents clearly show not only that CBN is not entitled to summary judgment based on the newly-developed theory of unavailability as between plaintiff and Morgan, but that, in this action between Verlinden and CBN (not Morgan), it would probably not be erroneous to grant plaintiff summary judgment on this particular issue. At a minimum, it is clear that there are genuine disputed issues of material, triable fact, which cannot be disposed of on affidavits. Since a trial with respect to other issues will in any event be necessary, plaintiff is not suggesting that this Court enter summary judgment in its favor on this issue, but simply that this branch of the CBN motion, like the other branches, should be summarily denied.

CONCLUSION

Accordingly, I respectfully pray that all three branches of defendant's CBN motion -- to dismiss, for summary judgment, and for vacatur of this court's order dated October 12, 1979 -- be in all respects denied.

Berthold H. Hoeniger

BERTHOLD H. HOENIGER

Sworn to before me this
16th day of January, 1980.

Linda Thompson

LINDA THOMPSON
Notary Public, State of New York
No. 03-4632011, Qual. in Bronx Cty.
Certificate Filed in New York Cty.
Commission Expires March 30, 19 80

AFFIDAVIT OF FRANS VERLINDEN, FOR PLAINTIFF, IN OPPOSITION TO MOTION TO DISMISS THE COMPLAINT AND FOR RELIEF FROM ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VERLINDEN B.V.,	:	Index No. 79 Civ. 1150 (E.W.)
Plaintiff,	:	
-against-	:	PLAINTIFF'S AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
CENTRAL BANK OF NIGERIA,	:	
Defendant.	:	

----------X

CITY OF AMSTERDAM)
:ss.:
THE NETHERLANDS)

FRANS VERLINDEN, being duly sworn, deposes and says:

1. I am, and at all times relevant hereto have been, the President and principal of Verlinden B.V., the plaintiff herein. I am personally familiar with the facts and circumstances of this action, and with the matters hereinafter set forth. I make this affidavit in opposition to defendant's motion to dismiss this action for alleged lack of personal and subject matter jurisdiction, and for summary judgment.

2. I personally, on behalf of Verlinden B.V., negotiated with the Federal Ministry of Defence of Nigeria with respect to the sale by Verlinden, and the purchase by Nigeria, of 240,000 metric tons of cement, plus or minus 10% at Verlinden's option, at a price of U.S. $60 per metric ton, C.I.F. Lagos/Apapa, Nigeria. Such contract was signed under date of April 21, 1975, and contains the following payment terms:

"1. ***

(v) TERMS OF PAYMENT: By virtue of a revolving Performance Bond, in the sum of $ U.S. 36,000.00 (representing one-twelfth of 3% of the total purchase price) already deposited by the seller with the Central Bank of Nigeria, Lagos,

> the buyer undertakes to establish, within twenty-one (21) days from the date hereinbefore mentioned, an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Slavenburg's Bank, Amsterdam, Netherlands."

3. It was I, on behalf of Verlinden B.V., who requested that the letter of credit be established through Slavenburg's Bank, in Amsterdam, since this was and is Verlinden's bank. At no time did I request that such letter of credit be advised and made payable through Morgan Guaranty Trust Company of New York ("Morgan").

4. By letter dated July 7, 1975 Morgan advised Verlinden B.V. that Central Bank of Nigeria ("CBN") had established an irrevocable letter of credit, No. CBN/BO/75/145, in favor of Verlinden B.V., for a face amount of U.S. $14,400,000, through Morgan, and payable at Morgan. Said letter of credit also contained an open-ended, unlimited demurrage clause, in addition to the $14,400,000, at the rate of $3,500 per day per vessel, if and to the extent that discharge of cargo was not completed at the rate of at least 1,000 tons per day, commencing with the first day after such vessel's arrival in Nigeria.

5. The interposition of a United States bank, Morgan, in this transaction, was done unilaterally by CBN, for its own reasons and convenience. It was solely CBN which chose to have its letter of credit to Verlinden B.V. advised and made payable in New York, through Morgan; this was not what the contract called for, and was not what Verlinden B.V. had requested.

6. Contrary to the contract, the letter of credit in favor of Verlinden B.V. was not confirmed. We, therefore, communicated with Morgan to see if it would be willing to confirm

the same. On September 2, 1975, Morgan reiterated that it would be willing to confirm CBN's irrevocable letter of credit, provided Verlinden paid Morgan's confirmation charges; and Morgan stated that its offer was valid until October 3, 1975. I annex hereto as Exhibit S, cable or telex from Morgan to said effect dated September 2, 1979. This is totally inconsistent with the position now taken by Morgan and defendant CBN that the letter of credit lapsed or became unavailable at Morgan as of August 25 or September 24, 1975.

7. Even while the question of confirming the letter of credit was being discussed with Morgan, I, for the benefit of Verlinden B.V., contracted with Interbuco A.G. for the sale by Interbuco, and the purchase by me, of 240,000 metric tons of cement, C.I.F. Lagos/Apapa, Nigeria, at a price of $51.00 per ton, by means of a written contract executed on August 21, 1975. The contract provides for the payment of liquidated damages by me to Interbuco of $5 per ton for each ton of cement out of said 240,000 tons, which is not accepted and paid for by me. As a result of Nigeria's anticipatory breach of the cement contract, and of CBN's repudiation of its purportedly irrevocable letter of credit, Verlinden B.V. was unable to ship any cement to Nigeria, and I was unable to take down any of said 240,000 tons from Interbuco. As a result, Interbuco has asserted claims against me for $1,200,000 (240,000 X $5), and I, in order to induce Interbuco to delay the institution of suit against me pending the resolution of this action, have already paid Interbuco 792,600 guilders (approximately $300,000 at the then exchange rate) on account and with respect to Interbuco's claim.

8. On or about September 1, 1975, Verlinden received a cable from Nigeria's Ministry of Defence, suspending for three months the performance under Verlinden's cement contract, and requiring

Verlinden to defer the chartering and loading of vessels pursuant to said contract. A copy of said cable is annexed as Exhibit T. Obviously, said cable by its express terms extended the time for Verlinden to begin performance by three months, and therefore necessarily similarly extended the CBN letter of credit which had been issued pursuant to the payment term of the cement contract. To contend otherwise would be an absurdity. I am advised that our attorney, Mr. Hoeniger, will present to this Court, as exhibits to his opposing affidavit, additional communications between Morgan and Verlinden B.V., or Slavenburg's Bank, showing that Morgan never treated the letter of credit as having lapsed, and that it was always assumed by all parties that an ammendment thereto, extending the time to commence delivery, would of course be issued by CBN and was indeed purely a formality. Other amendments requested by Verlinden had already been made by CBN.

9. I am advised by our attorney that since CBN, voluntarily and unilaterally, chose to come into the United States and to use a U.S. bank, Morgan, as the advising and paying bank under this letter of credit, CBN has clearly subjected itself to U.S. law and the jurisdiction of the courts of the United States with respect to this commercial transaction. Of course, the locus of CBN's repudiation was also the United States, and more particularly New York, since it was there that CBN's repudiating instructions had their effect, prevented Morgan from paying, and caused the injuries to Verlinden for which this action seeks recovery.

10. Insofar as CBN's motion also seeks summary judgment on the ground that the Verlinden letter of credit expired or lapsed on August 25, 1975, I believe it is clear that at the

very least, based on my sworn statements above and the exhibits annexed hereto, there are substantial and genuine issues of fact which require a trial, and which cannot be determined on affidavits.

Accordingly, I respectfully pray that defendant's motion to dismiss and for summary judgment be in all respects denied.

Frans Verlinden

Sworn and subscribed to before
me this 18th day of December
1979.

Mr Antonius Hendrikus Maria Santen,
notaris with official seat in Amsterdam,
The Netherlands.

Kingdom of the Netherlands
Province of North Holland
City of Amsterdam
Consulate General of the
United States of America
} ss

I, ROBERT E. SORENSON Vice Consul of the United States of America at Amsterdam, The Netherlands, duly commissioned and qualified, do hereby certify that MR. A.H.M. SANTEN whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was at the time he signed the annexed document a NOTARY PUBLIC

at AMSTERDAM, The Netherlands, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I hereunto set my hand and the seal of the Consulate General of the United States at Amsterdam, The Netherlands, this 19th day of DECEMBER 1979

Robert E. Sorenson
Vice Consul of
the United States of America

EXHIBIT P TO HOENIGER AND VERLINDEN AFFIDAVITS - PAGES 36, 39, 46-47 OF MORGAN DEPOSITION IN REALE INTERNATIONAL, INC. v. FEDERAL REPUBLIC OF NIGERIA AND CENTRAL BANK OF NIGERIA (S.D.N.Y., 78 Civ. 0023-CSH)

file and I saw in one case where the beneficiary I believe requested specific ports for shipment.

Q Did there come a time, Mr. Koebel, when CBN instructed Morgan not to make any further payments under the Reale credit?

A They put up -- they established various restrictive measures which prohibited us from making payment.

Q And were those instructions limited to the Reale credit?

A No.

Q They applied to all fourteen cement credits?

A Yes.

MR. SIMMS: I object to the last question on the ground that it exceeds the ruling by Judge haight, the last question.

Q And the original amount of the credits affected by those instructions, including the Reale credit was approximately two hundred million; is that correct?

MR. SIMMS: I object to the question. It goes beyond Judge Haight's ruling.

MR. HOFFMAN: And I object on the same basis, also it is unfair. I think you should get a ruling, and if the Judge rules that you are entitled to ask the question, we will be happy to add them up for you,

PENGAD CO., BAYONNE, N.J. 07002 · FORM 2040

MR. HOFFMAN: Yes.

MR. HOENIGER: Mr. Koebel has testified that the restrictive measures adopted by CBN, which prohibit Morgan from making further payments, related both to the Reale credit and to the thirteen other credits.

Q Is that correct, Mr. Koebel?

A That's correct.

MR. HOENIGER: Fine.

MR. HOFFMAN: Well, my understanding is that --

MR. HOENIGER: So how do we separate out Reale from the other --

MR. HOFFMAN: No, no, my understanding --

MR. HOENIGER: Please let me finish, Mr. Hoffman.

MR. HOFFMAN: Go ahead.

MR. HOENIGER: (cont'g) -- from the other thirteen, when the witness testifies, under oath, that these were general instructions applicable both to Reale and to the other thirteen?

MR. HOFFMAN: I think the objection I make is quite different. I don't think that I am objecting to that. I am objecting to your question about what his other experiences are with other letters of credit. I think that the evidence of what other issuing banks or entities have done with other letters of credit --

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2646

and by "correspondence" I include cable or telex -- about these instructions with any third parties, anybody outside Morgan?

You have already told us you don't know whether there were discussions with counsel. I am asking you now whether you know about any discussions with any other third parties.

A No, I don't know.

Q You don't know that?

A No.

Q Who would be my best source of information in that area at Morgan?

A Artie Brown.

Q And Ralph Bunche, Jr.?

A He's in Europe.

Q But he was here in 1975, wasn't he?

A Yes, he was.

Q In charge of the Nigeria desk, or the West African desk?

A He worked on that desk.

Q Mr. Koebel, an article in Business Week, November third, 1975, Page 40, entitled, "NIGERIA SETTING ITS OWN RULES FOR BANKING AND TRADE," the following sentence appears, "The order stopping payment on the letters of credit is

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2044

virtually unprecedented in international trade."

Would you say that is a fair characterization based --

MR. SIMMS: I object to the question.

MR. HOENIGER: Excuse me, let me finish the question.

Q -- based on your more than thirty years of experience in handling letters of credit for Morgan?

MR. SIMMS: I object to the question. It adopts what is clearly just hearsay from a publication.

Beyond that, it goes beyond the scope of Judge Haight's order and I object to the question.

MR. HOFFMAN: I will allow him to answer, if you feel qualified to comment on it, Mr. Koebel.

Q You may answer the question, Mr. Koebel.

A Yes.

Q You would agree that that is a fair characterization?

A Yes.

MR. HOENIGER: Thank you very much, sir. Subject to cross examination by Mr. Simms today, your deposition is adjourned to a date that we will agree upon after I have received the Xeroxes, which I assume will be sent in within two or three days.

MR. HOFFMAN: Yes.

MR. SIMMS: I don't agree with your statement, to

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2440

EXHIBIT Q TO HOENIGER AND VERLINDEN AFFIDAVITS - JUDGE PIERCE'S ORDER DATED NOVEMBER 6, 1978 IN THE EAST EUROPE/NIKKEI/CHENAX ACTIONS, ADOPTING AND SO ORDERING MAGISTRATE SCHREIBER'S REPORT AND RECOMMENDATIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

v. 77 Civ. 2809

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

CHENAX MAJESTY, INC.,

Plaintiff,

v. 77 Civ. 3045

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

DECOR BY NIKKEI INTERNATIONAL, INC.,

Plaintiff,

v. 77 Civ. 2348

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

ORDER

No timely objections having been filed and the Court having reviewed the Magistrate's report and recommendations, the Court hereby denies defendants' motion to dismiss and the cross-motions for summary judgment for the reasons stated in the Magistrate's report.

SO ORDERED.

Dated: New York, New York
November 6, 1978

LAWRENCE W. PIERCE
U. S. D. J.

EXHIBIT R TO HOENIGER AND VERLINDEN AFFIDAVITS - JUDGE PIERCE'S ORDER DATED JUNE 18, 1979 IN THE EAST EUROPE/NIKKEI/CHENAX ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR BY NIKKEI INTERNATIONAL, INC.	:	
-v-	:	77 Civ. 2348 77 Civ. 2809
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA	:	77 Civ. 3045

ORDER

Defendants' motion for an order dismissing plaintiffs' claims for lost profits on demurrage is hereby denied without prejudice to renewal at the time of trial.

Plaintiffs' request for an order striking defendants' affirmative defenses of lack of subject matter and personal jurisdiction, sovereign immunity and act of state doctrine (which were previously asserted in defendants' motion to dismiss which was denied) is hereby granted.

SO ORDERED.

LAWRENCE W. PIERCE
U. S. D. J.

Dated: New York, New York
June 18, 1979

322a

EXHIBIT S TO HOENIGER AND VERLINDEN AFFIDAVITS - TELEX OR CABLE FROM MORGAN TO VERLINDEN'S BANK DATED SEPTEMBER 2, 1979

IA1275

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PARTS

CLASS OF SERVICE DESIRED

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CODE USED

NO.	TEST	FIGURED	CHECKED	TEST REQUIRED YES	TEST REQUIRED NO	ROUTE	CLASS	CODED BY	CHECKED

No.

TELEGRAM OR CABLEGRAM TO BE DISPATCHED

CHARGE THIS MESSAGE TO:

CHARGES

N.V. SLAVENBURGS BANK
AMSTERDAM
NETHERLANDS

ACCOUNT NUMBER

☐ FOREIGN S A/C OF ADDRESSEE

☒ EXPENSE A/C NO. 192-844

☐ DEPARTMENT

FILL IN COMPLETELY
OAKES/ts
ORIGINATOR (NAME)
9/2/75
DATE
REFER REPLY TO
COML. CREDITS
DEPARTMENT

ALWAYS START MESSAGE HERE →

PLEASE DOUBLE SPACE YOUR MESSAGE THROUGHOUT AND REMOVE CARBONS

RE CENTRAL BANK NIGERIA LETTER OF CREDIT CBN/BO/75/145 OUR REFERENCE A-10452 FAVOR VERLINDEN B.V. OF LOMANSTRAAT AMSTERDAM WE ARE PREPARED TO CONFIRM CREDIT TO EXTENT $14,400,000.00 PROVIDED BENEFICIARY PAYS OUR CONFIRMATION CHARGES $28,800.00 IN ADVANCE STOP IF NO CHARGES PAID WITHIN 30 DAYS FROM SEPTEMBER 3, 1975 WE SHALL CONSIDER AS REJECTION TO AMENDMENT ON PART BENEFICIARY AND WILL NOTIFY OUR CUSTOMERS ACCORDINGLY STOP ADVISE BENEFICIARY URGENTLY

Bij EXH. 13
AUG 2 1973
IDENT.
JACK MITCHELL, C.S.R.

FORM 46-4-497B 7/74 200M

DO NOT TYPE TEXT OF MESSAGE BEYOND THIS LINE

WRITTEN BY: _____ CHECKED BY: _____ AUTHORIZED _____

EXHIBIT T TO HOENIGER AND VERLINDEN AFFIDAVITS - CABLE DATED SEPTEMBER 1, 1975 FROM NIGERIA'S MINISTRY OF DEFENCE TO VERLINDEN

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col 1 bg/101/s.16 18

page2/27

agreement x anticipate new agreement will be negotiated with you shortly in order reschedule delivery programme for balance of cement already ordered x permdef
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ptt tgf to adam

LETTER FROM BERTHOLD H. HOENIGER TO JAMES G. SIMMS, ESQ. DATED FEBRUARY 27, 1980

BERTHOLD H. HOENIGER
ATTORNEY AT LAW
505 PARK AVENUE
NEW YORK, N.Y. 10022
(212) 838-5324

February 27, 1980

James G. Simms, Esq.
Kissam, Halpin & Genovese
120 Broadway
New York, New York 10005

Re: Verlinden B.V. v. Central Bank of Nigeria

Dear Mr. Simms:

Enclosed herewith for service upon your firm, as attorneys for defendant, is a copy of the amended complaint herein.

The amended complaint is served as a matter of right, pursuant to F.R.Civ.P. 15(a), since no responsive pleading, as defined by F.R.Civ.P. 7(a), has yet been served by defendant.

I am prepared to stipulate that your pending motion to dismiss and motion for summary judgment shall be deemed to relate to the amended complaint enclosed herewith, since the changes in the amended complaint are not relevant and do not affect the bases for your said motions.

Very truly yours,

Berthold H. Hoeniger

cc.(w/ encl.):
Hon. Edward Weinfeld
U. S. D. J.

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VERLINDEN B.V.,	:	79 Civ. 1150 (EW)
Plaintiff,	:	
-against-	:	AMENDED COMPLAINT
CENTRAL BANK OF NIGERIA,	:	
Defendant.	:	

Plaintiff, as and for its amended complaint, by its attorney, Berthold H. Hoeniger, respectfully shows to this Court and alleges:

FEDERAL JURISDICTION; VENUE

1. Federal jurisdiction is founded upon the provisions of §2(a) of the Foreign Sovereign Immunities Act of 1976 (the "Act") (Pub.L. 94-583, 90 Stat. 2891, 27 U.S.C. §§1330, 1391(f), 1441(d), and 1602 through 1611), and specifically 28 U.S.C §1330(a) and (b).

2. Venue is properly laid in this District under §3 of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1391(f), because a substantial part of the events giving rise to the claim occurred within this District, a substantial part of the moneys that are the subject of this action are located within this District, and also because, upon information and belief, the defendant is doing business in this District.

PARTIES TO THE ACTION

3. Plaintiff is, and at all times relevant hereto has been, a Netherlands corporation engaged, among other activities,

in the building and contruction business. Plaintiff's principal office at the times here relevant, was at Lomanstraat 1, Amsterdam, The Netherlands.

4. Defendant Central Bank of Nigeria ("CBN") was and is the central bank of the Federal Republic of Nigeria ("Nigeria"), and an agency or instrumentality of Nigeria for purposes of the Act and as defined in §4.(a) thereof, 28 U.S.C. §1603(b). Throughout the relevant period, Morgan Guaranty Trust Company of New York ("Morgan Guaranty"), headquartered in this District, was the sole United States commercial correspondent bank for CBN, and acted as and was defendant's agent in the United States.

FACTS CONSTITUTING THE CLAIM FOR RELIEF

5. On or about June 23, 1975, defendant established its Documentary Credit No. CBN/BO/75/145 in favor of plaintiff for $14,400,000, plus an open-ended amount for demurrage at the rate of $3,500 per day per vessel, and subject to the Uniform Customs and Practice for Documentary Credits, 1962 revision, International Chamber of Commerce Brochure No. 222 (hereafter "Uniform Customs").

6. Said Uniform Customs provide in relevant part:

"General provisions and definitions

c. Credits by their nature are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.

* * *

A. Form and notification of credits

Article 3. - An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the

> beneficiary and bona fide holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.
>
> * * *
>
> Such undertakings can neither be modified nor cancelled without the agreement by all concerned."

7. Defendant caused the aforesaid irrevocable letter of credit established by it in favor of plaintiff to be advised and to be made payable in U. S. dollars through and at Morgan Guaranty in New York, New York, despite the fact that the cement contract between plaintiff and Nigeria in connection with which said irrevocable letter of credit was established called for the same to be advised and payable through and at plaintiff's bank in The Netherlands.

8. The aforesaid letter of credit so established by defendant was irrevocable and transferable only to second beneficiaries within The Netherlands; but, as established by defendant, was not confirmed, not divisible, and internally inconsistent and commercially ineffective and unusable, and failed to conform to the terms of the cement contract.

9. On or about July 7, 1975, Morgan Guaranty sent advice to both plaintiff and plaintiff's Netherlands bank of the establishment of said irrevocable letter of credit by defendant in favor of plaintiff, and sent plaintiff and plaintiff's Netherlands bank copies thereof. As previously alleged, the letter of credit as thus advised was defective and commercially unusable and unavailable.

10. Amendments to said letter of credit to render the same internally consistent and commercially available and usable

were thereafter requested by plaintiff directly and through Morgan Guaranty. Said amendments were issued by defendant over the following 10 weeks; the two final amendments requested by plaintiff and required to render the letter of credit available and usable were not advised to plaintiff on behalf of defendant by Morgan Guaranty, in signed, binding form, until the latter half of September, 1975.

11. Even before plaintiff's requests for amendments had been fully granted, plaintiff duly performed all the terms and conditions of said letter of credit (and of the underlying cement contract with Nigeria) on its part, until prevented and excused from further performance by reason of defendant's repudiation and anticipatory breach of said irrevocable letter of credit (and Nigeria's breach of its cement contract with plaintiff), as hereinafter alleged. Specifically, plaintiff entered into a contract with Interbuco Anstalt, Vaduz, Liechtenstein (hereinafter "Interbuco"), dated August 21, 1975, for the fulfillment by Interbuco of the aforesaid contract between plaintiff and Nigeria, at a price of $51 per ton of cement, C.I.F. Lagos/Apapa, for each of the 240,000 tons covered by said contract, as compared to the price of $60 per ton for each of said 240,000 tons stipulated in plaintiff's contract with Nigeria; and said contract between plaintiff and Interbuco further provided for the payment by plaintiff of liquidated damages of $5 per ton in the event of plaintiff's nonperformance. Interbuco, as plaintiff's subcontractor, thereupon duly set about to perform all the terms and conditions on plaintiff's part of the contract between plaintiff and Nigeria, and duly performed the same, until prevented and excused from further performance by defendant's repudiation and anticipatory breach of the aforesaid irrevocable letter of credit and Nigeria's breach of the aforesaid contract. But for said breach and repudiation, plaintiff would have realized a profit of $240,000 x $9, or $2,160,000.

12. The aforesaid acts of defendant in establishing said irrevocable letter of credit in plaintiff's favor through Morgan Guaranty, causing the same to be advised and made payable by Morgan Guaranty, and making the same payable to plaintiff in New York in U. S. dollars, were part of the large-scale commercial activity carried on in the United States by said defendant, and specifically were part of the commercial activity of contracting for the purchase of and of establishing irrevocable letters of credit in payment for some 16 to 20 million tons of cement from U. S. and European suppliers. Alternatively, said acts constituted acts performed in the United States by defendant in connection with a commercial activity of said defendant elsewhere.

13. Since 1966, Nigeria had been ruled by a military government headed by Col. Yakubu Gowon. On July 29, 1975, the Gowon government was overthrown by a military coup d'etat headed by Brig. Muritala Rufai Mohammed (who in turn was assassinated on February 13, 1976, and succeeded by Lieut. Gen. Olusegun Obasanjo).

14. On or about September 1, 1975, Nigeria by its Ministry of Defense, advised plaintiff that, because of congestion at Lagos and other Nigerian ports, the (new) Nigerian government had suspended all importantion of cement for three months, and that plaintiff was required to defer all further chartering and loading of vessels as scheduled under the terms of plaintiff's cement contract with Nigeria. On or about September 19 and September 30, 1975, Morgan Guaranty advised plaintiff that pursuant to instructions and unilateral amendments received by Morgan Guaranty from its principal, defendant CBN, Morgan Guaranty would refuse any and all payments under the aforesaid irrevocable letter of credit to plaintiff or plaintiff's assignee or transferee

unless each presentment was accompanied by a certificate showing that two months' advance notice had been given to the Nigerian Ports Authority prior to the departure of each vessel engaged to transport cement to Nigeria pursuant to the terms of plaintiff's contract, and that the Nigerian authorities had issued prior clearance for each proposed shipment. Said unilateral amendments by defendant also purported to make other material changes in the terms of the aforesaid irrevocable letter of credit.

14A. It was the defendant's intended purpose and effect in making said unilateral amendments to render it impossible for Morgan Guaranty to make payments, or further payments, under said irrevocable letter of credit in favor of plaintiff.

15. Said advice by defendant to plaintiff through its agent, Morgan Guaranty, that it was unilaterally and in material respects purporting to alter and to modify the aforesaid letter of credit, and said instructions by defendant CBN to Morgan Guaranty not to honor said irrevocable letter of credit in accordance with its terms, were wholly unilateral, unauthorized, and unlawful, and were done wholly without plaintiff's authorization, agreement or assent, and constituted a repudiation and anticipatory breach of said irrevocable letter of credit, and were acts performed either in the United States in connection with commercial activities of said defendant in the United States and elsewhere, or were acts outside the territory of the United States in connection with commercial activities of said defendant elsewhere whose foreseeable consequence was to cause, and which did cause, a direct effect -- non-payment and repudiation -- in the United States, to plaintiff's injury and detriment.

16. Pursuant to said instruction from defendant, its principal, Morgan Guaranty also advised plaintiff's bank that the latter could not pay, or would not be reimbursed by Morgan Guaranty if it paid, sight drafts drawn under the aforesaid letter of credit for cement loaded pursuant to plaintiff's contract with Nigeria and said letter of credit, even though such sight drafts were duly accompanied by all documents required by said letter of credit as originally issued and as amended by various amendments requested by plaintiff and issued and instructed by defendant. Subsequently, Nigeria placed a total embargo on cement shipments to Nigeria, and defendant CBN caused its agent, Morgan Guaranty, to advise both plaintiff and plaintiff's bank thereof.

17. By letter dated on or about November 14, 1975, Morgan Guaranty further advised plaintiff that at the request of defendant, it was forwarding to plaintiff therewith a copy of the text of a press conference held on October 29, 1975, by the Commissioner for Transport of Nigeria. In said text of his press conference, said official was reported as stating at the conclusion:

> "However, I wish to warn those suppliers who are threatening to obtain their pound of flesh, that Nigeria is not here today and gone tomorrow. This is a battle for economic survival and we shall not hesitate to declare all detractors as enemies of the people of Nigeria and to deal with them ruthlessly. I would like to assure the Nigerian public that this Administration is doing, and will continue to do everything possible to safeguard and protect our national interest."
> [Emphasis added].

18. On or about October 1, 1975, defendant invited plaintiff and the other cement suppliers to Nigeria to attend meetings with CBN and other Nigerian officials (the so-called Ijewere Committee) in Lagos, purportedly to reschedule deliveries of cement, which invitation plaintiff accepted. At the

meeting with the Ijewere Committee on or about October 14, 1975, plaintiff was asked, not to reschedule deliveries, but to cancel its cement contract and letter of credit; and plaintiff declined to do so.

19. In late 1975 or early 1976, plaintiff was requested by defendant to return to Lagos, Nigeria to meet with the representatives of defendant and of other Nigerian departments and agencies constituting the Cement Contracts Negotiating Committee (hereinafter "Committee"), whose chairman was one Fred Egbe. Plaintiff met with the Committee in Lagos on or about January 16, 1976. At said meeting, the Committee represented to plaintiff and plaintiff's Nigerian attorney that:

(a) Any holder of a cement contract with Nigeria and a CBN irrevocable letter of credit who did not agree to the cancellation of the unperformed portion of said contract and the unused portion of said letter of credit -- in plaintiff's case, 100% of said contract and said letter of credit -- would be regarded as an enemy of the Nigerian people and dealt with accordingly. Mr. F. Verlinden, plaintiff's president and principal, who attended said meetings on behalf of plaintiff, understood said statements to convey a threat that his passport might be seized, that he might be imprisoned, or that he might be physically injured unless he agreed to said demands by the Committee; and said understanding and belief were reasonable, since Nigerian officials have, in fact, seized the passports of foreign nationals (including at least one U. S. citizen) and imprisoned the same, in order to obtain and coerce economic concessions from the foreign corporation for which such foreign national was acting.

(b) If plaintiff did not agree to the cancellation of said letter of credit and contract, plaintiff would be blacklisted and forever barred from doing any business with Nigeria in the future.

(c) If plaintiff agreed to such cancellation, and executed a discharge agreement and releases to defendant CBN and to Nigeria, plaintiff would be awarded new cement contracts (in larger quantities and carrying a higher profit margin than the existing contract) as soon as Nigeria resumed the importation of cement, that plaintiff would also be awarded contracts to supply other goods to Nigeria, and that plaintiff would become one of Nigeria's major and most favored suppliers.

20. The representations set forth in paragraph 19(c) above, were false when made, and were known by defendant CBN and the other departments and agencies of Nigeria by whose representatives said representations were also made to be false when made, or if not known to be false, were made with reckless disregard for the truth and for facts which were readily ascertainable by defendant, said other departments and agencies, at that time. The respects in which said representations were false, as far as presently know to plaintiff, are the following:

i. The Committee had no power or authority to cause new contracts to be awarded in the future to plaintiff or to other cement contract holders, and knew that it had no such power or authority.

ii. The Committee knew that its sole mandate was to obtain discharge agreements and releases from plaintiff and the other holders of cement contracts and CBN irrevocable letters of credit, by whatever means and representations might prove useful for that end.

iii. The Committee knew that even a recommendation by it that plaintiff should be invited to bid for new cement contracts, if and when Nigeria resumed the importation of cement, carried, or would carry, no weight whatever, and was unlikely to be acted upon.

iv. The Committee knew, or if it did not know, recklessly failed to ascertain the readily ascertainable fact that Nigeria intended in the future to obtain all or most of its cement requirements through direct negotiations with and purchases from Eastern European countries or state trading organizations of such countries.

v. The Committee knew, or if it did not know, recklessly failed to ascertain the readily ascertainable fact that plaintiff's execution of a discharge agreement and releases, as demanded by the Committee, would not result in plaintiff's becoming a major or favored supplier of cement or other goods to Nigeria.

vi. The Committee, upon information and belief, made identical promises to at least 42 other cement suppliers, knowing that Nigeria could not and would not enter into new contracts for 10,320,000 tons of cement (43 x 240,000) when the capacity of its harbors to unload cement was only a minor fraction of that quantity.

21. The representations alleged in paragraph 19(c) above were material, and were believed and relied upon by plaintiff.

22. As a result of the coercion and duress upon plaintiff, the fears reasonably engendered in plaintiff by the aforesaid threats, and in reliance upon the representations above set forth, plaintiff, in or about January 1976, executed a so-called Discharge Agreement in favor of Nigeria (but, upon information and belief, not in favor of CBN), pursuant to which plaintiff purported to cancel its cement contract with Nigeria (but, upon information and belief, not CBN's irrevocable letter

of credit in favor of plaintiff for $14,400,000, plus an open-ended amount of demurrage). Plaintiff executed said document in the office of its Nigerian attorney, and instructed the latter to deliver the same to the Committee only in exchange for either a new cement contract or written, signed confirmation from the Committee of the oral representations above set forth. Upon information and belief, such Discharge Agrement has never been delivered to the Committee or to any other agency or representative of Nigeria or of CBN, and remains, undelivered, in plaintiff's Nigerian attorney's hands; or if so delivered by said attorney, such delivery was unauthorized and wrongful and is not binding of plaintiff, since no such new contract or written confirmation was ever received.

23. No consideration whatever flowed to plaintiff from defendant or from Nigeria for the execution of said Discharge Agreement.

24. Upon information and belief, various members of the Committee later attempted to, and did, extort large sums of money from various holders of Nigerian cement contracts and CBN letters of credit in return for recommending substantial settlements of the claims by such holders of contracts and letters of credit; various members of the Committee have been arrested and charged with such conduct; and the Committee was ultimately disbanded, and its functions taken over by the Nigerian Ministry of Justice.

25. If and to the extent relevant to this action, plaintiff's execution of said Discharge Agreement in favor of Nigeria was induced and obtained by coercion and duress, and by fraud, as previously alleged, and is therefore void or voidable; and, if

and to the extent relevant to this action, plaintiff elects to rescind and void the same. Additionally, said Discharge Agreement is void for lack of consideration. Further, if and to the extent that this Court determines thatthe promise and undertaking by the Committee to invite plaintiff to enter into a new contract to supply, or to be invited to bid for the supply, of cement to Nigeria in the future, constituted a legally binding obligation, said Discharge Agreement is void or voidable because of the breach of such obligation by defendant CBN and by Nigeria, in that plaintiff was never awarded a new contract for and was never invited to supply, or to bid for the supply of, cement or any other goods to Nigeria.

26. By reason of the premises, plaintiff has been and will be injured as follows:

(a) Liquidated loss of profit as a result of defendant's repudiation and anticipatory breach $2,160,000.

(b) Amount thus far paid to Interbuco on account of its claim for liquidated damages of $1,200,000 (principal) 300,000.

(c) Balance of Interbuco claim (principal and interest through 1981) 1,400,000.

(d) Incidental costs and expenses incurred and to be incurred by plaintiff as a result of defendant's repudiation and anticipatory breach 50,000.

(e) Costs, expenses and reasonable attorney's fees of the instant action 750,000.

Total..... $4,660,000.

27. The repudiation by defendant CBN of its irrevocable letter of credit established in favor or plaintiff was willful, intentional and deliberate, evinced a high degree of moral turpitude, demonstrated such wanton dishonesty and wanton disregard of internationally recognized basic principles of commercial conduct and honor as to imply a criminal indifference to civil obligations, and was virtually unprecedented in international commerce. Indeed, upon information and belief, Banque Nationale de Paris, CBN's correspondent bank in and for France during the relevant period, found CBN's instructions to repudiate and not to pay the irrevocable letters of credit which CBN established and had caused to be advised and to be made payable through Banque Nationale de Paris to be so grossly offensive to said internationally recognized basic principles of commercial conduct and honor, that it refused to honor or to comply with said inscructions.

Accordingly, plaintiff is entitled to, and demands, punitive or exemplary damages of $4,660,000 against defendant CBN.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against defendant, Central Bank of Nigeria, for $4,660,000 in compensatory damages, with interest from October 1, 1975; for exemplary or punitive damages of $4,660,000; for the costs and disbursements of this action; and for such other, further and different relief

as may be just and proper upon the facts proven.

Dated: New York, New York
February 27, 1980

Yours, etc.

Berthold H. Hoeniger
Attorney for Plaintiff
505 Park Avenue
New York, New York 10022
(212) 838-5324

TO: Kissam, Halpin & Genovese
120 Broadway
New York, New York 10005

OPINION OF WEINFELD, D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VERLINDEN B.V.,		
Plaintiff,	:	79 Civ. 1150
-against-	:	
CENTRAL BANK OF NIGERIA,	:	OPINION
Defendant.	:	

BERTHOLD H. HOENIGER, ESQ.
Attorney for Plaintiff
505 Park Avenue
New York, New York

KISSAM, HALPIN & GENOVESE
120 Broadway
New York, New York

Attorneys for Defendant

JAMES G. SIMMS, ESQ.
LAURENCE MAY, ESQ.
Of Counsel

EDWARD WEINFELD, D. J.

Verlinden B.V. ("Verlinden"), a Dutch corporation with its principal offices in Amsterdam, The Netherlands, commenced this action for anticipatory breach of an irrevocable documentary letter of credit established in its favor by the defendant Central Bank of Nigeria, and advised and payable by its correspondent bank, Morgan Guaranty Trust Company in New York. The defendant Central Bank of Nigeria ("Central Bank") is the central bank of the Federal Republic of Nigeria ("Nigeria") and is an "agency or instrumentality of a foreign state" within the meaning of the Foreign Sovereign Immunities Act ("Immunities Act") of 1976.(1)

Although the instant action is based upon the alleged breach and repudiation by Central Bank of its obligations with respect to the irrevocable letter of credit, in order to put the matter into proper perspective, it is necessary to refer to events prior and subsequent to its issuance. On April 21, 1975, plaintiff entered into a contract whereby Nigeria agreed to buy

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(1) 28 U.S.C. § 1603(b)(Supp. 1979).

The Act defines a "foreign state" broadly to include "an agency or instrumentality of a foreign state." Id. § 1603(a). We follow that usage here. The substantive provisions of the Act are codified in 28 U.S.C. §§ 1602-11. To accommodate these new provisions, certain changes were made to the language of existing jurisdictional statutes; see 28 U.S.C. §§ 1332(a)(4)(diversity), 1391(f)(venue), 1441(d)(removal); and an entirely new section was added as well. See id. § 1330.

from plaintiff, 240,000 metric tons of Portland Cement for the price of $U.S.60 per ton, or a total of $14,400,000.[2] The Nigerian government agreed to establish, within 21 days after the contract was signed, "an Irrevocable, Transferable abroad, Divisible[3] and confirmed Letter of Credit in favour of the seller for the total purchase price through Slavenburg's Bank, Amsterdam, Netherlands." Shipment was to be made at the rate of 20,000 metric tons per month to commence 45 days after Verlinden had received the documentary irrevocable letter of credit in its favor. Demurrage was to be paid at the rate of $3,500 per day per vessel, if and to the extent that discharge of the cargo was not completed at the rate of at least 1,000 tons per day. Demurrage payments were to accrue commencing on the first day after a vessel's arrival in the waters of Lagos Apapa, the port of Nigeria. The parties also agreed that the contract was to be governed by the Laws of the Netherlands and that disputes arising thereunder would be resolved by arbitration before the International Chamber of Commerce, Paris, France.

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(2) The contract was signed by the "Permanent Secretary, Ministry of Defense, Lagos . . . on behalf of the Federal Military Government of the Federal Republic of Nigeria."

(3) The letter of credit was to be governed by the Uniform Customs and Practice for Documentary Credits (The International Chamber of Commerce Brochure No. 222)(1962 Revision). It provides that a "credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank. Terms such as 'divisible' . . . add nothing to the meaning of the term 'transferable' and shall not be used." Id. Art. 46.

According to the allegations of plaintiff's amended complaint, on June 23, 1975 the defendant established its Documentary Credit No. CBN/BP/75/145 ("the letter of credit" or "the credit") in favor of plaintiff for the full contract price ($14,400,000); the credit included as well an open-ended amount for demurrage, to be paid at the rate of $3,500 per day per vessel. However, contrary to the terms of the cement agreement, the letter of credit was advised by and made payable through Morgan Guaranty Bank in New York, rather than plaintiff's bank (Slavenburg's) in the Netherlands. It was further at variance with the terms of the cement contract in that, as plaintiff alleges, it "was not confirmed, not divisible . . . internally inconsistent and commercially ineffective and unusable." Moreover, unlike the cement contract, the credit did not indicate when demurrage payments would commence. Plaintiff further alleges that in response to its request defendant, over a period of weeks, issued amendments to said letter of credit to render it internally consistent and commercially available and usable, as to which plaintiff was not advised by Morgan Guaranty until the latter part of September 1975. However, Morgan Guaranty did not confirm the credit as originally issued or amended, although it did advise plaintiff as beneficiary of amendments.(4)

(4) Morgan Guaranty was prepared to confirm the letter of credit as amended upon payment of its confirmation charges by plaintiff, the beneficiary, but these were not paid.

In August 1975, the ports of Nigeria became bottlenecked with hundreds of ships carrying cargoes of cement, sent by the more than 68 other cement suppliers from whom Nigeria had purchased cement. As a result of the increasing congestion in these ports, Central Bank commencing in mid-September 1975 unilaterally directed its correspondent banks, including Morgan, to adopt a series of amendments to all irrevocable letters of credit issued in connection with the cement contracts. In essence, the advising banks were directed to stop demurrage payments against documents unless those documents had been sent to and certified for payment by Central Bank. Additionally, Central Bank directly notified the suppliers that payment would be accorded only for those shipments cleared and approved by Central Bank two months before their arrival in Nigerian waters. On September 30, 1975 Morgan Guaranty cabled Slavenburg's Bank in Amsterdam to advise plaintiff of these amendments. It can hardly be questioned -- and the parties do not seriously dispute the fact -- that these unilateral amendments to the irrevocable letter of credit constitute violations of the Uniform Customs and Practice for Documentary Credits the terms of which, by stipulation of the parties, are applicable.(5)

(5) See id. Art. 3, which provides:

> An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and bona fide holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in

Plaintiff alleges that, in reliance upon the issuance of an irrevocable letter of credit as agreed upon, it contracted with another European concern, Interbuco Anstalt, Vaduz, Liechtenstein ("Interbuco"), for the purchase of cement and thereby exposed itself to a potential liability in liquidated damages. It seeks to recover damages for payments already made or owing to Interbuco, as well as its own lost profits, counsel fees and expenses in the sum of $4,660,000 as compensatory damages and punitive damages in a like amount.

Presently before the Court are the defendant's motions to dismiss the action for (1) lack of subject matter jurisdiction; (2) lack of in personam jurisdiction over Central Bank based upon sovereign immunity and the act of state doctrine; (3) its motion for summary judgment on the merits; (4) also its motion pursuant to Rule 60(b) to be relieved of an order directing that it instruct Morgan Guaranty to keep funds in a separate account sufficient to satisfy any judgment plaintiff may recover; and (5) plaintiff's renewed motion for the entry of default judgment based upon defendant's failure timely to file its answer.

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footnote (5) cont'd

> the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with. . . . Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

I

Plaintiff alleges jurisdiction under section 2(a) of the Immunities Act, 28 U.S.C., section 1330, which, in pertinent part, provides:

> § 1330. Actions against foreign states
>
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

Defendant's initial challenge is to plaintiff's assertion of jurisdiction under section 2(a) of the Immunities Act, contending that that provision does not empower a federal district court to adjudicate a dispute between foreign entities involving claims based upon a breach of a documentary letter of credit -- which defendant contends, if American law applies at all, would be governed by the laws of the State of New York and not by the United States Constitution or any federal statute enacted thereunder.

It is not questioned that if jurisdiction exists it must be because the claim arises under either the Constitution or the laws of the United States. The parties agree that in this instance the framework of reference is a "law of the United States" since neither the Constitution nor any of the other bases for jurisdiction under Article III of the Constitution is applicable.(6) Thus an initial inquiry centers about section 2(a) of the Immunities Act upon which plaintiff in its complaint expressly asserts jurisdiction "is founded." The defendant's basic position is that the Act does not create the claim or right as alleged in plaintiff's complaint; that section 2(a) does not confer subject matter jurisdiction with respect to the Verlinden claim; that it is a procedural statute defining the limits of sovereign immunity and regulating the circumstances under which foreign states, and their agencies or instrumentalities, may be sued in American courts, both state and federal.(7) It contends that, like the Declaratory Judgment Act,(8) the Immunities Act only "enlarged the range of remedies available"(9) to a litigant but did not thereby

(6) Plaintiff concedes that the diversity statute is inapplicable.

(7) The argument paraphrases the opening portion of the Act's legislative history. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. Code Cong. & Admin. News 6604 (hereinafter cited as "House Report").

(8) 28 U.S.C. § 2201 (Supp. 1979).

(9) Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671 (1950).

enlarge federal jurisdiction to include "the kinds of issues which give right of entrance to federal courts."(10) According to this view, when Congress enacted the Immunities Act it did no more than affirm the already existing bases of jurisdiction -- such as diversity or federal question -- while eliminating the requirement of jurisdictional amount when the defendant is a foreign state. The hard core of defendant's argument is that plaintiff's claim for damages based upon an alleged breach of the letter of credit is one that normally would be adjudicated under state or common law, and unless it appears that the claim is based upon a federal right or a federal question this Court is without jurisdiction; in short, defendant contends that the claim must be grounded upon a federal right authorized by Congress as an essential element under a well-pleaded complaint, "unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose,"(11) -- such as, in this case, sovereign immunity or the act of state doctrine. This restrictive concept, as Mr. Justice Frankfurter noted, was not "to indulge in formalism or sterile technicality" but reflected a deep concern that federal district courts would be inundated with a vast volume of litigation that normally should be adjudicated in state courts, merely because

(10) Id.

(11) Id. at 672 (quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)).

of an artfully pleaded complaint that anticipated defenses derived from federal law.(12)

Plaintiff responds that the Immunities Act is primarily a substantive federal statute -- that Congress' purpose in passing the Act was to codify a single body of substantive, federal law governing assertions of sovereign immunity;(13) that although section 2(a), the jurisdictional provision of the statute, is cast in part in procedural terms, it incorporates by reference substantive criteria set forth in section 4(a).(14) Plaintiff emphasizes that these substantive criteria govern an area of law -- foreign relations -- that is uniquely federal in nature. In sum, the argument proceeds that since the Immunities Act is primarily substantive in that it makes fundamental substantive changes in the law of sovereign immunity, the claim asserted is one arising under a "law of the United States" within Article III of the Constitution under which the courts have federal question jurisdiction. Plaintiff emphasizes that, although state courts may continue to entertain suits against foreign states, they must apply federal substantive law in assessing the validity of the sovereign

(12) Id. at 673.

(13) See House Report, supra note 7, at 7-8; reprinted at 6605-06. See also id. at 12; reprinted at 6610. Cf. Behring International, Inc. v. Imperial Iranian Air Force, 475 F.Supp. 383, 394 (D.N.J. 1979).

(14) 28 U.S.C. §§ 1605-1607 (defining sovereign immunity).

immunity defense.[15] Thus, plaintiff argues that any complaint wherein jurisdiction is alleged under the Act requires for its correct determination the construction of the Act;[16] accordingly it is within federal jurisdiction. In further support of this, plaintiff points out that Congress obviously considered the likely increase in litigation by virtue of the Immunities Act since it eliminated the requirement of a jurisdictional amount in suits against foreign states "in order to encourage the bringing of actions against foreign states in Federal courts"[17] and also provided for removal of such actions from the state to the federal courts. In essence, then, resolution of the present dispute turns on whether Congress intended to make the issue of sovereign immunity a controlling question of federal law, and an essential, substantive element of the plaintiff's proof; or, as plaintiff has termed it, whether Congress intended to "federalize" all disputes in which foreign states are named as defendants. If it did, then, under plaintiff's theory, a foreign state could be sued under the Immunities Act by any plaintiff, regardless of its citizenship.

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(15) 28 U.S.C. § 1602 (Supp. 1979).

(16) Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486, 492 (2d Cir. 1968). See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821)(Marshall, C.J.)("A case . . . may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.") Cf. Smith v. Kansas City Title Co., 255 U.S. 180, 199-201 (1921) (citing various tests of federal question jurisdiction).

(17) Congress rewrote the federal jurisdictional statutes, eliminating the requirement of jurisdictional amount in

Plaintiff cites numerous cases and passages from the legislative history of the Immunities Act in support of its contentions. Of the cases cited, only one involved the Immunities Act and none sheds any light on the precise issue before the Court. Principal reliance is placed upon Pfizer, Inc. v. Government of India,(18) in which a five-member majority of the Supreme Court held that foreign nations could sue domestic corporations to recover damages for violations of the antitrust laws. Essentially, the issue there was whether a foreign sovereign nation was a "person" as that term is used in section 4 of the Clayton Act. Although the majority held that it was, they emphasized that the result reached did "not involve any novel concept of the jurisdiction of the federal courts"(19) since Congress had already specifically conferred jurisdiction upon the federal courts to entertain suits brought by foreign nations(20) and that to allow foreign nations to sue under the antitrust acts was "no more than a specific application of a long-settled general rule."(21)

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footnote (17) cont'd

suits against foreign states, in order "to encourage the bringing of actions against foreign states in Federal courts." House Report, supra note 7, at 13; reprinted at 6612.

(18) 434 U.S. 308 (1978).

(19) Id. at 318.

(20) 28 U.S.C. § 1332(a)(4)(1976).

(21) Pfizer, Inc. v. Government of India, 434 U.S. at 319.

None of the many other lawsuits brought in the aftermath of the Nigerian cement crisis[22] and cited by plaintiff is parallel to this action. In all but one of those brought in United States courts the plaintiff was a domestic corporation allegedly injured by Nigeria's breach of the cement contract. Indeed, of the cases cited by the plaintiff, only two involved aliens on both sides of the dispute and neither is apposite. In Ipitrade International v. Federal Republic of Nigeria[23] -- yet another of the Nigerian cement contract cases -- a Swiss corporation sued in the United States District Court for the District of Columbia to enforce a final arbitration award against Nigeria pursuant to Swiss law and based upon the parties' agreement to submit all disputes to arbitration. Federal subject matter jurisdiction in Ipitrade, however, existed by virtue of a treaty for the enforcement of foreign arbitration awards to which the United States was a signatory and which had been incorporated into federal law.[24] Finally, plaintiff cites Abdul-Rahman Omar Adra v. Clift,[25]

(22) See, e.g., National American Corp. v. Federal Republic of Nigeria, 420 F.Supp. 954 (S.D.N.Y. 1976); id., 425 F.Supp. 1365 (S.D.N.Y. 1977); id., 448 F.Supp. 622 (S.D. N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979); East Europe Import-Export, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria, No. 77 Civ. 2809 (S.D.N.Y.) (consolidating three cases)(decision pending); Reale International, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria, No. 78 Civ. 23 (S.D.N.Y.)(decision pending).

(23) 465 F.Supp. 824 (D.D.C. 1978).

(24) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08 (Supp. 1979).

(25) 195 F.Supp. 857 (D. Md. 1961).

a custody dispute between alien parents of a Lebanese child living in the United States involving tortious conduct by one of the parties. In that case, federal jurisdiction explicitly was conferred by a statute(26) permitting aliens to sue in tort; moreover, the Court cited its inherent equitable powers to act on behalf of children found within its jurisdiction. In sum, none of these cases sheds any light on the instant issue.

The legislative history of the Immunities Act invoked by each party on its own behalf likewise provides no clear answer. Although the drafters of the Act proclaimed, among other matters, their intent to codify the restrictive principle of sovereign immunity(27) and to create a single uniform federal standard(28) they also stated that another purpose was to fashion a remedy for "American citizens," "U.S. businessmen" and "American property owner[s]" who "are increasingly coming into contact with foreign states and entities owned by foreign states."(29) The legislators repeatedly emphasized that they did not intend to create an international court of claims, and that the bill was "not

(26) 28 U.S.C. § 1350 (1976). The paucity of cases brought under this statute is noted by Judge Friendly in I.T.T. v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

(27) House Report, supra note 7, at 7; reprinted at 6605.

(28) Id. at 12; reprinted at 6610.

(29) Id. at 6-7; reprinted at 6605.

designed to open up our courts to all comers to litigate any dispute which any party may have with a foreign state anywhere in the world."(30) Despite this somewhat contradictory and unilluminating legislative history, Professor Moore finds a "plain intention" on the part of Congress "to confer on the district court jurisdiction of an action by an alien against a foreign state if the action otherwise meets the requirements of that section."(31) However, the single section of legislative history cited to support that view does not, either expressly or impliedly, reflect Congress' "plain intent" on the precise jurisdictional question here at issue -- whether subject matter jurisdiction was granted as to a claim asserted, not by a United States citizen, but by a foreign entity against a foreign state. A close study of the legislative history indicates that Congress did not consider or even discuss either vesting or limiting jurisdiction in the district courts where the claimant was a foreign entity.

Nonetheless, the view propounded by Professor Moore and plaintiff is not without support. While Congress' foremost concern was with actions by United States citizens against

(30) Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 94th Cong., 2d Sess., on H.R. 11315, June 2 and 4, 1976, p. 31.

(31) 1 Moore's Federal Practice ¶ 0.66[4] at 700.178-79 (1979) (emphasis supplied)(citation omitted).

foreign sovereigns it does not follow that it necessarily intended to deny foreign citizens or entities access to our courts when they asserted claims against a foreign state. In fact, the legislative history reflects a purpose "to provide when and how parties can maintain a lawsuit against a foreign state."(32) The Congressional Report further commented that "there are no comprehensive provisions in our law to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state."(33) To be sure the all inclusive references to "parties" by themselves hardly carry the day for the plaintiff's contention. But the language of section 1330 is broad and embracing. It confers jurisdiction over "any nonjury civil action" against a foreign state.(34) It neither limits such actions to those brought only by citizens of the United States nor does it exclude those brought by foreign citizens. The only delimiting test of jurisdiction contained in the express language of the statute is the requirement that the case have sufficient contact with the United States, considered hereafter.(35) Moreover, section 1330(a) must be read in conjunction with the new removal

(32) House Report, supra note 7, at 6; reprinted at 6605 (emphasis supplied).

(33) Id. at 7; reprinted at 6605 (emphasis supplied).

(34) 28 U.S.C. § 1330(a)(Supp. 1979).

(35) See 28 U.S.C. §§ 1603(d) and (e); 1605(a)(2).

provision;[36] both are part of the "comprehensive jurisdictional scheme" enacted by Congress to foster "uniformity in decision"[37] in cases involving foreign states. The removal provision permits a foreign state named as a defendant in "[a]ny civil action brought in a State court"[38] to avail itself of a federal forum.

Clearly there are instances in which aliens may sue foreign instrumentalities in the state courts.[39] If the defendant's view of the Immunities Act were adopted, and aliens were barred from suing aliens in the federal courts, the purpose of the removal statute would be thwarted; a foreign state that removed an action might well find that the federal court had no jurisdiction over the case. That result would frustrate the Congressional purpose of concentrating litigation against sovereign states in the federal courts in order to aid the development of a uniform body of federal law governing assertions of sovereign immunity. It could hardly have been within the contemplation of Congress to permit removal in the instance of an action properly commenced in a state court by a foreign citizen against a foreign nation and to deny initial access to the federal courts to the same plaintiff.

(36) Id. § 1441(d).

(37) House Report, supra note 7, at 13; reprinted at 6611.

(38) 28 U.S.C. § 1441(d).

(39) See, e.g., J. Zeevi & Sons v. Grindlays Bank (Uganda), 37 N.Y.2d 220, 371 N.Y.S.2d 892, cert. denied, 423 U.S. 866 (1975).

In sum, although the Court is unable to discern any precedent or any articulated Congressional intention to grant subject matter jurisdiction in actions of this type in the federal courts, the language of the statute itself is controlling. That language is broad and inclusive. It incorporates into the concept of jurisdiction substantive, federal criteria for determining the validity of assertions of sovereign immunity. It imposes a single, federal standard to be applied uniformly by both state and federal courts hearing claims brought against foreign states. In consequence, even though the plaintiff's claim is one grounded upon common law, the case is one that "arises under" a federal law because the complaint compels the application of the uniform federal standard governing assertions of sovereign immunity.(40) In short, the Immunities Act injects an essential federal element into all suits brought against foreign states. That Congress may not have foreseen the result of its handiwork -- that foreigners suing foreigners would be given access to a federal forum to litigate contract disputes -- does not undo the broad language it wrote. We hold that the presence of aliens on both sides of this dispute does not deprive the Court of subject matter jurisdiction.

(40) See Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486, 492 (2d Cir. 1968)(citing cases).

II

That determination, however, does not end inquiry. There remains for consideration the defendant's further motion to dismiss the complaint for lack of in personam jurisdiction. Subdivision (a) of section 1330, already cited, provides that the district court has jurisdiction:

> . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . under sections 1605-1607. . . .(41)

Subdivision (b) of section 1330, which the legislative history describes as in effect a federal long-arm statute over foreign states, their agencies and instrumentalities,(42) provides in pertinent part:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a). . . .(43)

Thus, a foreign state is subject to district court in personam jurisdiction only in those instances where it is not entitled to sovereign immunity as specified in sections 1605-07 of the Act. The enumerated exceptions to sovereign immunity set forth therein for the most part concern commercial activities by a foreign state having a nexus with the

(41) 28 U.S.C. § 1330(a).

(42) House Report, supra note 7, at 13; reprinted at 6612.

(43) 28 U.S.C. § 1330(b).

United States.(44) These substantive criteria were intended to embody the constitutional requirements of due process, which may only be satisfied if there are sufficient contacts between the litigant and the forum state.(45)

Section 1605(a)(2) defines three "commercial activity" situations in which a foreign state is not entitled to sovereign immunity and consequently in which the court has personal jurisdiction over a foreign state. These are when:

> [1] . . . the action is based upon a commercial activity carried on in the United States by the foreign state; [2] or upon an act performed in the United States by the foreign state in connection with a commercial activity of the foreign state elsewhere; [3] or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .(46)

Plaintiff asserts that its action is based upon each specified "commercial activity" and hence that it has satisfied

(44) There are other exceptions as well. For purposes of this motion, the most important of these is the waiver provision, 28 U.S.C. § 1605(a)(1), discussed in Part III, infra.

(45) See House Report, supra note 7, at 13-14; reprinted at 6612. Cf. Rush v. Savchuk, 100 S. Ct. 571 (1980); World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

(46) 28 U.S.C. § 1605(a)(2).

the requirements of in personam jurisdiction.

The term "commercial activity", and its companion term, "commercial activity carried on in the United States by a foreign state," are explicitly defined by the Act:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.(47)

We turn now to the plaintiff's contention that it comes within each of the three exceptions.

A. "Commercial Activity Carried on in the United States"

Plaintiff's initial contention is that Central Bank subjected itself to the jurisdiction of the United States courts by carrying on commercial activity within this country. To prevail upon this point, the plaintiff must identify a "regular course of commercial conduct" or a "particular commercial transaction or act" carried on here; demonstrate that

(47) 28 U.S.C. § 1603(d) and (e).

this activity has "substantial contact[s]" with the United States; and prove that its cause of action is "based upon" the commercial activity.

Plaintiff's task is burdened by the fact that the underlying activity which gave rise to its claim of anticipatory breach of the letter of credit occurred outside the United States. The parties are foreigners. Plaintiff, a Dutch corporation, negotiated and executed the cement contract in Nigeria. Shipment of the cement was to be made from ports in Europe. Delivery was to be made in Nigeria. The work was subcontracted to Interbuco, a European concern. The express terms of both the contract and the credit provide for payment ultimately to be made in the Netherlands through Slavenburg's Bank. The parties agreed to resolve all disputes by applying foreign law in a foreign tribunal.

Like the contract, the credit involved activity carried on or consummated overseas. It was established abroad by a foreign bank; was to be advised abroad, to another foreign bank; and named a foreign beneficiary. It adopted many of the contract's substantive provisions, which were to be performed exclusively in Europe and Nigeria by foreign parties. Although it contained no choice of law or forum provisions, it hardly can be argued that the issuing bank (the defendant) and

the beneficiary (the plaintiff) intended to invoke the benefits and privileges of American law,(48) or to select an American forum for the resolution of disputes arising out of the credit. Certainly there is no indication, either in the credit as originally issued or in any of the discussions preceding its amendment, that the parties ever contemplated such a result. Indeed, their agreement that Dutch law was to govern disputes under the contract suggests otherwise.

Nevertheless, plaintiff contends that Central Bank carried on "a regular course of commercial conduct" in this district which constituted substantial contact. It points to an entire series of transactions, involving vast sums of money, between Central Bank and Morgan Guaranty. There is no dispute over the fact that Central Bank kept large sums of U.S. dollars on deposit at Morgan, and that Morgan was authorized to draw on the defendant's behalf from accounts kept by Central Bank in the Federal Reserve Bank in New York. Moreover, Central Bank regularly advised letters of credit through Morgan; a number of these were issued in connection with cement contracts between the Federal Republic and suppliers other than Verlinden. Morgan confirmed several of these

(48) See Hanson v. Denckla, 357 U.S. 235, 253 (1958); Carey v. National Oil Corp., 453 F.Supp. 1097, 1101 (S.D.N.Y. 1978), aff'd, 592 F.2d 673, 676 n.7 (2d Cir. 1979); Upton v. Empire of Iran, 459 F.Supp. 264, 266 (D.D.C. 1978), aff'd, 607 F.2d 494 (D.C. Cir. 1979).

credits and thereby exposed itself to separate liability for breach of the credit's terms.(49) Furthermore, as part of its ongoing banking relationship with Morgan, the defendant sent several of its employees to Morgan for training in bank management. In short, there is ample evidence that both before and after the transaction at issue here, Morgan had a long-standing banking relationship with Central Bank, for whom it performed multifarious banking services within the United States.

Plaintiff argues that these actions, considered together, constitute "a regular course of commercial conduct" in the United States, and that that conduct has substantial contact with this country. For purposes of this motion, we assume that these assertions are true. We may even assume that these jurisdictional facts would be sufficient to justify a finding that Central Bank is "present" or "doing business"(50)

(49) See Art. 3, Uniform Customs and Practice for Documentary Credits (The International Chamber of Commerce Brochure No. 222)(1962 Revision).

(50) See N.Y. C.P.L.R. 301 (McKinney's 1978). See also Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964), on remand, 385 F.2d 116 (1967); Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 43 (1967)(citing cases).

The District of Columbia has a provision which dates from a time antecedant to the passage of the long-arm statute and which remains in force today. D.C. Code §§ 13-334 (1973). See Ramamurti v. Rolls-Royce Ltd., 454 F.Supp. 407, 409 n.2 (D.D.C. 1978).

in New York and thus would be subject to suit here if those traditional tests of jurisdiction applied. But they do not compel the same finding under the Act which here controls.

The Immunities Act rejected the traditional jurisdictional test of "doing business" and adopted instead the approach of the more recent long-arm statutes.(51) Specifically, the Act "is patterned after the long-arm statute Congress enacted for the District of Columbia."(52) Yet even the modern portion of the District's statute is only a guide to interpreting the Act, not a binding directive. There are significant differences in language and effect between the District's statute and the Act, which Congress, the author of both, could not have overlooked. For example, jurisdiction under the District's long-arm statute exists whenever a foreign defendant

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footnote (50) cont'd

> The sheer volume of a defendant's business in the forum state is not the decisive factor in determining whether jurisdiction exists, even under the traditional test. It is the nature and quality of the relationship between the defendant and the forum that determines whether the exercise of jurisdiction is appropriate. See Hanson v. Denckla, 357 U.S. 235, 253 (1958); International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). Cf. East Europe Domestic Intern. Sales Corp. v. Terra, 467 F.Supp. 383, 388-89 (S.D.N.Y. 1979); National American Corp. v. Federal Republic of Nigeria, 425 F.Supp. 1365, 1369, 1370 (S.D.N.Y. 1977); Textile Museum v. F. Eberstadt & Co., Inc., 440 F.Supp. 30, 32 (D.D.C. 1977).

(51) See, e.g., N.Y. C.P.L.R. § 302 (McKinney's 1978); D.C. Code §§ 13-401 to 13-434 (1973).

(52) House Report, supra note 7, at 13; reprinted at 6612.

(1) "transact[s] business,"[53] or (2) causes tortious injury within the District of Columbia by an act outside the District, "if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia."[54] The first of these provisions has been interpreted to extend jurisdiction to the farthest reaches permitted by the due process clause;[55] the second, to permit jurisdiction even when the defendant's contacts with the District bear "no relation to the particular tort" that forms the basis of the cause of action.[56] Neither of these provisions has found its way into the Immunities Act. Instead, as to foreign states, Congress provided a much narrower basis for jurisdiction.[57] When jurisdiction is alleged under any of the Act's three "commercial activities" exceptions, the

(53) D.C. Code § 13-423(a)(1)(1973) (emphasis supplied).

(54) Id. § 13-423(a)(4).

(55) See Margoles v. Johns, 483 F.2d 1212, 1218 (D.C. Cir. 1973); Dorothy K. Winston & Co. v. Town Heights Develop., Inc., 376 F. Supp. 1214, 1216 (D.D.C. 1974).

(56) Aiken v. Lustine Chevrolet, Inc., 392 F. Supp. 883, 885 (D.D.C. 1975) (quoting Uniform Interstate and International Procedure Act, § 1.03(a)(4), 9B Uniform Laws Ann. 307, 312 (Commissioners' Notes) (1966)).

(57) See Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1059 (S.D.N.Y. 1979) ("[D]ue to the policy and language of the Immunities Act, the Act's bases of jurisdiction are less comprehensive than those found in the usual jurisdictional statutes of the states and the District of Columbia.")

plaintiff's cause of action must be "based upon" the commercial activity specifically enumerated in the exception.(58) At least with respect to the first two exceptions, we take this to mean that there must be a close connection between the cause of action asserted and the jurisdictional facts upon which it is based.(59) Other contacts between a defendant and a forum state unrelated to a particular cause of action but that might justify the assertion of jurisdiction under the theories of "doing business," or even of "transacting business," do not satisfy the requirements of the Immunities Act. Rather, the focus must be on the nexus between the forum and the particular facts giving rise to the cause of action. In the instant case, the only relevant conduct of Central Bank which might support jurisdiction is the establishment of the Verlinden letter of credit and its decision to advise the credit to plaintiff through a New York bank. This action is not "based upon" Central Bank's establishment of other letters of credit issued in payment of other contracts or the other services performed by Morgan on behalf of Central Bank and unrelated to the Verlinden letter of credit.

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(58) 28 U.S.C. § 1605(a)(2)(emphasis supplied). See Harris v. VAO Intourist, Moscow, 481 F.Supp. 1056, 1060 (S.D. N.Y. 1979)(citing cases and articles); Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A., No. 77 Civ. 4470, slip op. at 3 (S.D.N.Y. January 30, 1980)(Sand, J.)

(59) Accord Harris v. VAO Intourist, Moscow, 481 F.Supp. 1056, 1060-61 (S.D.N.Y. 1979).

Whether one denominates the conduct of Central Bank and Morgan in the United States with respect to the Verlinden letter of credit "a regular course of commercial conduct" or "a particular transaction or act," the crucial question is whether it involves "substantial contact" with the United States within the meaning of the Act. We hold that it does not. The letter of credit, the breach of which is the basis of plaintiff's claim, does not constitute a commercial activity carried on in the United States by the defendant. The establishment of the letter of credit by the defendant in Nigeria was a single act performed there to provide payment if due under the cement contract. It did not involve substantial contact with the United States within the meaning of the Act.

Although Congress deliberately left to the courts the task of defining the nature and scope of the requisite contacts,(60) it provided some guidance. The legislative history makes plain that Congress intended to bestow jurisdiction in cases in which there is "a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff."(61) This passage clearly underscores the fact that the "commercial activity carried on in the United States"

(60) House Report, supra note 7, at 17; reprinted at 6616.

(61) Id. (emphasis supplied).

must be substantial to support jurisdiction. Not only does the plaintiff not meet that test, but the other contacts relied upon between Central Bank and the United States with respect to the Verlinden credit are insufficient to satisfy the required standard. Central Bank engaged Morgan to act as a correspondent and advising bank with respect to the Verlinden credit. All of Morgan's subsequent actions were consistent with that role, which never changed. When Central Bank established the credit, Morgan advised plaintiff and its Dutch bank of that fact. Thereafter, it telexed all correspondence, including notice of amendments to the credit and clarifications of its terms, to the parties.(62) It was prepared to accept appropriate shipping documents tendered by plaintiff or plaintiff's bank and to pay drafts against them on terms specified by Central Bank in the letter of credit and in subsequent amendments. Every piece of correspondence emanating from its office and sent to Verlinden, including a copy of the credit itself, indicated that Morgan acted solely as an advising bank and undertook no independent responsibility for guaranteeing the letter of credit. It functioned in a ministerial capacity, without exercising discretion or independent judgment.

(62) The use by a foreign party of an agent within the United States to forward messages by telex between itself and another foreign party is not a sufficient contact upon which the Court may base jurisdiction in the United States. East Europe Domestic Intern. Sales Corp. v. Terra, 467 F. Supp. 383 (S.D.N.Y. 1979).

From the beginning it was clear that the parties never regarded New York as a focal or end-point in the transaction. By its terms the letter of credit was to be "advised [by Morgan] through Slavenburg's Bank, Amsterdam." Both parties, by their actions, have diminished the importance of their own New York contacts to the transaction. Plaintiff has maintained throughout that while the parties never agreed to any contacts with the United States and the entire deal was to be performed in Europe and Africa, nonetheless, by unilaterally choosing to establish contacts with the United States, the defendant subjected itself to the jurisdiction of this Court. Defendant, on the other hand, maintains that although it utilized the services of a New York bank, it strictly circumscribed the depth and extent of its New York contacts. For example, it repeatedly instructed Morgan, in both the credit itself and in subsequent correspondence, not to undertake any independent liability for the transaction. During subsequent negotiations, when it changed that instruction and authorized Morgan to confirm the letter at Verlinden's expense, Central Bank acted only upon Verlinden's insistence; when Verlinden declined to accept the offer, the letter remained unconfirmed. Plaintiff's attempt to dissect Morgan's ministerial activities cannot destroy the fact that Morgan's function throughout was solely that of an advising bank. In short, whatever contacts there were with New York with respect to the subject matter of this

litigation were transitory and insubstantial;(63) accordingly, we hold that this Court is without jurisdiction under the first of the three commercial activities exceptions to the Act.

B. "An Act Performed in the United States in connection with a Commercial Activity of the Foreign State Elsewhere"

Verlinden next argues that Central Bank is subject to suit under the second exception to the Act. Essentially it contends that the repudiating instruction, which is the basis of its claim of anticipatory breach of the letter of credit, although issued in Nigeria, took effect only when received and acted upon by Morgan in New York. In plaintiff's words, "[t]he repudiating instructions had their effect and found their target in the U.S. not in Nigeria."(64) The fact that Morgan received the repudiating instruction in New York did not constitute an "act performed in the United States";

(63) Judge Goettel reached this same conclusion under the New York long-arm statute in another of the Nigerian cement contract cases. See National American Corp. v. Federal Republic of Nigeria, 425 F. Supp. 1365, 1370 (S.D.N.Y. 1977). In that case, the facts pointed more strongly in favor of jurisdiction than they do here: plaintiff was a New York corporation; the credit was payable to it in New York through a New York bank; plaintiff sued under the New York long-arm statute, which only requires "minimum" rather than "substantial" contacts to support jurisdiction.

(64) Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and for Summary Judgment, at 11 (emphasis supplied).

the repudiating act was performed at the place where the instruction was issued -- Nigeria. Plaintiff's argument on this point is more properly addressed to the third commercial exception.

C. "An Act . . . Outside the United States . . . that Causes a Direct Effect in the United States"

Plaintiff's final contention is that Central Bank surrendered its immunity under this exception -- by commiting acts outside the United States that "cause[d] a direct effect in the United States." Although this section has principally been applied to activity causing tortious consequences,(65) the legislative history makes clear that it was intended to have wider application.(66) However, this exception can only be invoked when a "substantial" effect within the territory "occurs as a direct and foreseeable result of the conduct outside the territory."(67) In applying this section courts

(65) See, e.g., Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (S.D.N.Y. 1979); Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), aff'd, 607 F.2d 494 (D.C. Cir. 1979).

(66) House Report, supra note 7, at 19; reprinted at 6618. Congress adopted by reference "the principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." Id. The broad language of that section of the Restatement grants a state the power to "prescribe a rule of law attaching legal consequences" to conduct, whether tortious or otherwise, that occurs outside the jurisdiction and causes substantial, direct, and foreseeable effects within the jurisdiction.

(67) Id. See Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1062-63 (S.D.N.Y. 1979) (emphasis supplied).

have uniformly held that the locus of the injury is dispositive of jurisdiction;[68] indeed, that factor takes precedence over the citizenship of the victim. For example, even when the victim of a foreign state's tortious conduct is an American citizen injured abroad, the sovereign is protected by immunity and there is no jurisdiction in the American courts. In such cases the injury to the victim's bereaved relatives living in the United States is not sufficiently "direct" or "substantial" to support the assertion of federal jurisdiction.[69]

In the case at bar, while the "repudiation" was issued in Nigeria (an act outside the United States) its receipt by Morgan caused no "direct effect in the United States." Perhaps recognizing this, plaintiff in its continued effort to come within the exception relies upon J. Zeevi & Sons v. Grindlays Bank (Uganda)[70] in which the New York State Court of Appeals held that the repudiation by a foreign bank of a letter of credit advised through a New York Bank had an

(68) Carey v. National Oil Corp., 592 F.2d 673, 676 (2d Cir. 1979); Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1064-65 (S.D.N.Y. 1979); Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978), aff'd, 607 F.2d 494 (D.C. Cir. 1979). Cf. Yessenin-Volpin v. Novosti Press Agency, Tass, 443 F. Supp. 849, 855 (S.D.N.Y. 1978).

(69) Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1065 (S.D.N.Y. 1979) (citing cases); Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978), aff'd, 607 F.2d 494 (D.C. Cir. 1979).

(70) 37 N.Y. 2d 220, 371 N.Y.S.2d 892, cert. denied, 423 U.S. 866 (1975).

injurious effect upon New York's reputation as "financial capital of the world, . . . [and] international clearing-house and marketplace for a plethora of international transactions. . . ."(71) This effect visited not upon the plaintiff but upon a constituency of unnamed strangers to this lawsuit, is at most speculative and remote.(72) Indeed, solicitude for New York's "preeminent financial position"(73) should induce the courts to forbear the exercise of jurisdiction in close cases. New York would be detrimentally served by a decision subjecting foreign customers of its banks to the in personam jurisdiction of American courts whenever they advise credits to foreign beneficiaries through American banks. It would not be unrealistic to suggest that foreign states, aware that the designation of American banks as advisors in letters of credit would in consequence subject them to in personam jurisdiction in the event of a claimed breach, would have little hesitancy or difficulty in designating banks in foreign lands. It could hardly have been the purpose of Congress to force the loss of such business upon the American financial community. We hold that the instruction of repudiation received by Morgan did not subject defendant to in personam jurisdiction under the third exception.

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(71) Id. 37 N.Y.2d 220, 227, 371 N.Y.S.2d 892, 898.

(72) Cf. ITT v. Cornfeld, No. 79-7084, slip op. at 1885 (2d Cir. March 17, 1980).

(73) J. Zeevi & Sons v. Grindlays Bank (Uganda), 37 N.Y.2d 220, 227, 371 N.Y.S.2d 892, 898, cert. denied, 423 U.S. 866 (1975).

In urging jurisdiction under the third commercial exception, plaintiff relies principally upon two decisions, neither of which is dispositive here. First, Verlinden points to Judge Goettel's observation, made in a case with facts quite different from those of the instant action, that "[t]he breach of a letter of credit having a New York beneficiary, advised by and payable through New York banks, would appear to satisfy the last [of the three] criteria of 28 U.S.C. §1605(a)(2)...."(74) Apart from the fact that this is dictum, recognized as such by Judge Goettel, the plaintiff, the named beneficiary in the letter of credit, was a New York corporation. New York was the final destination for payment under that credit, the locus of the injury occasioned by the alleged breach of the credit, and the home state of the beneficiary. Thus, the act of anticipatory repudiation had a direct effect in New York. None of those factors obtains here. Although Judge Goettel's holding in that case actually was based upon pre-Immunities Act law, his dictum is consistent with those subsequent cases, already discussed, in which courts have held that the locus of the injury is crucial in determining whether jurisdiction exists under the third "commercial activity" exception of the Act.(75)

The second case upon which plaintiff relies is

(74) National American Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 639 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979).

(75) See note 68, supra.

J. Zeevi & Sons v. Grindlays Bank (Uganda),[76] which involved the wrongful repudiation by a Ugandan bank of an irrevocable letter of credit advised through a New York bank and in favor of an Israeli corporation. Jurisdiction was established by the attachment of assets held in New York by the defendant's bank, which was found to be its agent in New York. Zeevi is distinguishable from the case at bar in a multitude of respects. It was decided before the passage of the Immunities Act; the decision was based solely on New York law; questions of personal jurisdiction, or of the reach of the long-arm statute, were not decided or even considered by the court in Zeevi. The court's precise holding was limited to the narrow conclusion that under section 1314 of the Business Corporation Law of New York, a cause of action for wrongful repudiation of a Ugandan bank's obligation "arose within" the state of New York. This conclusion was premised, at least in part, on the court's rather questionable assumption that the "parties, by listing United States dollars as the form of payment, impliedly" accepted the benefits and invoked the protection of New York law.[77]

Here, by contrast, we deal solely with the question of whether personal jurisdiction exists under the standard set by Congress. We find no indication that Morgan acted as

(76) 37 N.Y.2d 220, 371 N.Y.S.2d 892, cert. denied, 423 U.S. 866 (1975).

(77) J. Zeevi & Sons v. Grindlays Bank (Uganda), 37 N.Y.2d 220, 227, 371 N.Y.S.2d 892, 898, cert. denied, 423 U.S. 866 (1975).

Central Bank's agent. Although payment was prescribed in U.S. dollars, the parties never invoked, explicitly or by implication, the protection of New York law.(78)

Finally, even if Zeevi were applicable, there is reason to believe that its authority has been limited to its peculiar factual situation. In at least two subsequent decisions, New York courts have held that the establishment of a correspondent banking relationship between a foreign and domestic bank does not subject the foreign bank to the personal jurisdiction of the New York courts under the state's long-arm statute.(79) We reach the same conclusion with respect to federal jurisdiction under the Immunities Act. Defendant's acts with respect to the Verlinden letter of credit caused no direct, substantial, injurious effect in the United States. Thus, the defendant's immunity is not defeated under the third commercial exception to the Act.

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(78) Judge Goettel also held that Zeevi was inapplicable to the question of whether personal jurisdiction exists; he distinguished that case on the same bases as those enumerated here. See National American Corp. v. Federal Republic of Nigeria, 425 F.Supp. 1365, 1370-71 (S.D.N.Y. 1977).

(79) Amigo Foods Corp. v. Marine Midland Bank, 39 N.Y.2d 391, 384 N.Y.S.2d 124 (1976); Taub v. Colonial Coated Textile Corp., 54 A.D.2d 660, 387 N.Y.S.2d 869 (1st Dep't 1976).

III

The Act contains another exception, invoked more rarely than those governing commercial activities, but which plaintiff urges is applicable here. Foreign states are not immune from the jurisdiction of the courts of the United States:

> . . . in any case
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver. . . .(80)

There is no assertion in the case at bar that the defendant has explicitly waived its immunity;(81) instead, plaintiff argues that Central Bank has implictly waived its immunity in two related respects. The cement contract signed by Nigeria and Verlinden contains the following provision:

> The construction, validity and performance of this contract shall be governed by the Laws of the Netherlands and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. [emphasis supplied.]

(80) 28 U.S.C. § 1605(a)(1).

(81) Normally, such a waiver is accomplished by treaty or by the explicit language of a contract entered into with a private party. See House Report, supra note 7, at 18; reprinted at 6617.

Plaintiff contends that Nigeria's choice of a foreign forum for arbitration and of foreign law precludes it from asserting any immunity, on its own behalf or that of its instrumentalities, with respect to any issue connected with the Verlinden cement contract. Specifically, Verlinden contends that Nigeria's choice of Dutch law and a French tribunal constitutes a waiver of objection to American jurisdiction, and that this waiver is binding as well upon Central Bank, Nigeria's instrumentality charged with the task of making payments under the cement contract.

Some support for this view appears in the cryptic language of the Congressional report, which noted:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.(82)

Moreover, at least one court has held, in one of the other cement contract cases, that Nigeria's choice of European laws and a European forum to resolve disputes constituted a waiver of its sovereign immunity in the American courts.(83) Even

(82) Id. This single paragraph contains the legislative history's entire discussion of implicit waivers.

(83) Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F.Supp. 824 (D.D.C. 1978).

if that case were correct on the law, it is inapplicable to the facts here.(84)

Here plaintiff, for reasons which are apparent, has decided not to sue upon its cement agreement with Nigeria. Instead it bases its claim upon the Verlinden letter of credit. But that instrument, unlike the contract, is devoid of any provision accepting foreign law for its interpretation, nor does it name any foreign tribunal for arbitration.

Plaintiff seeks to blur the distinctions between two separate obligations binding between different parties. The cement contract was signed by Nigeria's Minister of Defense on behalf of the Nigerian government; Central Bank is not a party to that agreement, which binds only Verlinden and Nigeria. By its very definition, the letter of credit is

(84) Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F.Supp. 824 (D.D.C. 1978) did not require a decision on the issue of implicit waiver. The Ipitrade action was brought to enforce an arbitration award against Nigeria made by a French tribunal applying Swiss law. The District Court had subject matter jurisdiction of the enforcement action by virtue of a treaty to which the United States, France, Switzerland, and Nigeria all are parties. 9 U.S.C. §§ 201-208 (Supp. 1980). The treaty explicitly federalizes all such enforcement actions, id. § 203, and sharply constricts the scope of review of arbitral awards. Id. § 207. By signing the treaty Nigeria had explicitly waived its objection to such enforcement actions.

a separate and distinct obligation;[85] in this case, it bound only Central Bank, and not the Nigerian government. Nigeria's obligation under the contract was "to establish" the letter of credit in favor of Verlinden within a specified period of time. Central Bank's obligation under the letter of credit matured upon presentation of appropriate documents. Nigeria undertook no obligations under the letter of credit; nor Central Bank, under the contract. This is not a hyper-technical distinction. The contract indicates that to whatever extent, if at all, Nigeria waived its immunity by reason of the arbitration provision, it did so only with respect to the contract, not the credit. Plaintiff can hardly have been unaware of these distinctions when it chose to pursue its remedies against Central Bank under the credit, rather than against Nigeria under the contract.

Even if Nigeria's waiver of immunity under one contract were held to bind its instrumentality under a different obligation, we would nevertheless find no implicit waiver, for Nigeria itself has never implicitly accepted the jurisdiction of American courts. The Congressional history cited

(85) See Uniform Customs and Practice for Documentary Credits (1962 Rev.); General Provisions and Definitions § (c) ("Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.")

by the plaintiff is not dispositive of this issue, indeed, it is at most ambiguous. The comment in the Congressional report, previously mentioned, that the courts had found an implicit waiver "where a foreign state has agreed to arbitration in another country or . . . agreed that the law of a particular country" would apply,(86) does not necessarily constitute an endorsement of that result. More importantly, it is by no means clear that Congress intended, in referring to "another country" or "a particular country," to include a third-party country the adoption of whose law or forum by a foreign state as one of the contracting parties would operate as a waiver thereby subjecting the foreign state to jurisdiction in this country. It may be reasonable to suggest that a sovereign state which agrees to be governed by the laws of the United States -- which is both "another country" and "a particular country" -- has implicitly waived its ability to assert the defense of sovereign immunity when sued in an American court. But it is quite another matter to suggest, as did the Court in Ipitrade,(87) that a sovereign state which

(86) House Report, supra note 7, at 18; reprinted at 6617. There is no indication as to which cases the legislators were referring, or even whether they were cases decided under American law by American courts.

(87) Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F.Supp. 824 (D.D.C. 1978).

agrees to be governed by the laws of a third-party country -- such as the Netherlands -- is thereby precluded from asserting its immunity in an American court.

Although both of these interpretations may be consistent with the literal language of the single paragraph of legislative history that addresses implicit waivers, there are strong reasons to reject the latter view. By its peculiar mixture of substantive and procedural provisions, the Immunities Act confers personal jurisdiction over all foreign states not entitled to immunity (assuming that valid service has been effectuated). Proof of an implicit waiver absolutely defeats the assertion of sovereign immunity. If the language of the Act is applied literally, the result is that a foreign sovereign which has waived its immunity can be subjected to the personal jurisdiction of United States courts regardless of the nature or quality of its contacts with this country.(88)

(88) There is reason to believe that Congress did not anticipate this problem at all. On the one hand the legislative history indicates that Congress intended the courts to exercise personal jurisdiction only over foreign states having sufficient contacts with the United States. See House Report, supra note 7, at 13-14; reprinted at 6612. On the other hand, the statute it wrote permits the assertion of jurisdiction either when there are sufficient contacts (i.e., when one of the commercial activity exceptions has been met) or when there has been a waiver.

Plaintiff's view, if adopted, would presage a vast increase in the jurisdiction of federal courts in matters involving sensitive foreign relations: whenever a foreign sovereign had contracted with a private party anywhere in the world, and chose to be governed by the laws or answer in the forum of any country other than its own, it would expose itself to personal liability in the courts of the United States. Verlinden and Nigeria could scarcely have foreseen this untoward result when they signed the contract; and it is unlikely that Congress could have intended it.

Because the Act's waiver provision is written as broadly as it is, it is incumbent upon the Court to narrow that provision's scope. We need not now decide whether the Court would have personal jurisdiction over a foreign state whose only contact with this country occurs by virtue of a private agreement in which it adopts American law or an American forum. We only hold that when a foreign state agrees to submit its disputes with another, non-American private party to the laws of a third country, or to answer in the tribunals of such country, it does not implicitly waive its immunity to the jurisdiction of the courts of the United States. Because Nigeria has not waived the defense of sovereign immunity in the American courts, it necessarily follows that Central Bank has not either.

In sum, we find that none of the exceptions to the Act is applicable here. The motion of the defendant to dismiss the complaint for lack of personal jurisdiction under the Foreign Sovereign Immunities Act is granted.

So ordered.

Dated: New York, New York
April 21, 1980

EDWARD WEINFELD
United States District Judge

JUDGMENT APPEALED FROM

Weinfeld, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VERLINDEN B.V.

Plaintiff,

-against-

CENTRAL BANK OF NIGERIA,

Defendant.

79 CIVIL 1150(EW)

JUDGMENT

U.S. DISTRICT COURT FILED APR 30 1980 S.D. OF N.Y.

Defendant having made various motions to dismiss the action, and also having moved pursuant to Rule 60(b), and the plaintiff having renewed its motion for the entry of default judgment, and the said motions having come on before the Honorable Edward Weinfeld, United States District Judge, and the Court thereafter on April 21, 1980, having handed down its opinion denying the plaintiff's motion as moot, and granting the defendant's motion to dismiss the complaint for lack of personal jurisdiction under the Foreign Sovereign Immunities Act, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
April 30, 1980

Raymond F. Burghardt

CLERK

MICROFILM APR 30 1980

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VERLINDEN B.V.,

Plaintiff,

- against -

CENTRAL BANK OF NIGERIA,

Defendant.

79 Civ. 1150 (EW)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Verlinden B.V., the plaintiff above-named, appeals to the Court of Appeals for the Second Circuit from the Judgment dated and filed herein on April 30, 1980, pursuant to opinion No. 49957 of the Court (Hon. Edward Weinfeld, D.J.) dated and filed April 21, 1980, which granted defendant's motion to dismiss the action for lack of personal jurisdiction and dismissed the action for lack of personal jurisdiction.

Dated: New York, N.Y.
May 9, 1980

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CLERK, United States District Court
Southern District of New York

Joint Appendix

2

No. 81-920

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In The

Supreme Court of the United States

October Term, 1981

VERLINDEN B.V.,

Petitioner,

— v. —

CENTRAL BANK OF NIGERIA,

Respondent.

JOINT APPENDICES
Vol. II

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Petition for Certiorari Filed November 13, 1981.
Certiorari Granted January 11, 1982.

Motion to Dispense with Printing of New Appendix, and Permitting This Case to be Heard on the Appendices Used in the Court Below, Granted February 22, 1982.

INDEX

	Page
NIKKEI DOCKET ENTRIES	1a
CHENAX DOCKET ENTRIES	7a
EAST EUROPE DOCKET ENTRIES	12a
NIKKEI AMENDED COMPLAINT	18a
EXHIBIT A TO AMENDED COMPLAINT - NIKKEI CEMENT CONTRACT	22a
EAST EUROPE COMPLAINT	27a
CHENAX SECOND AMENDED COMPLAINT	34a
EXHIBIT A TO SECOND AMENDED COMPLAINT - CHENAX CEMENT CONTRACT	39a
ANSWER TO NIKKEI AMENDED COMPLAINT	44a
ANSWER TO EAST EUROPE COMPLAINT	48a
ANSWER TO CHENAX SECOND AMENDED COMPLAINT	52a
DEFENDANTS' NOTICE OF MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS	57a
AFFIDAVIT OF JAMES G. SIMMS, ESQ. IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS	60a
EXHIBIT 2 TO SIMMS AFFIDAVIT - EAST EUROPE SUMMONS AND COMPLAINT (EAST EUROPE COMPLAINT IS REPRODUCED HEREIN AT PAGES 27a - 33a)	-
EXHIBIT 3 TO SIMMS AFFIDAVIT - NIKKEI SUMMONS AND COMPLAINT (NIKKEI AMENDED COMPLAINT IS REPRODUCED HEREIN AT PAGES 18a - 21a)	-

	Page
EXHIBIT 4 TO SIMMS AFFIDAVIT - CHENAX SUMMONS AND COMPLAINT (CHENAX SECOND AMENDED COMPLAINT IS REPRODUCED HEREIN AT PAGES 34a - 38a)	-
EXHIBIT 5 TO SIMMS AFFIDAVIT - EAST EUROPE CEMENT CONTRACT	72a
EXHIBIT 6 TO SIMMS AFFIDAVIT - NIKKEI CEMENT CONTRACT (REPRODUCED HEREIN AT PAGES 22a - 26a)	-
EXHIBIT 7 TO SIMMS AFFIDAVIT - CHENAX CEMENT CONTRACT (REPRODUCED HEREIN AT PAGES 39a - 43a)	-
EXHIBIT 8 TO SIMMS AFFIDAVIT - AFFIDAVIT OF JACOB OLADELE AMAO, DEPUTY CHIEF ACCOUNTANT OF CENTRAL BANK OF NIGERIA SWORN TO DECEMBER 22, 1976	76a
EXHIBIT 9 TO SIMMS AFFIDAVIT - AUGUST 13, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE AND EAST EUROPE LETTER OF CREDIT DATED AUGUST 4, 1975	79a
EXHIBIT 10 TO SIMMS AFFIDAVIT - JULY 23, 1975 LETTER FROM MORGAN GUARANTY TO NIKKEI AND NIKKEI LETTER OF CREDIT DATED JULY 14, 1975	83a
EXHIBIT 11 TO SIMMS AFFIDAVIT - MAY 8, 1975 LETTER FROM MORGAN GUARANTY TO CHENAX AND CHENAX LETTER OF CREDIT DATED APRIL 25, 1975	88a
EXHIBIT 12 to SIMMS AFFIDAVIT - AFFIDAVIT OF HON. OLUJIMI JOLAOSO, AMBASSADOR TO THE UNITED STATES FROM NIGERIA SWORN TO OCTOBER 25, 1977 (REPRODUCED HEREIN AT PAGES 115a - 119a)	-
EXHIBIT 13 TO SIMMS AFFIDAVIT - AFFIDAVIT OF AUGUSTINE O. OKAFOR, SECRETARY OF NIGERIA'S CEMENT CONTRACTS NEGOTIATING COMMITTEE, SWORN TO DECEMBER 16, 1976 AND ATTACHMENTS THERETO	94a
DEFENDANTS' AMENDED NOTICE OF MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS	108a

	Page
SECOND AFFIDAVIT OF JAMES G. SIMMS, ESQ., IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS	111a
EXHIBIT 1 TO SIMMS SECOND AFFIDAVIT - AFFIDAVIT OF HON. OLUJIMI JOLAOSO, AMBASSADOR TO THE UNITED STATES FROM NIGERIA SWORN TO OCTOBER 25, 1977	115a
EXHIBIT 2 TO SIMMS SECOND AFFIDAVIT - PORTS (EMERGENCY PROVISIONS) DECREE 1975, DECREE NO. 40, DATED DECEMBER 19, 1975 (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 123a - 125a)	-
EXHIBIT 3 TO SIMMS SECOND AFFIDAVIT - LEGISLATIVE HISTORY OF IMMUNITIES ACT (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 81a - 112a)	-
NIKKEI NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT	120a
NIKKEI RULE 9(g) STATEMENT	122a
AFFIDAVIT OF TETSUO OZAWA IN SUPPORT OF NIKKEI MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT	125a
EXHIBIT A TO OZAWA AFFIDAVIT - NIKKEI CEMENT CONTRACT (REPRODUCED HEREIN AT PAGES 22a - 26a)	-
EXHIBIT B TO OZAWA AFFIDAVIT - NIKKEI LETTER OF CRFDIT DATED JULY 14, 1975 (ALSO REPRODUCED HEREIN AT PAGES 85a - 87a)	131a
EXHIBIT C TO OZAWA AFFIDAVIT - CONTRACT C-703	135a
EXHIBIT D TO OZAWA AFFIDAVIT - AUGUST 1975 TELEX FROM CENTRAL BANK OF NIGERIA TO NIKKEI	143a
EXHIBIT E TO OZAWA AFFIDAVIT - SEPTEMBER 30, 1975 LETTER FROM MORGAN GUARANTY TO NIKKEI	145a
EXHIBIT F TO OZAWA AFFIDAVIT - OCTOBER 22, 1975 LETTER FROM MORGAN GUARANTY TO NIKKEI	147a

	Page
EAST EUROPE NOTICE OF MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT	149a
EAST EUROPE RULE 9(g) STATEMENT	151a
AFFIDAVIT OF ROBERT ROSS IN SUPPORT OF EAST EUROPE MOTION FOR PARTIAL SUMMARY JUDGMENT SWORN TO NOVEMBER 3, 1977	155a
EXHIBIT A TO ROSS AFFIDAVIT - EAST EUROPE CEMENT CONTRACT (REPRODUCED HEREIN AT PAGES 72a - 75a)	-
EXHIBIT B TO ROSS AFFIDAVIT - EAST EUROPE LETTER OF CREDIT DATED AUGUST 4, 1975 (ALSO REPRODUCED HEREIN AT PAGES 81a - 82a)	163a
EXHIBIT C-1 TO ROSS AFFIDAVIT - AUGUST 13, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE (ALSO REPRODUCED HEREIN AT PAGE 80a)	166a
EXHIBIT C-2 TO ROSS AFFIDAVIT - SEPTEMBER 8, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE	168a
EXHIBIT D TO ROSS AFFIDAVIT - OCTOBER 3, 1975 TELEX AND LETTER FROM MORGAN GUARANTY TO BANCO INTERNACIONAL DE COMERCIO AND INTRAFINSA	170a
EXHIBIT E TO ROSS AFFIDAVIT - SEPTEMBER 10, 1975 LETTER FROM MORGAN GUARANTY TO BERGBAU HANDEL	174a
EXHIBIT F TO ROSS AFFIDAVIT - SEPTEMBER 1975 TELEX FROM CENTRAL BANK OF NIGERIA TO EAST EUROPE	177a
EXHIBIT G TO ROSS AFFIDAVIT - SEPTEMBER 30, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE	179a
CHENAX NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT	182a
CHENAX RULE 9(g) STATEMENT	184a
AFFIDAVIT OF DR. UCHE AKUBA IN SUPPORT OF CHENAX MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT, SWORN TO DECEMBER 3, 1977	186a

	Page
EXHIBIT A TO AKUBA AFFIDAVIT - CHENAX CEMENT CONTRACT (REPRODUCED HEREIN AT PAGES 39a - 43a)	-
EXHIBIT B TO AKUBA AFFIDAVIT - CHENAX LETTER OF CREDIT DATED APRIL 25, 1975 (ALSO REPRODUCED HEREIN AT PAGES 91a - 93a) AND JUNE 10, 1975 AND AUGUST 1, 1975 LETTERS FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY	191a
EXHIBIT C TO AKUBA AFFIDAVIT - MARCH 12, 1975 LETTER FROM SCHRODER, MUNCHMEYER, HENGST & CO. TO CHENAX, AND MARCH 14, 1975 LETTER FROM SCHRODER, MUNCHMEYER, HENGST & CO. TO CENTRAL BANK OF NIGERIA	197a
EXHIBIT D TO AKUBA AFFIDAVIT - AUGUST 1975 TELEX FROM CENTRAL BANK OF NIGERIA TO CHENAX	204a
ADDENDUM TO AKUBA AFFIDAVIT - AFFIDAVIT OF DR. UCHE AKUBA SWORN TO JANUARY 5, 1978	206a
EXHIBIT 1 TO AKUBA AFFIDAVIT SWORN TO JANUARY 5, 1978 - MARCH 20, 1975 LETTER FROM AKUBA TO MINISTRY OF DEFENSE OF NIGERIA	211a
EXHIBIT 2 TO AKUBA AFFIDAVIT SWORN TO JANUARY 5, 1978 - APRIL 29, 1975 LETTER FROM AKUBA TO MINISTRY OF DEFENSE OF NIGERIA	212a
AFFIDAVIT OF ROBERT ROSS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, SWORN TO NOVEMBER 11, 1977	213a
EXHIBIT 1 TO ROSS AFFIDAVIT - EAST EUROPE CEMENT CONTRACT (REPRODUCED HEREIN AT PAGES 72a - 75a)	-
EXHIBIT 2 TO ROSS AFFIDAVIT - JULY 14, 1975 LETTER FROM CENTRAL BANK OF NIGERIA TO EAST EUROPE	220a
EXHIBIT 3 TO ROSS AFFIDAVIT - JULY 22, 1975 LETTER FROM EAST EUROPE TO CENTRAL BANK OF NIGERIA	222a

Page

EXHIBIT 4 TO ROSS AFFIDAVIT - AUGUST 13, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE AND LETTER OF CREDIT DATED AUGUST 4, 1975 (REPRODUCED HEREIN AT PAGES 163a - 167a) -

EXHIBIT 5 TO ROSS AFFIDAVIT - SEPTEMBER 8, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE (REPRODUCED HEREIN AT PAGES 168a - 169a) -

ADDENDA TO EAST EUROPE MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS

ADDENDUM A TO EAST EUROPE MEMORANDUM OF LAW - LEGISLATIVE HISTORY OF THE IMMUNITIES ACT (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 81a - 112a) -

ADDENDUM C TO EAST EUROPE MEMORANDUM OF LAW - DECISION IN TRENDTEX TRADING CORP. v. CENTRAL BANK OF NIGERIA, [1977] W.L.R.356 (CT. OF APPEAL, GREAT BRITAIN 1977)(REPRODUCED IN VERLINDEN APPENDIX AT PAGES 196a - 229a) -

ADDENDUM D TO EAST EUROPE MEMORANDUM OF LAW - DECISION IN NONRESIDENT PETITIONER v. CENTRAL BANK OF NIGERIA (DISTRICT COURT OF FRANKFURT, WEST GERMANY DATED DECEMBER 2, 1975) 224a

AFFIDAVIT OF CARL F. SALANS, ESQ., IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS, SWORN TO MAY 12, 1978 229a

AFFIDAVIT OF ANTONIO REALE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS, SWORN TO MAY 18, 1978 232a

EXHIBIT 1 TO REALE AFFIDAVIT - REALE CEMENT CONTRACT 235a

EXHIBIT 2 TO REALE AFFIDAVIT - MAY 8, 1975 LETTER FROM MORGAN GUARANTY TO REALE 240a

	Page
SUPPLEMENTAL AFFIDAVIT OF BERTHOLD H. HOENIGER, ESQ., SWORN TO MAY 23, 1978 IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT	242a
EXHIBIT A TO HOENIGER AFFIDAVIT - APRIL 6, 1978 LETTER FROM THEODORE GODDARD & CO. TO B. H. HOENIGER	264a
EXHIBIT D TO HOENIGER AFFIDAVIT - COMMITTEE REPORT ON THE SOVEREIGN IMMUNITY ACT OF 1975, BY THE COMMITTEE ON INTERNATIONAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK	266a
EXHIBIT E TO HOENIGER AFFIDAVIT - AUGUST 2, 1976 OFFICE MEMORANDA OF MORGAN GUARANTY	271a
EXHIBIT F TO HOENIGER AFFIDAVIT - OCTOBER 4, 1976 OFFICE MEMORANDUM OF MORGAN GUARANTY	273a
EXHIBIT G TO HOENIGER AFFIDAVIT - OCTOBER 4, 1976 OFFICE MEMORANDUM OF MORGAN GUARANTY	274a
EXHIBIT H TO HOENIGER AFFIDAVIT - OCTOBER 6, 1975, JUNE 30, 1976 AND JULY 30, 1976 OFFICE MEMORANDA OF MORGAN GUARANTY	276a
EXHIBIT I TO HOENIGER AFFIDAVIT - 1974 - 1976 CORRESPONDENCE BETWEEN MORGAN GUARANTY AND CENTRAL BANK OF NIGERIA	279a
EXHIBIT J TO HOENIGER AFFIDAVIT - MAY 17, 1978 LETTER FROM WARSHAVSKY & HOFFMAN TO ATTORNEYS IN EAST EUROPE, NIKKEI AND CHENAX ACTIONS ENCLOSING OFFICE MEMORANDA OF MORGAN GUARANTY	312a
EXHIBIT K TO HOENIGER AFFIDAVIT - MAY 2, 1975 CREDIT AUTHORIZATION OF MORGAN GUARANTY	328a
EXHIBIT L TO HOENIGER AFFIDAVIT - DECEMBER 1975 LETTERS FROM MORGAN GUARANTY	329a
EXHIBIT M TO HOENIGER AFFIDAVIT - SCHEDULE OF LETTERS OF CREDIT CONFIRMED OR ADVISED BY MORGAN GUARANTY IN PAYMENT FOR NIGERIAN CEMENT CONTRACTS	338a

Page

EXHIBIT N TO HOENIGER AFFIDAVIT - OCTOBER 14, 1975 TELEX FROM MORGAN GUARANTY TO CENTRAL BANK OF NIGERIA AND NOVEMBER 21, 1975 TELEX FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY 340a

ADDITIONAL DOCUMENTS ANNEXED TO HOENIGER AFFIDAVIT:

TESTIMONY OF PAUL WINSTON FITZPATRICK, OFFICER OF MORGAN GUARANTY TRUST COMPANY AT TRIAL OF NATIONAL AMERICAN ACTION 343a

TESTIMONY OF ALFRED KOEBEL, OFFICER OF MORGAN GUARANTY TRUST COMPANY AT TRIAL OF NATIONAL AMERICAN ACTION 394a

TESTIMONY OF CHARLES JURICEK, OFFICER OF MORGAN GUARANTY TRUST COMPANY AT TRIAL OF NATIONAL AMERICAN ACTION 412a

TESTIMONY OF GEORGE W. RYAN, OFFICER OF FEDERAL RESERVE BANK OF NEW YORK AT TRIAL OF NATIONAL AMERICAN ACTION 430a

DEPOSITION OF MORGAN GUARANTY TRUST COMPANY BY ARTHUR J. BROWN AND PAUL WINSTON FITZPATRICK ON APRIL 18, 1978 452a

EXHIBIT 1 TO DEPOSITION OF MORGAN GUARANTY - OCTOBER 24, 1975 TELEX FROM MORGAN GUARANTY TO CENTRAL BANK OF NIGERIA 526a

EXHIBIT 2 TO DEPOSITION OF MORGAN GUARANTY - DECEMBER 22, 1975 FORM LETTER FROM MORGAN GUARANTY (REPRODUCED HEREIN AT PAGES 329a - 332a) -

EXHIBIT 3 TO DEPOSITION OF MORGAN GUARANTY - JULY 28, 1976 TELEX FROM MORGAN GUARANTY TO CENTRAL BANK OF NIGERIA AND JULY 15, 1976 TELEX FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY 527a

EXHIBIT 5 TO DEPOSITION OF MORGAN GUARANTY - JULY 14, 1976 LETTER FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY 529a

	Page
EXHIBIT 8 TO DEPOSITION OF MORGAN GUARANTY - OCTOBER 7, 1975 TELEX FROM MORGAN GUARANTY TO UNIVERSAL GRAIN COMPANY	531a
EXHIBIT 9 TO DEPOSITION OF MORGAN GUARANTY - OCTOBER 7, 1975 LETTER FROM MORGAN GUARANTY TO BERGBAU HANDEL AND SEPTEMBER - OCTOBER 1975 TELEXES BETWEEN MORGAN GUARANTY AND CENTRAL BANK OF NIGERIA	532a
EXHIBIT 12 TO DEPOSITION OF MORGAN GUARANTY - NOVEMBER 14, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE	537a
EXHIBIT 16 TO DEPOSITION OF MORGAN GUARANTY - SEPTEMBER 29 and 30, 1975 DEBIT TICKETS OF MORGAN GUARANTY	538a
EXHIBIT 18 TO DEPOSITION OF MORGAN GUARANTY - AUGUST 26, 1975 AND SEPTEMBER 4, 1975 TELEXES FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY	540a
EXHIBIT 20 TO DEPOSITION OF MORGAN GUARANTY - NOVEMBER 12, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE AND NOVEMBER 10, 1975 LETTER FROM MORGAN GUARANTY TO CENTRAL BANK OF NIGERIA	545a
EXHIBIT 21 TO DEPOSITION OF MORGAN GUARANTY - AUGUST 28, 1975 AND SEPTEMBER 8, 1975 LETTERS FROM MORGAN GUARANTY TO EAST EUROPE (ALSO REPRODUCED HEREIN AT PAGES 168a - 169a)	547a
EXHIBIT 24 TO DEPOSITION OF MORGAN GUARANTY - OCTOBER 22 and 24, 1975 TELEXES FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY	549a
EXHIBIT 25 TO DEPOSITION OF MORGAN GUARANTY - OCTOBER 14, 1975 TELEX FROM MORGAN GUARANTY TO CENTRAL BANK OF NIGERIA (REPRODUCED HEREIN AT PAGES 340a - 342a)	-
EXHIBIT 26 to DEPOSITION OF MORGAN GUARANTY - NOVEMBER 6, 1975 LETTER FROM EAST EUROPE TO MORGAN GUARANTY	553a

	Page
AFFIDAVIT OF DR. UCHE AKUBA, SWORN TO JUNE 28, 1978, IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS	554a
EXHIBIT A TO AKUBA AFFIDAVIT - MAY 8, 1975 CABLE FROM AKUBA TO CENTRAL BANK OF NIGERIA	559a
EXHIBIT B TO AKUBA AFFIDAVIT - MAY 27, 1975 LETTER FROM CENTRAL BANK OF NIGERIA TO CHENAX	560a
EXHIBIT C TO AKUBA AFFIDAVIT - CHENAX SHIPPING CONTRACT	561a
EXHIBIT D TO AKUBA AFFIDAVIT - AUGUST 14, 1975 LETTER FROM M.G. PAMIES, SHIPBROKERS, S.A. TO CHENAX	565a
ADDENDA TO PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS	566a
ADDENDA TO PLAINTIFFS' SUR-REPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS	587a
DUPLICATE ORIGINAL MAGISTRATE'S AMENDED RECOMMENDATION FILED ON SEPTEMBER 28, 1978	590a
ORDER OF JUDGE PIERCE ADOPTING MAGISTRATE SCHREIBER'S RECOMMENDATION DENYING DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT, DATED NOVEMBER 6, 1978	608a
PRE-TRIAL SCHEDULE ORDER DATED NOVEMBER 14, 1978	610a
ORDER OF JUDGE PIERCE RESTORING ACTION TO THE ACTIVE CASE CALENDAR, DATED JANURY 23, 1979	611a
NIKKEI NOTICE OF INTENTION TO AMEND DATED FEBRUARY 12, 1979	612a
EAST EUROPE SUPPLEMENTAL NOTICE OF INTENTION TO AMEND, DATED APRIL 19, 1979	614a

	Page
ORDER OF JUDGE PIERCE DENYING, WITHOUT PREJUDICE TO RENEW, DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS FOR LOST PROFITS ON DEMURRAGE AND GRANTING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES WITH RESPECT TO JURISDICTION, DATED JUNE 18, 1979	615a
SCHEDULE E: PLAINTIFFS' LIST OF WITNESSES ANNEXED TO THE JOINT PRE-TRIAL ORDER OF JUDGE PIERCE, FILED ON SEPTEMBER 17, 1979	616a
ORDER OF JUDGE PIERCE GRANTING MOTION BY PLAINTIFFS NIKKEI AND CHENAX FOR AN ORDER STRIKING DEFENDANTS' AFFIRMATIVE DEFENSES WITH RESPECT TO JURISDICTION, FILED ON AUGUST 14, 1979	617a
OPINION AND ORDER OF JUDGE PIERCE IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS, FILED ON AUGUST 19, 1980	618a
NIKKEI JUDGMENT	665a
EAST EUROPE JUDGMENT	666a
CHENAX JUDGMENT	667a
NIKKEI NOTICE OF APPEAL	668a
EAST EUROPE NOTICE OF APPEAL	669a
CHENAX NOTICE OF APPEAL	670a
NIKKEI NOTICE OF CROSS-APPEAL	671a
EAST EUROPE NOTICE OF CROSS-APPEAL	672a
CHENAX NOTICE OF APPEAL	674a
TRIAL EXHIBITS OFFERED BUT NOT ADMITTED INTO EVIDENCE:	
PLAINTIFFS' JOINT EXHIBIT 56: OCTOBER 30, 1975 OFFICE MEMORANDUM OF MORGAN GUARANTY	675a
EAST EUROPE EXHIBIT 68: ECONOMIC AND COMMERCIAL GUIDE TO ROMANIA, EDITED BY THE CHAMBER OF COMMERCE AND INDUSTRY OF THE SOCIALIST REPUBLIC OF ROMANIA, FOREIGN TRADE PUBLICITY AGENCY	677a

	Page
CHENAX EXHIBIT 23: HANDWRITTEN NOTATIONS	686a
CHENAX EXHIBIT 7: MAY 13, 1975 LETTER FROM MORGAN GUARANTY TO CHENAX	687a
NIKKEI EXHIBIT 8: CONTRACT C-702	688a

NIKKEI DOCKET ENTRIES
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 80-7783

- X

DECOR BY NIKKEI INTERNATIONAL, INC.,
d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff-Appellee,

- against -

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- X

DOCKET ENTRIES.

-12-77	1	Filed complaint and issued summons.
-24-77	2	Filed Order of Attachment, pltff. undertaking is found in the total sum of $7,500 , et. cet. and sum of $25 to cover U.S. Marshal fees. After levy is made, pltff shall make a motion on notice to defendants garnishees and the U.S. Marshall for leave to prove the grounds upon which the order of attachment was issued. If not such motion is made the order of attachment shall be deemed vacated. No disposition of the levied property shall be made by the U.S. Marshal until final determination of the motion.....So ordered.....Pierce, J. m/n
-27-77	3.	Filed undertaking of attachment by pltff. on deft. Federal Republic of Nigeria & Central Bank of Nigeria by Fidelity and Deposit Co. of Md. in the amount of $7,500.
6-13-77	4	Filed order vacating attachment. Pierce J.
6-17-77	5	Filed order vacating attachment. Pierce J.
6-22-77	6	Filed Amended Complaint.
-24-77	7	Filed certificate of mailing of S&C to Central Bank of Nigeria by certified mail rect # 241587 & 241588 Tinubu Square Lagos Nigeria
8-5-77	8	Filed certificate of mailing bo S&C by certified mail recpt # C 159911 served the following: Director of Special Consular Services Secretary of State Wash. DC return recpt attached ; served 8-9-77.

DOCKET ENTRIES

9-14-77	9	Filed True Copy of Order of Attachment on document dated 9-14-77 & Marshals ret served- Federal Reserve Bk. of N.Y. by Floyd Duggan on 6-7-77.
9-21-77	10	Filed Stip & Order ext. defts' time to appear, move or answer to the cmplt. to 10-3-77.....Pierce, J.
9-29-77		Pre Trial Conference held - Pierce, J
10-18-77	11	Filed stip and order ext. defts' time to answer to the complt. to 10-12-77. So ordered Pierce, J.
10-21-77	12	Filed stip. and order of defts'.ext. Federal Republic of Nigeria & Central Bank Nigeria time to move or answer the complaint to 10-24-77, & further stipul & agrees that it shall not request of pltff. or the court a further ext- ensionto move or answer to the ccmplt on the grounds of the unavailability of documents.....Gagliardi, J.
11-2-77	13	Filed defts. affdvt. and Notice of Motion to transfer & consolidate & to dismiss for an order transferring the actions commenced by pltff Decor by Nikkei I ternational, Inc. etc. and to consolidate these three actions on the groun that they involve a common question of law in the FRCP, Rule 42 (a) etc.,& order dismissing the complts. pursuant to Rule 12(b) of the FRCP etc. Ret: 11-18-77 at 10:00 am in Room 402.
11-10-77	14	Filed defts' Amended Notice of motion to transfer and consolidate & to dismiss Ret: 11-18-77 at 10:00 AM in Room 402.(Transferring the actions commenced pltff. Decor by Nikkei International, Inc. presently assigned to Pierce, and by pltff Chenax Majesty, Inc. presently assigned to Frankel, J. to the calendar of Goettel, J. before whom the action & to consolidate these actio
11-10-77	15	Filed defts. Memorandum in support of Motion to transfer, Consolidate & dismiss.
11-14-77	16	Filed letter from the Dept. of State & a certified copy of the transmittal note #621 & a copy of documents served.A true copy of Embassy note #621, dated 9-15- & delivered to the Ministry of External Affairs on 9-19-77.
11-29-77	17	Filed ORDER transferring to the suspense docket of the Ct. pending approval by Judge Goettel. Pierce, J. m/n
2-22-78	18	Filed Pltff's Notice of Cross Motion for summary judgt. & Partial Summary Judgt. Ret: Sine Die
2-22-78	19	Filed Pltff'n Memorandum of Law in support of its Motion for Summary Judgt.
2-23-78	--	Filed MEMO ENDORSED on document #15 (Ordered that the motion to transfer be & hereby is granted. the motion to consolidate is referred to Magistrate Sol Schreiber to hear & to determine & to report to the undersigned hereon. Ordered that the above-entitled cases be & hereby are referred to Mag. Schreiber for all pre-trial purposes. The Magistrate is requested to contact the parties. The pre-trial conference scheduled before this Court on 2-23-78 is cancelled. Pierce, J. m/n
5-5-78	-	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
5-15-78	-	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
5-26-78	20	Filed pltff East Europe Import-Export, Inc.'s SUPPLEMENTAL AFFDVTS. in opposition to defts' Motion to Dismiss & for Summary Judgt. By Antonio Reale
5-26-78	21	Filed pltffs' SUPPLEMENTAL MEMORANDUM OF LAW in opposition to defts' motion to Dismiss & for Summary Judgt.
5-26-78	22	Filed deposition of Morgan Guaranty Tr. Co. of N.Y. on 4-18-78 m/n
5-26-78	23	Filed pltff's exhibits.

DOCKET ENTRIES

6-1-78	--	Filed MEMO ENDORSED on document #22, The attached motion & opposition papers are referred to Mag. Sol Schreiber to hear & to determine & to report to the undersigned hereon. The Mag. is requested to contact the parties.....Pierce m/n
6-28-78	24	Filed defts' SUPPLEMENTAL MEMORANDUM in support of their Motion to Dismiss & for Summary Judgt. and in opposition to pltffs' Motions for summary judgt.
9-28-78	25	Filed Duplicate Original MAGISTRATE'S RECOMMENDATION OF, Mag. Schreiber.
9-28-78	26	Filed Duplicate Original Magistrate's Amended Recommendation of Schreiber, Mag.
** 10-24-78	(27)	Filed Affdvt. in rebuttal to statements made by defts' counsel, by Dr. Uche Akuba for pltffs' Chenax & Decor. Received 10-24-78)
** 10-24-78	28	Filed Affdvt. of pltff. East Europe Import Export by Carl F. Salans.
10-30-78	29	Filed ORDER, No timely objections having been filed & the Court having reviewed the Mag.'s report & recommendations, the Court denies pltffs' motions for Summary Judgt. for the reasons stated in the Mag.'s report. So ordered Pierce, J. m/n
11-3-78	30	Filed Pltff's AMENDED COMPLAINT, with exhibit A.
11-9-78	31	Filed ORDER, No timely objections having been filed & the Court having reviewed Mag.'s report & recommendations, the Court denies defts' motion to dismiss and the cross-motions for summary judgt. for the reqsons stated in the Mag.'s report.....Pierce, J. m/n
11-13-78	32	Filed PRETRIAL SCHEDULE ORDER, Ordered that all documents discovery is to be completed by 12-31-78, etc. Ordered that counsel are to submit on 1-31-79 etc. Ordered trial marked readyon 1-31-79, Ordered Settlement conference is set down 2-1-79 at 4:30 p.m. Room 2002. Pierce, J. (Also in 77 Civ 2809-3045) REV. (1/78)
11-16-78	33	Filed ORDER, Hearing the parties at oral argument this day, the Court directs defts. to answer pltff's second set of interrogs. consisting of one interrogatory by 12-31-78.....Pierce, J. (Also in 77 Civ 2809-3045)
1-12-79	34	Filed ANSWER, of defts. Fed. Republic of Nigeria & Central Bk. of Nigeria. (KHG)
1-19-79	35	Filed defts' AFFDVT. AND NOTICE OF MOTION, pur. to Rule12(c) of the FRCP, dismiss so much of each of the instant complts. as requests damages for demurrage etc (Sine-die)
1-19-79	36	Filed defts' MEMORANDUM OF LAW in support of motion pur. to FRCP 12(c) for an o dismissing claims for lost profits on demurrage.
1-31-79	37	Filed ORDER, Ordered that this action is restored to the active case calendar and suspense is vacated. Ordered that this case is marked "ready for trial" as of 1-31-79 etc.....Pierce, J. m/n

DOCKET ENTRIES

2-5-79	38	Filed pltffs' AFFIDAVIT in opposition to defts' motion pur. to Rule 12(c) to dismiss pltffs' claims,; By lewis S. Sandler.
2-5-79	39	Filed Pltffs' MEMORANDUM OF LAW in opposition to the motion by defts under F.R.C.P. 12(c) to strike claims for loss of profit under the demurrage Clauses of the governing documents, partivularly The CBN Irrevocable Letters of Credit, from the respective complts.
2-20-79	40	Filed defts' REPLY MEMORANDUM OF LAW in support of motion pur. to FRCP 12(c) for an order dismissing pltffs' claims for lost profits on demurrage.
2-27-79	41	Filed pltffs. Notice of Intention to Amend pur. to FRCP 12(b) and 54(c).
6-20-79	42	Filed ORDER, defts' motion for an order dismissing pltffs' claims is denied without prejudice to renewal at the time of trial. Pltffs' request for an orde striking defts' affirmative defenses of lack of subject matter etc. is granted. So ordered Pierce, J. m/n (filed in this action.) m/n
8-14-79	43	Filed ORDER, The request of pltffs' Decor By Nikkei Internat'l Inc, and Chenax Majesty, Inc. for an order striking defts' affirmative defenses etc. is grante So ordered Pierce, J. m/n
9-6-79	44	Filed defts' First Trial Memorandum.
9-6-79	45	Filed defts' Notice to Produce.
9-17-79	46	Filed stip and order adj. the return date of the subpoena, dated 9-4-79 to 9-11- at 5:00 p.m. So ordered Pierce, J. (ALSO in 77 civ 2809- 3045)
9-17-79	47	Filed JOINT PRE-TRIAL ORDER, The schedules annexed to and forming part of this Pre-Trial order are as stated. So ordered Pierce, J. (ALSO in 77 civ 2809- 77 civ 3045)
9-10-79		NON-JURY TRIAL begun & Continued 9-10-79 9-11-79; 9-12-79; 13,14,17,18,19,20,21,24,25, 26,27. Trial concluded 9-27-79 (14 days) Judge's Decision Reserved.
10-30-79	48	Filed Pltffs' Proposed Findings of Fact & conclusions of Law (also in 77-2809- 77-3045)
10-30-79	49	Filed Pltffs' Post Trial Memorandum. (Also in 77-2809 - 3045)
11-13-79	50	Filed defts' Proposed findings of fact & conclusions of law. (also in 77-2809-3045
11-13-79	51	Filed defts' Post Trial MEMORANDUM OF LAW. (ALSO IN 77-2809 & 77-3045
4-9-80	52	Filed ORDER, Pltffs shall submit their memorandua by 4-20-80. defts shall submit a reply by 4-31-80. Pierce, J.
4-21-80	53	Filed Pltff's Supplemental Post-Trial Memorandum pur. to this court's order dated 3-31-80.
8-19-80	54	Filed OPINION & ORDER#50469, Interest on an award for breach of contract may be recovered under N.Y. law, N.Y. C.P.L.R. §5001(a) etc. Accordingly, this court finds that Nikkei shall recover interest on its award of compensatory & incidental damages as of 3-1-76, etc. Nikkei shall recover compensatory damages from Nigeria for lost profits on the sale of 231,500 metric tons of cement, etc. as indicated. East Europe's claim for attny's. fees is denied. Pltffs' claims for punitive damages are denied. Pltffs' claims for demurrage ar dismissed. etc. Submit Judgments. So ordered Pierce, J. m/n (Also docketed in 77 civ 3045 and 2809)

DOCKET ENTRIES

9-2-80	55	Filed Transcript of record of proceedings, dated 9-10-79
9-2-80	56	Filed Transcript of record of proceedings, dated 9-11-79
9-2-80	57	Filed Transcript of record of proceedings, dated 9-12-79
9-2-80	58	Filed Transcript of record of proceedings, dated 9-14-79
9-2-80	59	Filed Transcript of record of proceedings, dated 9-17-79
9-2-80	60	Filed Transcript of record of proceedings, dated 9-18-79
9-2-80	61	Filed Transcript of record of proceedings, dated 9-19-79
9-4-80	62	Filed Transcript of record of proceedings, dated 9-20-79
9-4-80	63	Filed Transcript of record of proceedings, dated 9-21-79
9-5-80	64	Filed Transcript of record of proceedings, dated 9-25-79
9-5-80	65	Filed Transcript of record of proceedings, dated 9-26-79
9-5-80	66	Filed Transcript of record of proceedings, dated 9-27-79
9-5-80	67	Filed Transcript of record of proceedings, dated 9-24-79
9-11-80	68	Filed JUDGMENT #80,1055 Ordered that Pltff Nikkei Intern'l Inc. recover of deft. Federal Republic of Nigeria the sum of $1,857,000., with int. at 6% from 3-1-76 & its costs. Alternatively, pltff. may recover such sum from deft. Central Bank of Nigeria. Pierce, J.-judgt. ent. 9-11-80-Clerk. m/n..... 9-12-80.
9-16-80	69	Filed defts' NOTICE OF APPEAL to the USCA for the Second Circuit from the final judgt. dated 9-11-80. m/c Lewis S. Sandler, Esq. on 9-17-80.
9-19-80	70	Filed Transcript Information form for defts' Daily copy is available.
9-29-80	71	Filed defts' NOTICE OF MOTION, WITH supporting AFFDVT. PUR. TO Rule 62 FRCP STAYING EXECUTION UPON THE SEPARATE JUDGTS. ENT. 9-11-80 in favor of pltffs'. Ret: 10-10-80 at 10 a.m. room 706.
9-29-80	72	Filed defts' MEMORANDUM in support of motion for a stay of execution.
10-2-80	73	Filed pltff's NOTICE OF CROSS-APPEAL, to the USCA for the Second Circuit from the final judgt. ent. on 9-11-80 etc. m/c to Kissam, Halpin & Genovese on 10-3-80.

DOCKET ENTRIES

10-6-80	74	Filed BILL OF COSTS on Judgt. #80,1055, in the sum of $684.75;
10-6-80	—	No Appearance in opposition Bill of Costs as taxed in the sum of $684.75, in fa pltff. as against the deft. Fed. Republic of Nigeria & added to the judgt. Clerk.
10-8-80	75	Filed pltff's NOTICE OF CROSS-MOTION for an Order under 28 U.S.C. §1610(c) directing issuance of Execution upon judgt. in favor of pltff's. Ret: 10-10-8 at 10:00 a.m.
10-8-80	76	Filed Pltff's MEMORANDUM in opposition to defts' motion to stay execution.
10-8-80	77	Filed defts' MEMORANDUM IN OPPOSITION TO East Europe's Motion for an order perm tine Issuance of Execution on Judgt. (filed in 77 civ 2809 LWP) sent to Chamb
10-22-80	78	Filed transcript of record of proceedings, dated 9-17-79
10-22-80	79	Filed transcript of record of proceedings, dated 9-18-79
10-31-80	80	Filed stipulation re: transmission of certain named documents to
11-10-80	81	Filed Notice of certification of record on appeal to the USCA for the Second Circuit.
11-12-80	82	Filed ORDER, The motion of the defts. for a stay of execution of judgt. pending appeal pur. to Rule 62(d) FRCP is granted. The defts are directed to furnish an undertaking by Morgan Guaranty Tr. Co. in the amt. of $2,794,103.96 by East Europe Import Export (77 civ 2809) and $2,621841.90 by Decor by Nikke International (77 civ 2348). Such undertaking shall be submitted to the Clerk of the Court within 10 days of date of the filing of this order. So ordered Pierce, J. m/n (Yokies)
11-13-80	83	Filed stipulation re: trans of certain docs to USCA.
11-13-80	83	Filed Notice of certification for record on appeal to the USCA for the Second Circuit.

CHENAX DOCKET ENTRIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 80-7771

CHENAX MAJESTY, INC.,

Plaintiff-Appellant,

- against -

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DOCKET ENTRIES.

2-77	1.	Filed complaint. Issued summons.
4-77	2.	Filed Certificate of mailing Summons & Complaint by certified mail receipt #241585 & 241586 to Central B nk of Nigeria T'nubu Square Lagos Nigeria, & Federal Republic of Nigeria c/o Head of the Ministry fo Foreign Affairs Lagos Nigera.....CLERK.
77	3.	Filed Certificate of Mailng Summons & Complaint by certified mail receipt #C-159912 to Director of Special Consular Services Secretary of State Washington D.C... CLERK.
-77	4.	Filed certified copy of the transmittal note and copy of documents served pursuant to Section 1608 (a)(4) of the Foreign Sovereign Immunities Acto of 1976. The dept. of State has forwarded a summons and compalint and notice of suit to the Federal Republic of Nigeria. (Note #573 with certifitation under seal attached. Served 8-23-77.
0-77	5.	Filed Stip. & order extending time for the defts; to answer the complaint to 10-3-77...so ordered... Frankel, J.
2-77	6.	Filed Stip. & order that the defts'.,time to answer the complaint is extended to 10-12-77...so ordered...Frankel, J.
21-77	7.	Filed Stip. & Order that the deft. time to answer the complaint is extended to 10-24 ...so ordered...Frankel, J.
-77	8.	Filed defts. affdv.t and notice of motion to transfer and consolidate and to dismiss Ret. 11-18-77.
7-77	9.	Filed Defts., Amended Notice of Motion to transfer & consolidate & to dismiss... Ret: 11-18--77.
7-77	10.	Filed Defts., memorandum in support of motion to transfer, consolidate & to dismiss
5-77	11	Filed Pltff's Notice of Taking deposition of Morgan Guaranty Trust on 12-13-77.

DOCKET ENTRIES

12-9-77	12.	Filed Stip. & Order....that thepltff. time to serve papers in response to defts motion to consolidate & dismiss the action is extended to 1 week after Pl counsel is notified of the decision of the Hon., Judge Goettel as to whet he will accept the transfer to haim of this actio,.....so ordered.....F
12-12-77	13.	Filed Stip & Order that the date for which pltff. noticed the deposition of M Guarty Trust Comapny of New York as a non-party witness is adjourned till 12-16-77.....so ordered.....Frankel, J.
12-14-77	14.	Filed Stip. & Order.....That the date for the pltff. noticed to take deposition guaranty Trust Co., of n.y. is adjourned till 12-16-77.....so ordered.....
12- 15-77	15.	Filed Order to show cause....before Mag. Schreiber on 12-19-77 at 10:15..... dated 12-14-77.....Schreiber.
2-1-78	16	Filed Defts' memorandum in opposition to pltffs' request for discovery of Morga guaranty by deposition & subpoena of documents.
2-1-78	17.	Filed Defts' memorandum in oppositon to pltffs' requests for discovery of Morgan Guaranty by deposition & supoena of documents. (Filed in 77 Civ. 2809 LWP)
2-22-78		Filed Memo-end on the back of Defts. Motion dated 11-2-78.....Ordered that th to transfer is granted. The Motion to consolidate is hereby referred to M Sol Schreiber to hear & determine & to report to the undersigned....& tha these cases are referred to Mag. Schreiber for all pre-trial purposes. Th is requested to contract the parties. The pre trial conference scheduled this court is cancelled.....Pierce, J. mn (Filed in 77 2809 LWP)
3-23-78	18	Filed Notice of Reassignment, fromFrankel, J. to Pierce, J.
4-25-78	19	Filed Pltff's NOTICE OF CROSS-MOTION for summary judgt. & Partial Summary Judgt Pursuant to FRCP 56(a) and (c) Sine die
4-25-78	20	Filed Pltff's MEMORANDUM OF LAW in support of its Motion for Summary Judgt.
5-5-78	—	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
5-15-78	—	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
5-23-78	21	Filed pltff's AMENDED COMPLT.
5-26-78	22	Filed pltff's AFFDVT. in connection with the motions of defts to dismiss the actions commenced by pltffs Chenax Majesty, Inc., Decor by Nikkei Internatic Inc., & E. Europe Import-Export, Inc. & pltff's motion for summary judgt. by Lewis S. Sandler.
5-26-78		Filed pltff East Europe Inport-Export, Inc.'s SUPPLEMENTAL AFFDVTS. in oppositi to defts' Motion to Dismiss & for Summary Judgt. by Antonio Reale (filed in 77 Civ 2348)
5-26-78		Filed pltffs SUPPLEMENTAL MEMORANDUM OF LAW in opposition to defts' motion to dismiss & for Summary Judgt. (filed in 77 Civ 2348)
5-26-78		Filed deposition of Morgan Guarantv Tr. Co. of N.Y. on 4-18-78 m/n(filed in
5-26-78		Filed pltff's exhibits. 77 Civ 23
6-1-78		Filed MEMO ENDORSED on document#22, The attached motion & opposition papers are referred to Mag. Sol Schreiber to hear & to determine & to report to the undersigned hereon. The Mag. is requested to contact the parties.....Pierce, m/n (filed in 77 Civ 2348)

DOCKET ENTRIES

3-78	23	Filed Duplicate Orig. of Magistrate's Schreibers Amended Recommendation.
8-78	24	Filed transcript of record of proceedings dated May Schreiber 12-19-77
0-24-78	-	Filed Affdvt. in rebuttal to statements made by defts' counsel, by Dr. Uche Akubu for pltffs Chenax & Decor. Received10-24-78) filed in 77 civ 2348
0-24-78	-	Filed Affdvt. of pltff. East Europe Import Export by Carl F. Salans. filed in 77 Civ 2348.
5-78	-	Filed PRETRIAL SCHEDULE ORDER, Ordered that all documents discovery is to be completed by 12-31-78 etc. Ordered that counsel are to submit on 1-31-79 etc. Ordered trial marked ready on 1-31-79, Ordered Settlement conference is set down 2-1-79 at 4:30 p.m. Room 2002. Pierce, J. (filed in 77 Civ 2348)
16-78	-	Filed ORDER, Hearing the parties at oral argument this day, the Court directs defts. to answer pltff's second set of interrogs. consisting of one interrogatory by 12-31-78.....Pierce, J. (filed in 77 Civ 2346)
1-78	25	Filed ORDER, Pltff's request to amend the complt. a second time is granted.. So ordered Pierce, J. m/n
-78	26	Filed pltff's SECOND AMENDED COMPLAINT.
-79	27	Filed ANSWER to Second Amended Complt. (KHG)
-79	28	Filed pltff's Notice of Intention to Amend, pur. to FRCP 12(b) and 54(c).
0-79	29	Filed ORDER, defts' motion for an order dismissing pltffs' claims is denied. without prejudice to renewal at the time of trial. Pltffs' request for an order striking defts' affirmative defenses of lack of subject matter etc. is Granted. So ordered Pierce, J. m/n (filed in 77 Civ 2348).
14-79	30	Filed ORDER, The request of pltffs' Decor By Nikkei Internat'l and Chenax Majesty, Inc. for an order striking defts' affirmative defenses etc. is granted. So ordered Pierce, J. m/n (filed in 77 civ 2348 LWP)
-79	—	Filed defts' First Trial Memorandum. (filed in 77 civ 2348)
-79	31	Filed defts' Notice to Produce. (filed in 77 civ 2348)
-79	32	Filed stip and order adj. the return date of the subpoena, dated 9-4-79 to 9-11-79, at 5:00 p.m. So ordered Pierce, J. (FILED in 77 civ 2348)
-79	47	Filed JOINT PRE-TRIAL ORDER, the schedules annexed to the forming part of this Pre Trial order are as stated. So ordered Pierce, J. (FILED in 77 civ 2348)

DOCKET ENTRIES

9-10-79		NON-JURY TRIAL begun & Continued 9-10-79 9-11-79; 9-12-79; 13/14/17/18/19/20/21/24/25/27. Trial concluded 9-27-79 (14 days) Judge's Decision Reserved:
10-30-79	48	Filed MEMORANDUM OF LAW on behalf of pltff Chenax Majesty, Inc. with respect to th application of Swiss Law.
10-30-79	--	Filed Pltffs' Proposed Findings of Fact & Conclusions of Law. (filed in 77-2348)
10-30-79	--	Filed Pltffs' POST TRIAL MEMORANDUM. (filed in 77-2348)
11-13-79		Filed defts' Proposed findings of fact & conclusions of law. (filed in 77-2348)
11-13-79		Filed defts' Post Trial MEMORANDUM OF LAW. (filed in 77-2348)
3-12-80		Filed transcript of record of proceedings, dated 2-15-78 (filed 77 civ 2809 LWP) (mag. Schreiber)
4-9-80	49	Filed ORDER, Pltffs shall submit their memoranda by 4-20-80. Defts shall submit a reply by 4-31-80. So ordered Pierce, J.
4-19-80	*	Filed OPINION & ORDER # 50469, Interest on an award for breach of contract may be recovered under N.Y. law, N.Y. C.P.L.R. §5001(a) etc. Accordingly, this court find: that Nikkei shall recover interest on its award of compensatory & incidnetal damages as of 3-1-76, etc. Nikkei shall recover compensatory damages from Nigeria for lost profits on the sale of 231,500 metric tons of cement, etc. as indicated. East Europe's claim for attny's fees is denied. Pltffs' claims for punitive damages are denied. Pltffs' claims for demurrage are dismissed. etc. Submit Judgts. So ordered Pierce, J. m/n (filed in 77 civ 2348)
9-2-80	—	Filed Transcript of record of proceedings, dated 9-10-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-11-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-12-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-14-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-17-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-18-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-19-79

filed in 77-2348 (LWP)

DC-111A REV. (1/75)

(cont'd (95)

DOCKET ENTRIES

2-80	50	Filed JUDGMENT, Ordered that the pltff. take nothing, that the defts. reco of the pltff. their costs. Pierce, J. Judgt. ent.9-2-80.....ent. 9-3-8
4-80	*	[redacted] 9-20-79 (filed in 77 civ 2
16-80	51	Filed defts' NOTICE OF APPEAL to the USCA for the Second Circuit from the fi judgt ent. 9-2-80. m/c Lewis S. Sandler, Esq. on 9-17-80.
9-80	52	Filed Transcript Information form for deft. Daily copy is available. (Feder Republic of Nigeria & Central Bk. of Nigeria)
5-80	53	Filed pltff's NOTICE OF APPEAL to the USCA for the Second Circuit from the judgt. ent. on 9-2-80 dismissing pltff's claims. m/copy to Kissam, Halpin & Genovese on (9-26-80)
6-80	54	Filed BILL OF COSTS docketed as a judgt. #80,1170, in the sum of $1,751.17.
f-80	----	Consented to Bill of Costs as Taxed in the sum of $1,751,17 in favor of deft as against the pltff & added to the Judgt. -Clerk.
22-80	-	Filed [illegible] dated 9-17-79 (filed in 77 civ 23
1-31-80	-	Filed stipulation re: transmission of exhibits on appeal.(Als filed in 77-2809 & 77-2348)
10-80	55	Filed Notice of certification to the record on appeal to the USCA for the Second Circuit.
12-80		See Order filed in (77 civ 2348) by Pierce, J. m/n
13-80		Notice of certification for record on appeal to the USCA for the Second Cir (filed in 77 civ 2348)

DOCKET ENTRIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 80-7773

- X

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff-Appellee,

- against -

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- X

DOCKET ENTRIES.

6-8-77	1	Filed complaint and issued summons.
06-10-77	2	Filed certificate of mailing summons and complaint by the Clerk on 6-10-77--- Central Bank of Nigeria Tinubu Square Lagoa Nigeria # 478403 Bailey Marshall Hoeniger & Freitag #487402 2404, 345 Park Ave, NYC 10022
08-05-77	3	Filed certificate of mailing summons and complaint served — Director of Special Consular Services Secretary of State #457478 ret. receipt. received Wash, D.C. 20560 on 8-5-77--Clerk
08-10-77	-3-	Filed stip. and order that Atty's appears for deft Central Bank of Nigeria [illegible] and demands that all papers be served upon them at address indicated herein deft. time to answer is ext. to 9-30-77--Goettel, J.
09-01-77	-4-	Filed pltfs interrog and document request and requests to admit to deft. Central Bank of Nigeria
09-15-77	-5-	Filed pltf's interog. , document request (First Set)
10-14-77	6	Fld Notice of Motion for a protective order extending the time for defts to answe the complaint etc. ret on Oct 21, 1977 at 10:00 a.m.
10-14-77	7	Fld Defts' Memorandum in support of motion for a protective order.

EAST EUROPE DOCKET ENTRIES

10-11-77	8	Fl d Stip and Order that the time for defts Federal Rep of Nigeria & Central Bank o Nigeria to anser complaint etc is adj. form Sept 30, 1977 to Oct 12, 1977, Goettel, J.
10-18-77	9	Fld Notice of cross-motion for an order requiring defts to respond substantivley t pltffs discovery requests ret on Oct 21, 1977.
10-18-77	10	Fld Pltff's Memorandum in support of its cross-motion.
10-18-77	11	Fld pltff's Memorandum in oppositon defts' motion for further extensions of time a a protective order
10-18-77	12	Fld Affdvt in opposition to defts' motion by Berthold H. Hoeniger.
0-19-77	13	Filed ORDER referring this case to Mag. Schreiber for supervising discovery and inspection and for all pre-trial proceedings--Goettel, J. m/n
0-21-77	-14-	Filed defts affdvt. in opposition to ptlf's cross motion to compel defts to respon to pltf's interrog (First Set)
1-02-77	-15-	Filed defts affdvts and notice of motion for an order transferring the actions ret. 11-18-77.
1-04-77	-16-	Filed pltf's affdvt. and notice of motion for summary judgment ret. 11-18-77 and for partial summary judgment
1-004-77	-17-	Filed pltf's memorandum of law in support of above motion for summary judgment
1-02-77	-18-	Filed pltf's notice of taking deposition of Morgan Guaranty Trust Co. of NY on 11-10-77 witness will be required to produce documents--subp. i
1-07-77	-19-	Filed defts Fed. Republic of Nigeria and Central Bank of Nigeria affdvts and amen notice of motion for an order transferring the actions commenced by pltf Decor by Nikkei Int's, Inc. and consolidate and to dismiss ret. 1118-77
1-07-77	=20-	Filed defts amemorandum in support of above motion to transfer consolidate and to dismiss
11-11-77	-2-	Filed affdvt. of Robert Ross in opposition to defts motion to dismiss
11-11-77	-22	Filed pltf's memorandum of law in opposition to defts motion to dismiss
1-14-77	-23-	Filed letter from the Department of State and a certified copy of the transmitta note #622 and a copy of documents served and delivered to the Mini External Affairs on 9-19-77.
1-14-77	-24-	Filed defts responses to ptlf's interrog and documents requests and to admit (Fir Set)
11-17-77	25-	Filed protective order that Morgan Guaranty document will be labeled confiden and E. Europe shall maintain in strict confidence the information contained and such individual will execute a stip. of confidential proceeds --over on page -3-
		WITH ATTYS. FOR Nigeria and Central Bank with respect to all information made available and that at the conclusion of this litigation each of the confiden documents produced form the files of Morgan Guaranty and all copies therof s be return by East Europe to the attys for defts Nigeria and Central Bank-- So Ordered-- Mag: Schreiber m/n
07-77	-2f-	Filed pltf's affvdt. in response to defts motion to dismiss
-13-77	-27-	Filed pltf's objections to and exceptions form orders of Mag" Schreiber
2-16-77		Mailed notice of reassigment to Judge Pierce
1-1-78	28	Filed defts' Memorandum in opposition to pltffs' Requests for Discovery of Morgan Guaranty by deposition & subpoena of documents. (Also in 77 Civ 304

DOCKET ENTRIES

2-22-78	-	Filed MEMO ENDORSED on document #15, Ordered that the motion to transfer be & hereby is granted. The motion to consolidate is referred to Mag. Schreibe to hear & to determine & to report to the undersigned hereon. Ordered that the above-entitled cases be & hereby are referred to Mag. Schreiber for all pre-trial purposes. The Mag. is requested to contact the parties. The pre-trial conference scheduled before this Court on 2-23-78 is cancelle Pierce, J. m/n
5-5-78		PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber
5-15-78		PRE-TRIAL CONFERENCE HELD BY Mag Schreiber
5-26-78		Filed pltff East Europe Import-Export, Inc.'s SUPPLEMENTAL AFFDVTS. in opposit to defts' Motion to Dismiss & for Summary Judgt. by Antonio Reale (filed 77c
5-26-78		Filed pltffs' SUPPLEMENTAL MEMORANDUM OF LAW in opposition to defts' motion tc Dismiss & for Summary Judgt. (filed in 77 Civ 2348)
5-26-78		Filed deposition of Morgan Guaranty Tr. Co. of N.Y. on 4-18-78 m/n (filed in
5-26-78		Filed pltff's exhibits. 77 Civ 2
6-1-78	--	Filed MEMO ENDORSED on document 22, The attached motion & opposition papers are referred to Mag. Schreiber to hear & to determine & to report to the un signed hereon. The Mag. is requested to contact the parties.....Pierce, J. (filed in 77 Civ 2348)
9-25-78	29	Filed Pltff's Second Set of Interrogs. Propounded to defts.
9-28-78	30	Filed Duplicate Original Magistrate Schreibers Amended Recommendation.
** 10-24-78	31	Filed AFFDVT. in rebuttal to statements made by defts' counsel, by Dr. Uche for pltffs' Chenax & Decor. (Received 10-24-78.) filed & docketed in 77 ci
** 10-24-78	32	Filed AFFIDAVIT,of pltff. East Europe Import-Export, Inc. by Carl F. Salans docketed in 77 Civ 2348. and also filed.
11-3-78	33	Filed pltff's AFFDVT. & NOTICE OF MOTION for an order pur. to FRCP 37(d) striking defts' answer & directing the entry of a default Judgt. in favor of pltff. Ret: 11-10-78 at 10:00
11-3-78	34	Filed pltff's MEMORANDUM in support of its motion for an order under FRCP 3
11-9-78	35	Filed pltff's MOVANT'S RULE 9(f) AFFIDAVIT, by Berthold H. Hoeniger
11/13/78	36	Fld dfts memo of law in opposition to pltffs motion pur FRCP 37d etc.
11/13/78	37	Fld dfts rule 9 affdvt.
11/13/78	38	Fld dfts notice of cross motion for a protective order.
11-15-78	39	Filed PRETRIAL SCHEDULE ORDER, Ordered that all documents discovery is to b completed by 12-31-78 etc. Ordered that counsel are to submit on 1-31-79 Ordered trial marked ready on 1-31-79, Ordered Settlement conference is s down 2-1-79 at 4:30 P.M. Room 2002, Pierce, J. (filed in 77 Civ 2348)
11-16-78	40	Filed ORDER, Hearing the parties at oral argument this day, the Court direc defts. to answer pltff's second set of interrogs. consisting of one interr atory by 12-31-78.....Pierce, J. m/n (filed in 77 Civ 2348)

DOCKET ENTRIES

12-79	41	Filed defts' Answer to Pltff's Second Interrogs.
12-79	42	Filed ANSWER of defts. (KHG)
1-79	43	Filed pltff's Notice of intention to Amend pur. to FRCP 12(b)and 54(c).
-79	44	Filed pltff's AFFIDAVIT by Robert Ross; in support of deft's motion for summar
-79	45	Filed pltff's East Europe's AFFDVTS. & EXHIBITS in opposition to defts' motior for partial judgt. on the pleadings under FRCP 12(c).
20-79	46	Filed pltff's SUPPLEMENTAL Notice of Intention to Amend.
21-79	47	Filed Order for substitution of Attny. on Consent, Ordered that Berthold H. Hoeniger is substituted for Bailey, Marshall, Hoeniger & Freitag, as attny. f pltffs. effective as of 6-1-79. Pierce, J.
20-79	48	Filed ORDER, DEFTS" MOTION FOR AN ORDER DISMISSING PLTFFS" CLAIMS IS DENIED. without prejudice to renewal at the time of trial., Pltffs' request for an order striking defts' affirmative defenses of lack of subject matter etc. is granted. So ordered Pierce, J. m/n (filed in 77-2348)
-79	—	Filed defts' First Trial Memorandum. (filed in 77 civ 2348)
-79	49	Filed defts' Notice to Produce. (filed in 77 civ 2348)
10-79	50	Filed Non-Party Dresdner Bank A. G.'s NOTICE OF MOTION to Quash Civil Subpoena dated 9-4-79 pur. to FRCP 45.
10-79	51	Filed MEMORANDUM OF Non-Party Dresdner Bank in Support of its Motion to Quash t Subpoena .
17-79	52	Filed stip and order adj. the retrun date of the subpoena, dated 9-4-79 to 9-11- at 5:00 p.m. So ordered Pierce, J. (FILED IN 77 civ 2348)
17-79	53	Filed JOINT PRE-TRIAL ORDER, the schedules annexed to and forming part of this P Trialorder are as stated. So ordered Pierce, J. (FILED in 77 civ 2348)
-10-79	54	NON-JURY TRIAL begun & Continued 9-10-79 9-11-79; 9-12-79;13,14,17,18,19,20,21,24,25,27. Trial concluded 9-27-79 (14 days) Judge's Decision Reserved:
-30-79	—	Filed Pltffs' Post Trial Memorandum (filed in 77-2348)
-30-79	—	FiledPltffs' proposed Findings of Fact & Conclusions of Law(filed in 77-2348).
13-79		Filed defts' Proposed findings of fact & conclusions of law. (filed in 77-234
13-79		Filed defts' Post Trial MEMORANDUM OF LAW. (filed in 77-2348)
		Filed transcript of record of proceedings dated 2-15-79 (Mag. Goettel)

DOCKET ENTRIES

4-9-80		Filed ORDER, PLTFFS SHALL SUBMIT THEIR MEMORANDUA by 4-20-80. Defts shall sub a reply by 4-31-80. So ordered Pierce, J. (filed in 77-2348)
4-19-80		Filed OPINION & ORDER# 50469, Interest on an award for breach of contract may recovered under N.Y. law, N.Y. C.P.L.R. §5001(a) etc. Accordingly, this court finds that Nikkei shall recover interest on its award of compensatory & incidental damages as of 3-1-76, etc. Nikkei shall recover compensatory damages from Nigeria for lost profits on the sale of 231,500 metric tons of cement, etc. as indicated. East Europe's claim for attny's fees is denied. Pltffs' claims for punitive damages are denied. Pltffs' claims for demurrag are dismissed. etc. Submit Judgts. So ordered Pierce, J. m/n (filed in 77 civ 2348)
9-2-80	—	Filed Transcript of record of proceedings, dated 9-10-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-11-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-12-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-14-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-17-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-18-79
9-2-80	—	Filed Transcript of record of proceedings, dated 9-19-79
9-4-80	—	Filed Transcript of record of proceedings, dated 9-20-79
9-11-80		Filed JUDGMENT #80,1054, Ordered that Pltff E. Europe Import-Export, Inc.' recover of deft. Federal Republic of Nigeria the sum of $1,986,000. with int. at 6% from 4-1-76, and its costs, alternatively, pltff may recover such sum from deft. Central Bank of Nigeria. Pierce, J. Judgt. 9-11-80-Cler m/n
9-16-80		Filed defts' NOTICE OF APPEAL, to the USCA for the Second Circuit from the final judgt. ent. on 8-11-80. m/c Berthold H. Hoeniger on 9-17-80

filed in 77civ2348 kwp

DOCKET ENTRIES

29-80	Filed defts' AFFDVT. & NOTICE OF MOTION pur. to Rule 62 FRCP staying execution. upon the separate judgts. ent. 9-11-80, in favor of pltffs. Ret: 10-10-80 at 10 a.m. room 706.
29-80	Filed defts' MEMORANDUM in support of motion for a stay of execution.
0-80	Filed Pltff's AFFDVT. & NOTICE OF MOTION for an order under 28 U.S.C. 1610(c), directing the issuance of execution upon the final judgt. in favor of pltff. ent. on 9-11-80. Ret: 10-10-80 at 10:00 a.m.
0-80	Filed PLTFF's MEMORANDUM OF LAW in support of its motion for an order under 28 U.S.C. 1610(c) directing issuance of execution.
1-80	Filed pltff's NOTICE OF CROSS-APPEAL to the USCA for the Second Circuit from the final judgt. ent. on 9-11-80. m/n to Kissam, Halpin & Genovese on 10-1-80.
-7-80	Filed Pltff's MEMORANDUM in opposition to defts' Motion for a stay of Execution of judgt. pending appeal without posting security.
-7-80	Filed TRANSCRIPT INFORMATION FORM, for pltff. Daily copy is available.
-8-80	Filed defts' MEMORANDUM in opposition to East East Europe's Motion for an order mitting Issuance of Execution on Judgt.
-8-80	Filed defts' MEMORANDUM in opposition to East Europe's Motion for an order permitting issuance of execution on judgt.
2-80	[illegible] dated 9-17-79 (filed in 77 CIV 2348)
31-80	Filed stipulation re: transmission ofcertain named exhibits to the USCA. (Filed also in 77-3045 and 77-2348)
0-80	Filed certification of record on appeal to the USCA for the Second Circuit.
12-80	See Order in(77 civ 2348) by Pierce, J. m/n
-13-80	Filed Notice of certification for record on appeal to the USCA for the Second Circuit.

NIKKEI AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------x

77 Civ. 2348

AMENDED COMPLAINT

Plaintiff, DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC., by its attorney, LEWIS S. SANDLER, for its amended complaint herein, alleges as follows:

1. Plaintiff is a corporation duly organized and existing under the laws of the State of New York with offices for the conduct of its business in the Southern District of the State of New York.

2. The FEDERAL REPUBLIC OF NIGERIA (hereinafter called "FRN") is a foreign state located on the continent of Africa.

3. Upon information and belief, the CENTRAL BANK OF NIGERIA (hereinafter called "CBN") is a foreign banking institutic and an agency, citizen and subject of FRN, having its principal place of business at Tinubu Square, Lagos, Nigeria. Upon information and belief, CBN is doing business in the State of New York, and has substantial assets in this jurisdiction.

4. FRN and CBN transacted business in the State of New York from which this action arises, and these defendants have

waived their immunity. Furthermore, the action is based upon an act outside the territory of the United States in connection with a commercial activity of defendants elsewhere and that act caused a direct effect in the United States.

5. The amount in controversy exceeds $10,000.00, and jurisdiction also exists pursuant to 28 U.S.C. 1330.

6. On or about the 21st day of April, 1975, plaintiff and defendant FRN entered into a contract for the sale by plaintiff to FRN of cement. A copy of said contract is annexed hereto as Exhibit "A", and made a part hereof.

7. Pursuant to said contract, plaintiff agreed to sell and defendant FRN agreed to buy 240,000 metric tons of cement, plus or minus 10% at plaintiff's option, at a price of $60.00 per ton, making a total sum of $14,400,000.

8. Pursuant to the terms and conditions of said contract (Paragraph (v) thereof) on July 14, 1975, defendant FRN established an irrevocable transferable documentary credit identified as "CBN/BO/75/169" in the amount of $14,000,000 (hereinafter called "Letter of Credit"). The Letter of Credit was established to guarantee FRN's payment of (i) the purchase price of the cement, (ii) demurrage expenses at the rate of $4,100.00 per day, per ship, incurred in connection with the said cement contract.

9. Pursuant to the Letter of Credit, Morgan Guaranty Trust Company of New York (hereinafter called "Morgan Trust") was obligated to pay plaintiff's sight drafts for 100% of C.I.F. invoices.

10. In or about September, 1975, pursuant to said cement contract, plaintiff arranged for shipment of 8,500 metric tons of cement to defendant FRN. Upon loading the said cement on the vessel, appropriate documents were issued which were presented to Morgan Trust and payment thereunder was duly effecte

11. On or about September 30, 1975, defendant's agent, Morgan Trust, notified plaintiff that defendant would refuse payment to plaintiff for cement under the Letter of Credit and the cement contract unless plaintiff were to submit documents accompanied by a CBN certificate confirming that (i) plaintiff gave two months' advance notice to the Nigeria Port Authority prior to the departure of each ship engaged to transport said cement and (ii) clearance for said departures had been given by defendants.

12. These conditions were not a part of the cement contract, were not conditions to the original irrevocable Letter of Credit and were never consented to by plaintiff. These self-imposed conditions were unauthorized, unilateral and wrongfu amendments to the irrevocable Letter of Credit and constitute an anticipatory breach of the Letter of Credit engagement.

13. On or about September 11, 1975, plaintiff had entered into an agreement to furnish to defendant FRN, 120,000 metric tons of cement at a cost to plaintiff of $54.00 per metric ton for the first 8,500 tons and $52.00 per metric ton for the balance, C.I.F./Lagos, Nigeria, with an option to purchase all cement required under the said contract with defendant FRN, resulting in a profit to plaintiff of $8.00 per ton on all but the first 8,500 tons.

14. Plaintiff would thereafter have been able to purchase the remaining 144,000 metric tons in accordance with the contract with FRN at a cost to it of $45.00 per metric ton C.I.F./ Lagos, Nigeria, resulting in a profit to plaintiff of $15.00 per ton.

15. As a result of the wrongful cancellation, plaintiff was caused to travel to Nigeria and incurred other expenses all in the sum of $50,000.00.

16. By reason of the foregoing, plaintiff has been damaged in the sum of $3,102,000.00 excluding interest, plus loss of profits on demurrage aggregating, upon information and belief, to at least $3,000,000.

WHEREFORE, plaintiff demands damages in the amount of $6,102,000.00 and interest thereon, together with costs and disbursements of this action.

DATED: New York, New York
September 27,1978

LEWIS S. SANDLER
Attorney for Plaintiff
620 Fifth Avenue
New York, New York 10020
(212) 765-1010

EXHIBIT A TO AMENDED COMPLAINT -
NIKKEI CEMENT CONTRACT

Exhibit "A"

THIS AGREEMENT is made the ...[illegible]... day of ...APRIL... 1975..., BETWEEN IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria (hereinafter called "the buyer") of the one part

A N D

NIMKEI International Inc. of 110, East 23rd. Street, New York, N.Y. 10010, U.S.A.,

represented in Nigeria by

R. M. C. [illegible]

whose registered place of business is

No. 1, Kubi Close, Apapa Road, Ebute-Metta, Nigeria

(hereinafter called "the seller")

of the other part.

WITNESSETH AS FOLLOWS:

1. The Buyer agrees to buy from the seller and the seller agrees to sell to the buyer cement on the terms and conditions hereinafter expressed.

(i) DESCRIPTION: The cement shall be Portland Cement conforming to B.S.S.12/1958. ~~or B.S.S.12/1971~~

(ii) QUANTITY: ...240,000... metric tons, plus or minus 10% at seller's option.

(iii) PRICE: The price shall be $ U.S. ...60.00... per metric ton C.I.F. Lagos/Apapa Free Out (Incoterms 1953), making a total sum of $ U.S. ...14,400,000.00..., plus or minus 10%.

(iv) PACKING: In ...6-Ply Kraft paper bags each containing 50 kgs G/N. Also ...3-Ply empty spare bags, to be supplied free of cost, equal to 3 per cent of total number of filled bags comprising each consignment.

(v) TERMS OF PAYMENT: By virtue of a revolving Performance Bond, in the sum of $ U.S. 12,000.00 (representing one twenty-fourth twelfth of 3% of the total purchase price) already deposited by the seller with the Central Bank of Nigeria, Lagos, the buyer undertakes to establish, within twenty-one (21) fourteen (14) days from the date hereinbefore mentioned, an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through First National City Bank, 23rd Street and Lexington Avenue, New York, N.Y. 10010, U.S.A.

Drafts drawn under the Letter of Credit shall be payable at sight, on presentation to the bank designated above of Invoices, Clean on Board Bills of Lading and Insurance Certificates.

(vi) SHIPMENT: Shipment to commence within 30 days after receipt of the Letter of Credit in New York by the seller. Delivery shall be at the rate of 20,000 metric tons per mensem, plus or minus 10% at seller's option, or plus such additional quantity as the seller may be able to deliver. (P.A.)

(vii) INSURANCE: Insurance by the seller shall be from Barcelona and/or Piraeus to the Lagos/Apapa Quays. The buyer shall insure the goods against all risks during discharge at the Lagos/Apapa Quays, and therefrom to his warehouse.

(viii) UNLOADING: The buyer shall arrange the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from Customs and complying with all necessary formalities, and shall pay all clearance charges, .../3

Customs duties, and harbour and anchorage dues.

(ix) DEMURRAGE: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons, or pro-rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbourmaster, whether the vessel is berthed or not), demurrage not exceeding $ U.S. 4,100.00 ..... per diem shall be for the account of the buyer, provided that the seller shall have given due notice by cable to the buyer of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the bank designated in sub-clause (v) above of time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's agents in Lagos.

2. The construction, validity and performance of this contract shall be governed by the Laws of U.S.A., ... and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient.

..../4

IN WITNESS WHEREOF IBRAHIM M. DANICIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria has hereunto set his hand and seal, and ..... for and on behalf of ..... has set his hand and seal the day and year first above appearing.

SIGNED SEALED AND DELIVERED by the said IBRAHIM M. DANICIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria.

In the presence of .....

SIGNED SEALED AND DELIVERED by .....

for and on behalf of .....

In the presence of .....

EAST EUROPE COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

EAST EUROPE IMPORT-EXPORT, INC., : Plaintiff Demands a Trial by Jury

Plaintiff, :

-against- : 77 Civ. 2809 (GLG)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, : COMPLAINT

Defendants.

----------X

Plaintiff complaining of the defendants by its attorneys, BAILEY MARSHALL HOENIGER & FREITAG, respectfully shows to this Court and alleges:

FEDERAL JURISDICTION; VENUE

1. Federal jurisdiction is founded upon the provisions of Section 2(a) of the Foreign Sovereign Immunities Act of 1976 (Pub.L. 94-583, 90 Stat. 2891, 28 U.S.C. §§1330, 1391(f), 1441(d) and 1602 through 1611), 28 U.S.C. Section 1330(a) and (b).

2. Venue is properly laid in this District for the following reasons, among others, in accordance with Section 3 of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Section 1391(f):

(a) Plaintiff is, and at all times relevant hereto has been, a New York corporation with its principal place of business in this State and District, viz. at 440 Park Avenue South, New York, N.Y. 10016.

(b) A substantial part of the events giving rise to the claim occurred within this District. Specifically, the

contract was to be performed by defendants in this District, and was anticipatorily breached by them through the issuance of purported amendments and modifications to plaintiff's contract, and of instructions to MORGAN GUARANTY TRUST COMPANY ("Morgan"), in this District, as hereinafter alleged.

(c) Upon information and belief, CENTRAL BANK OF NIGERIA ("Central Bank"), at all times relevant hereto, has done, and is now doing, business in this District.

FACTS CONSTITUTING THE CLAIM FOR RELIEF

3. On January 28, 1975, the FEDERAL REPUBLIC OF NIGERIA ("Nigeria") entered into an agreement in writing with plaintiff, providing for the purchase by Nigeria from plaintiff, and the sale and delivery by plaintiff to Nigeria, of 240,000 metric tons of Portland cement at a price of $59.50 per ton, C.I.F. Lagos/Apapa, Nigeria, or a total contract price of $14,280,000. Pursuant to Section 1.(v) of said contract, Nigeria undertook to establish, and did establish, through Central Bank, an irrevocable, transferrable, divisible, and confirmed letter of credit in favor of plaintiff for the total purchase price, to be advised and paid to plaintiff by a major New York bank upon sight draft; and said contract further provided for delivery of said 240,000 metric tons of cement in stated installments and for sight drafts upon said letter of credit with respect to each such installment or shipment. Said contract further provided that unloading of each installment or shipment of cement shall be completed by Nigeria within 10 days per each 10,000 metric tons, or within a ratable time period in the case of any greater or lesser quantity of cement; and that after the end of such period, demurrage not exceeding $4,100 per

day per vessel will be paid by Nigeria and Central Bank to plaintiff under the terms of said letter of credit.

4. Pursuant to said contract, Central Bank duly established an irrevocable, transferrable, divisible, and confirmed letter of credit in favor of plaintiff for the purchase price of $14,280,000, Credit No. CBII/BO/75/201, and caused Morgan, as Central Bank's agent, to advise plaintiff of the establishment of said credit in plaintiff's favor on or about August 13, 1975.

5. Plaintiff duly performed all the terms and conditions of said contract on its part until the anticipatory breach of said contract by defendants, as hereinafter alleged, prevented and excused further performance by plaintiff. Specifically, plaintiff entered into a contract for its purchase of 120,000 metric tons of Portland cement, complying in all respects with the specifications of the contract between Nigeria and plaintiff, with INTERNATIONAL TRADE AND FINANCE ESPANOLA, S.A. ("Espanola"), at a price of $51.25 per ton, C.I.F. Lagos/Apapa; plaintiff entered into a further contract with BERGBAU HANDEL ("Bergbau"), Berlin, German Democratic Republic, for plaintiff's purchase of 30,000 metric tons of Portland cement, complying in all respects with the specifications of the contract between Nigeria and plaintiff, F.O.B. an East German port, at a price of $27.00 per ton; and plaintiff was engaged in negotiationg charters or contracts for the shipment of said 30,000 tons from East Germany to Lagos/Apapa, and for the obtaining of the remaining 90,000 metri tons required to fulfill said contract and their delivery to Lagos/Apapa, when defendants anticipatorily breached said contract, as alleged in paragraph 8, below. Pursuant to said contracts with Espanola and Bergbau, plaintiff made assignments

to Espanola of $6,150,000 (i.e., 120,000 x $51.29) and to Bergbau of $810,000 (i.e., 30,000 x $27) out of the letter of credit established in its favor by Central Bank, and caused Morgan to advise Espanola and Bergbau accordingly.

6. At all times relevant hereto, Nigeria has been ruled by a Military Government which officially styles itself thusly. Upon information and belief, in July 1975, the prior Military Government, which had entered into the aforesaid contract with plaintiff for Nigeria, was replaced by a new Military Government.

7. The contract entered into with plaintiff was one of approximately 70 substnatially similar contracts entered into by Nigeria in late 1974 and early 1975 with other American and foreign firms, for the purchase by Nigeria of an aggregate of more than 20,000,000 metric tons of Portland cement. The entry into said contract with plaintiff by Nigeria, and the establishment of a confirmed, irrevocable letter of credit by Central Bank for the contract purchase price of $14,280,000, both constituted commercial transactions or acts, and the conclusion of all said approximately 70 similar contracts by Nigeria and the establishment of all of said approximately 70 similar confirmed, irrevocable letters of credit by Central Bank both constituted a regular course of commercial activities, within the meaning of Section 4(a) of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Section 1603(d).

8. In or about September 1975, after the first vessel loaded with Portland cement supplied to plaintiff by Espanola had been loaded and had embarked from a European port for Lagos/Apapa, Nigeria,

(a) Central Bank advised plaintiff by cable that

> "in light present congestion at Lagos and other Nigerian ports Goverment [sic] has uspended [sic] importation cement for three months from 08 Aug x You are required to defer all further chartering and loading of ships as now scheduled under terms yor [sic] agreement. . . ."; and

(b) Morgan, as Central Bank's agent, notified plaintiff that, pursuant to instructions given to Morgan by Central Bank, Morgan would refuse any and all payments to plaintiff or plaintiff's assignees for cement shipped under the aforesaid irrevocable, confirmed letter of credit and the aforesaid contract between Nigeria and plaintiff pursuant to the terms of said letter of credit and said contract. Upon information and belief, Morgan was instructed by its principal, Central Bank, to refuse payments under plaintiff's and other similar Central Bank letters of credit unless plaintiff and the other contractors agreed (i) to give two months' advance notice to the Nigerian Ports Authority prior to the departure of each ship engaged to transport cement to Nigeria pursuant to the terms of said contracts; (ii) not to ship any cement or further cement to Nigeria under said contracts unless prior clearance for each proposed shipment had been obtained from defendants; and (iii) to other material changes in the terms of said contracts for the sale and delivery of cement to Nigeria.

9. Said advice by Central Bank, through its agent Morgan, that it was refusing to honor, and said instructions by Central Bank to Morgan not to honor, the irrevocable, confirmed letter of credit which it had established in plaintiff's favor, and said unilateral, wholly unauthorized and unlawful action on the part of Nigeria in purportedly changing and altering materi terms of its cement contract with plaintiff and in adding mater

terms and conditions thereto, were done wholly without plaintiff's authorization, agreement or consent, and constituted an anticipatory breach of said letter of credit and said cement contract by defendants; and plaintiff has never consented to, authorized, or agreed to any of said purported changes, alterations, and modifications of said terms and conditions.

10. By reason of defendants' breach of said contract and said letter of credit as aforesaid, plaintiff has been and will be damaged in at least the following respects and amounts:

(a) expenses incurred and to be incurred by plaintiff pursuant to said contract, aggregating at least ~~$250,000~~ $36,000;

(b) loss of profits on the sale of said 240,000 metric tons of cement, aggregating at least $2,730,000; ~~$3,256,600~~

(c) loss of profits on demurrage with respect to the second 120,000 metric tons of cement (to be supplied by Bergbau and others and whose transport was to be accomplished in vessels chartered by plaintiff) aggregating, upon information and belief, at least $3,000,000; and

(d) costs and expenses, including attorneys' fees, necessarily incurred and to be incurred by plaintiff as a result of defendants' wrongful conduct, aggregating, upon information and belief, at least $1,000,000;

(e) liabilities or contingent liabilities by plaintiff to suppliers of cement, shipowners, and other third parties, which, upon information and belief, may aggregate $7,000,000 or more.

11. The wrongful conduct by defendants hereinabove alleged was intentional, willful, and deliberate, and evinced a wanton and callous disregard of defendants' civil obligations under basic principles of commercial law as internationally recognized, and of which principles Nigeria, as one of the world's leading petroleum-exporting nations, is a continual beneficiary; and plaintiff is therefore entitled to recover all attorneys' fees and other expenses necessarily incurred and to be incurred by it as a result of defendants' said willful conduct.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against defendants, jointly and severally, for $6,980,000 and the amount of plaintiff's liabilities to cement suppliers, shipowners, and other third parties, with interest from October 1, 1975, the costs and disbursements of this action, and plaintiff's reasonable attorneys' fees; and for such other, further, and different relief as may be just and proper upon the facts proven

Dated: New York, N.Y.
June 8, 1977.

Yours, etc.,

BAILEY MARSHALL HOENIGER & FREITAG
Attorneys for Plaintiff

By: Berthold H. Hoeniger
Berthold H. Hoeniger

345 Park Avenue
New York, N.Y. 10022
Tel.No.: (212) 826-2305

Nov. 14 '78 Complete

CHENAX SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

CHENAX MAJESTY, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

----------x

77 Civ. 3045 (L.W.P.)

SECOND AMENDED COMPLAINT

Plaintiff, by its attorney LEWIS S. SANDLER, for its Second Amended Complaint herein, alleges as follows:

AS AND FOR A FIRST CLAIM FOR RELIEF

FIRST: Plaintiff is a corporation duly organized and existing under the laws of the State of New York with offices for the conduct of its business in the Southern District of the State of New York.

SECOND: The FEDERAL REPUBLIC OF NIGERIA (hereinafter called "FRN") is a foreign state located on the continent of Africa.

THIRD: Upon information and belief, the CENTRAL BANK OF NIGERIA (hereinafter called "CBN") is a foreign banking institution and an agency, citizen and subject of FRN, having its principal place of business at Tinubu Square, Lagos, Nigeria. Upon information and belief, CBN is doing business in the State of New York, and has substantial assets in this jurisdiction.

FOURTH: FRN and CBN transacted business in the State of New York from which this action arises. Furthermore, these defendants have waived their sovereign immunity and the action is based upon an act or acts outside of the territory of the United States in connection with a commercial activity of defendants elsewhere and that act or acts caused a direct effect in the United States.

FIFTH: The amount in con oversy exceeds $10,000.00 and jurisdiction also exists pursuant to 28 U.S.C. § 1330.

SIXTH: On or about the 20th day of March, 1975, plaintiff and defendant FRN entered into a contract for the sale by plaintiff to FRN of cement. A copy of said cement contract is annexed hereto as Exhibit "A", and made a part hereof.

SEVENTH: Pursuant to said contract plaintiff agreed to sell and defendant FRN agreed to buy 240,000 metric tons of cement, plus or minus 10% at plaintiff's option, at a price of $60.00 per ton, making a total sum of $14,400,000.

EIGHTH: Pursuant to the terms and conditions of said contract (Paragraph (v) thereof) on May 8, 1975, defendant FRN established an irrevocable transferable documentary credit identified as "CBN/BO/75/79" in the amount of $14,400,000 (hereinafter called "Letter of Credit"). The Letter of Credit was established to guarantee FRN's payment of (i) the purchase price of the cement and (ii) demurrage expenses at the rate of $4,100. per day, per ship, incurred in connection with the said cement contract.

NINTH: Pursuant to the Letter of Credit, Morgan Guaranty Trust Company of New York (hereinafter called "Morgan Trust") was obligated to pay plaintiff's sight drafts for 100% of C.I.F. invoices.

TENTH: On or about July 30, 1975 and August 1, 1975, pursuant to said cement contract, plaintiff entered into contracts to fulfill its obligations to furnish cement to defendant FRN at a profit to plaintiff of $4.50 per ton.

ELEVENTH: On or about September 30, 1975, defendant's agent, Morgan Trust, notified plaintiff that defendants would refuse payment to plaintiff for cement under the Letter of Credit and the cement contract unless plaintiff were to submit documents accompanied by a CBN certificate confirming that (i) plaintiff gave two months' advance notice to the Nigerian Port Authority prior to the departure of each ship engaged to transport said cement and (ii) clearance for said departures had been given by defendants.

TWELFTH: These conditions were not a part of the cement contract, were not conditions to the original irrevocable Letter of Credit and were never consented to by plaintiff. These self-imposed conditions were unauthorized, unilateral and wrongful amendments to the irrevocable Letter of Credit and constituted a revocation of the Letter of Credit engagement and an anticipatory breach of contract.

THIRTEENTH: By reason of the wrongful cancellation of the contract and the revocation of the Letter of Credit plaintiff was caused to incur additional costs including those of travel and cancellation penalties of its contracts with suppliers and shippers, in the amount of $245,680.

FOURTEENTH: By reason of the foregoing, plaintiff has been damaged in the sum of $245,680 plus lost profits of $1,188,000, or a total of $1,433,680.

AS AND FOR A SECOND CLAIM FOR RELIEF

FIFTEENTH: Plaintiff repeats and realleges paragraphs FIRST through TENTH of this complaint with the same force and effect as if such paragraphs were fully set forth herein.

SIXTEENTH: On or about August 18, 1975 defendants advised plaintiff that it had suspended importation of cement for three months from that date and instructed plaintiff to defer all further chartering and loading of ships.

SEVENTEENTH: On or about August 22, 1975 the company with whom plaintiff had contracted to furnish cement to defendants at a profit to plaintiff of $4.50 per ton, cancelled its contract with plaintiff.

EIGHTEENTH: Thereafter, plaintiff would have been able to obtain the cement for defendants at a price of $45 per ton, giving plaintiff a profit of $15 per ton.

NINETEENTH: Thereafter, plaintiff would have been able to charter vessels to carry the cement pursuant to contracts that would have provided for demurrage payments of substantially less than $4,100 per day, leaving plaintiff with profits of $3,000,000.

TWENTIETH: Plaintiff repeats and realleges paragraphs ELEVENTH through THIRTEENTH of this complaint with the same force and effect as if those paragraphs were fully set forth herein.

TWENTY-FIRST: By reason of the breach of contract and the wrongful revocation of the irrevocable Letter of Credit, plaintiff has been damaged in the sum of $245,680 plus $3,960,000, or a total of $4,205,680.

WHEREFORE, plaintiff demands damages from defendants as follows:

A. With respect to the FIRST CLAIM FOR RELIEF, in the sum of $1,433,680; or

B. With respect to the SECOND CLAIM FOR RELIEF, in the sum of $4,205,680 plus loss of profits on demurrage of $3,000,000, or a total of $7,205,680; and

C. Such other relief as the Court deems to be just and proper together with interest, costs and disbursements.

DATED: New York, New York
November 14, 1978

LEWIS S. SANDLER
Attorney for Plaintiff
620 Fifth Avenue
New York, New York 10020
(212) 765-1010

EXHIBIT A TO SECOND AMENDED COMPLAINT -
CHEMAX CEMENT CONTRACT

EXHIBIT "A"

THIS AGREEMENT is made the 20th day of MARCH 197[illegible]., BETWEEN IBRAHIM M. DANCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria (hereinafter called "the buyer") of the one part

A N D

Chenax Majesty of 1, Union Square West, New York, N.Y. 10003, U.S.A. represented in Nigeria by

Kate Onyeaso

whose registered place of business is

No. 7, MacGregor Road, Ikoyi, Lagos, Nigeria

(hereinafter called "the seller")

of the other part.

WITNESSETH AS FOLLOWS:

1. The Buyer agrees to buy from the seller and the seller agrees to sell to the buyer cement on the terms and conditions hereinafter expressed.

(i) DESCRIPTION: The cement shall be Portland Cement conforming to ~~B.S.S.12/1958 or B.S.S. 12/1971~~ Spanish specification P.350.

(ii) QUANTITY: 240,000 metric tons, plus or minus 10% at seller's option.

(iii) PRICE: The price shall be $ U.S. 60.00 per metric ton C.I.F. Lagos/Apapa Free Out (Incoterms 1953), making a total sum of $.U.S. 14,400,000.00....., plus or minus 10%.

(iv) PACKING: In .6.-Ply Kraft paper bags each containing 50 kgs G/W. Also .4.-Ply empty spare bags, to be supplied free of cost, equal to 3 per cent of total number of filled bags comprising each consignment.

...../2

(v) TERMS OF PAYMENT: By virtue of a revolving Performance Bond, in the sum of $ U.S. 36,000.00 (representing one-twelfth of 3% of the total purchase price) already deposited by the seller with the Central Bank of Nigeria, Lagos, the buyer undertakes to establish, within ~~thirty~~ twenty-one (21) days from the date hereinbefore mentioned, an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through ~~Schroeder, Munchmeyer, Hengst & Co. of D-2000 Hamburg 1, Ballindamm 33, Western Germany~~.

Drafts drawn under the Letter of Credit shall be payable at sight, on presentation to the bank designated above of Invoices, Clean on Board Bills of Lading and Insurance Certificates.

(vi) SHIPMENT: Shipment to commence within ~~30~~ 45 days after receipt of the Letter of Credit in Hamburg by the seller. Delivery shall be at the rate of 20,000 metric tons per season, plus or minus 10% at seller's option.

(vii) INSURANCE: Insurance, by the seller shall be (against All Risks, 2% deductible) from ~~Barcelona and/or Tarragona~~ ..... to the Lagos/Apapa Quays.

The buyer shall insure the goods against all risks during discharge at the Lagos/Apapa Quays, and therefrom to his warehouse.

(viii) UNLOADING: The buyer shall arrange the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from Customs and complying with all necessary formalities, and shall pay all clearance charges,

...../3

Customs duties, and harbour and anchorage dues.

(ix) DEMURRAGE: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbourmaster, whether the vessel is berthed or not), demurrage ~~not exceeding~~ of U.S. 4,100.00 ..... per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer by cable of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the bank designated in sub-clause (v) above of time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's agents in Lagos.

2. The construction, validity and performance of this contract shall be governed by the Laws of ..... Switzerland, and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient.

..../4

IN WITNESS WHEREOF IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria has hereunto set his hand and seal, Chenax Majesty.....
for and on behalf of .....
has set his hand and seal the day and year first above appearing.

SIGNED SEALED AND DELIVERED by the said IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria.

C. G. LAKIN-SMITH

In the presence of .....

SIGNED SEALED AND DELIVERED
UCHE AKUBA

by .....
Chenax Majesty

for and on behalf of .....
T. G. FISCHER

in the presence of .....

NOTE: This Agreement supersedes that made on the 25th. June, 1974.

ANSWER TO NIKKEI AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

Index No. 77 Civ. 2348 (LWP)

ANSWER To amended complaint

Defendants, Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank), by their attorneys, Kissam, Halpin & Genovese, answer the complaint on information and belief as follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the complaint.

2. Admit the allegations contained in paragraph 2 of the complaint.

3. Deny the allegations contained in paragraph 3 of the complaint, except aver that Central Bank is a department of the Government of Nigeria established under the Central Bank of Nigeria Act 1958; that the principal offices of Central Bank are located at Tinubu Square, Lagos, Nigeria; and that any assets held in the name of Central Bank in this jurisdiction are assets of Nigeria.

4. Deny the allegations contained in paragraph 4 of the complaint.

5. Deny the allegations contained in paragraph 5 of the complaint, except admit that plaintiff Decor by Nikkei International, Inc. (Nikkei) seeks to invoke jurisdiction pursuant to 28 U.S.C.§1330 and that the amount in controversy is in excess of $10,000.00.

6. Deny the allegations contained in paragraph 6 of the complaint except admit that Nikkei and the Federal Ministry of Defence of Nigeria entered into an agreement dated April 21, 1975 for the sale of cement by Nikkei to Nigeria and that a copy of that agreement is annexed to the complaint as "Exhibit A".

7. Deny that the allegations contained in paragraph 7 of the complaint fully or accurately state the terms of the cement agreement and respectfully refer the Court to the agreement for a full and accurate statement of its terms.

8. Deny the allegations in paragraph 8 of the complaint except admit that pursuant to the cement agreement Central Bank established an irrevocable transferable documentary letter of credit in favor of Nikkei, identified as "CBN/BO/75/169" and respectfully refer the Court to the letter of credit for a full and accurate statement of its terms.

9. Deny the allegations contained in paragraph 9 of the complaint and respectfully refer the Court to the letter of credit for a full and accurate statements of its terms.

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I0 of the complaint except admit that on or about September 29, 1975 Morgan Guaranty Trust Company of New York (Morgan Guaranty) paid $510,000 against documents presented under the Nikkei letter of credit.

11. Deny the allegations contained in paragraph 11 of the complaint except admit that by letter dated September 30, 1975 Morgan Guaranty transmitted to Nikkei the texts of cables

received from Central Bank relating to payments pursuant to the letter of credit and respectfully refer the Court to Morgan Guaranty's letter of September 30, 1975 for a full and accurate statement of its contents.

12. Deny the allegations contained in paragraph 12 of the complaint.

13. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the complaint.

15. Deny the allegations contained in paragraph 15 of the complaint and deny knowledge or information sufficient to form a belief as to the truth of the allegations concerning other expenses incurred by Nikkei.

16. Deny the allegations contained in paragraph 16 of the complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

17. This Court is without jurisdiction of the subject matter of the claims alleged in the complaint.

Second Affirmative Defense

18. This Court is without jurisdiction of the defendants Nigeria and Central Bank with respect to the claims alleged in the complaint.

Third Affirmative Defense

19. The claims alleged in the complaint arise out of purely governmental acts of the Government of Nigeria; i.e., the imposition and implementation of a ports embargo in the Fall of

1975. Plaintiff seeks a redress of alleged grievances by virtue of these governmental acts. An adjudication of the claims alleged will require the Court to inquire into and pass upon the validity or motive of the Government of Nigeria with respect to its purely governmental acts. The act of state doctrine is applicable to the claims alleged and renders the claims non-justiciable.

Fourth Affirmative Defense

20. The complaint fails to state a claim upon which relief may be granted.

WHEREFORE, defendants Nigeria and Central Bank demand judgment against plaintiff Nikkei dismissing the complaint, and for such other and further relief as is deemed just and proper by this Court.

New York, New York
November 24, 1978

KISSAM, HALPIN & GENOVESE

By James B. Sumner
A Member of the Firm
Attorneys for Defendants
Federal Republic of Nigeria
and Central Bank of Nigeria
120 Broadway
New York, New York 10005
(212) 962-2000

12/1/78

ANSWER TO EAST EUROPE COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

Index No. 77 Civ. 2809 (LWP)

ANSWER

Defendants, FEDERAL REPUBLIC OF NIGERIA (Nigeria) and CENTRAL BANK OF NIGERIA (Central Bank), by their attorneys, Kissam, Halpin & Genovese, answer the Complaint of plaintiff EAST EUROPE IMPORT-EXPORT, INC., (East Europe) on information and belief as follows:

1. Deny the allegations contained in paragraph 1 of the Complaint.

2. Deny the allegations contained in paragraph 2, 2(b) and 2(c) of the Complaint and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2(a) of the Complaint.

3. Deny the allegations contained in paragraph 3 of the Complaint, except admit that on or about January 28, 1975 the Federal Ministry of Defence of Nigeria entered into an agreement with plaintiff for the purchase by Nigeria of 240,000 metric tons of cement at a price of $59.50 per ton, C.I.F. Lagos/Apapa (the cement contract) and that pursuant to

the cement contract Central Bank established an irrevocable transferable documentary letter of credit in favor of plaintiff (the letter of credit); deny that plaintiff has fully, fairly or accurately set forth the terms of the cement contract or the letter of credit and respectfully refer the Court to these documents for a complete and accurate statement of their terms.

4. Deny the allegations contained in paragraph 4 of the Complaint, except admit that in August 1975, pursuant to the cement contract, Central Bank established the letter of credit in favor of plaintiff, identified as credit number CBN/BÒ/75/201, and admit that Morgan Guaranty Trust Company of New York (Morgan Guaranty), advised plaintiff that the letter of credit had been established.

5. Deny the allegations contained in paragraph 5 of the Complaint and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein relating to any actions taken by plaintiff; except admit that plaintiff instructed Morgan Guaranty to make partial transfers of the letter of credit as follows: to Bergbau Handle of Berlin, Germany, a total of $810,000 with respect to the payment for 30,000 metric tons of cement at the rate of $27 per ton; and to International Trade & Finance Espanola, S.A. of Madrid, Spain (Intrafinsa), in a total amount of $6,150,000 with respect to the payment for 120,000 metric tons of cement at the rate of $51.25 per ton.

6. Deny the allegations contained in paragraph 6 of the Complaint.

7. Deny the allegations contained in paragraph 7 of the Complaint, except admit that the Federal Ministry of

Defence of Nigeria, in 1975, contracted for the purchase of quantities of cement in addition to that which is the subject of plaintiff's cement contract.

8. Deny the allegations contained in paragraph 8 of the Complaint and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein relating to actions taken by plaintiff or Intrafinsa with respect to the supply, loading or shipment of cement; except admit that Central Bank notified plaintiff of the imposition by Nigeria in 1975 of a ports embargo on shipping into Nigerian ports and that Morgan Guaranty transmitted to plaintiff the texts of cables received from Central Bank relating to the ports embargo and the regulations implementing the embargo, and respectfully refer the Court to Central Bank's telexes and cables for a full and accurate statement of their contents.

9. Deny the allegations contained in paragraph 9 of the Complaint.

10. Deny the allegations contained in paragraph 10 of the Complaint.

11. Deny the allegations contained in paragraph 11 of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

12. This Court is without jurisdiction of the subject matter of the claims alleged in the complaint.

Second Affirmative Defense

13. This Court is without jurisdiction of the defendants Nigeria and Central Bank with respect to the claims alleged in the complaint.

Third Affirmative Defense

14. The claims alleged in the complaint arise out of purely governmental acts of the Government of Nigeria; i.e., the imposition and implementation of a ports embargo in the Fall of 1975. Plaintiff seeks a redress of alleged grievances by virtue of these governmental acts. An adjudication of the claims alleged will require the Court to inquire into and pass upon the validity of or motive for governmental acts of Nigeria. The act of state doctrine is applicable to the claims alleged and renders the claims nonjusticiable.

Fourth Affirmative Defense

15. The complaint fails to state a claim upon which relief may be granted.

WHEREFORE, defendants Nigeria and Central Bank demand judgment against plaintiff East Europe dismissing the complaint, and for such other and further relief as is deemed just and proper by this Court.

New York, New York
December 1, 1978

KISSAM, HALPIN & GENOVESE

By: James B. Simms
A Member of the Firm
Attorneys for Defendants
Federal Republic of Nigeria
and Central Bank of Nigeria
120 Broadway
New York, New York 10005
(212) 962-2000

12/7/78

ANSWER TO CHENAX SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHENAX MAJESTY, INC.,	:	
Plaintiff,	:	Index No. 77 Civ. 3045 (LWP)
- against -	:	
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,	:	ANSWER TO SECOND AMENDED COMPLAINT
Defendants.	:	

Defendants, Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank), by their attorneys, Kissam, Halpin & Genovese, answer, on information and belief, the Second Amended Complaint (the Complaint) of Chenax Majesty, Inc., as follows:

ANSWER TO PLAINTIFF'S FIRST CLAIM

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph FIRST of the Complaint.

2. Admit the allegations contained in paragraph SECOND of the Complaint.

3. Deny the allegations contained in paragraph THIRD of the complaint, except aver that Central Bank is a department of the Government of Nigeria established under the Central Bank of Nigeria Act 1958; that the principal offices of Central Bank are located at Tinubu Square, Lagos, Nigeria; and that

any assets held in the name of Central Bank in this jurisdiction are assets of Nigeria.

4. Deny the allegations contained in paragraph FOURTH of the Complaint.

5. Deny the allegations contained in paragraph FIFTH of the Complaint, except admit that plaintiff seeks to invoke jurisdiction pursuant to 28 U.S.C. Section 1330 and that the amount in controversy is in excess of $10,000.

6. Admit the allegations contained in paragraph SIXTH of the Complaint.

7. Deny that the allegations contained in paragraph SEVENTH of the Complaint fully or accurately state the terms of the cement agreement and respectfully refer the Court to the agreement for a full and accurate statement of its terms.

8. Deny the allegations contained in paragraph EIGHTH of the Complaint, except admit that pursuant to the cement agreement Central Bank established an irrevocable, transferable, documentary letter of credit in favor of plaintiff, identified as credit number CBN/BO/75/79 and respectfully refer the Court to the letter of credit for a full and accurate statement of its terms.

9. Deny the allegations contained in paragraph NINTH of the Complaint and respectfully refer the Court to the letter of credit for a full and accurate statement of its terms.

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph TENTH of the complaint.

11. Deny the allegations contained in paragraph ELEVENTH of the Complaint, except admit that in September 1975 Morgan Guaranty Trust Company of New York transmitted to the

plaintiff the texts of cables and telexes received from Central Bank relating to the imposition by Nigeria of a ports embargo and to payments pursuant to the letter of credit and respectfully refer the Court to these cables and telexes for a full and accurate statement of their contents.

12. Deny the allegations contained in paragraph TWELFTH of the Complaint.

13. Deny the allegations contained in paragraph THIRTEENTH of the Complaint and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein concerning any costs incurred by plaintiff.

14. Deny the allegations contained in paragraph FOURTEENTH of the Complaint.

ANSWER TO PLAINTIFF'S SECOND CLAIM

15. In answer to the allegations contained in paragraph FIFTEENTH of the Complaint, defendants repeat the answers above to the allegations contained in paragraphs FIRST through TENTH of the Complaint.

16. Deny the allegations contained in paragraph SIXTEENTH of the Complaint, except admit that in August 1975 defendants notified plaintiff of the imposition by Nigeria of a ports embargo with respect to shipping into Nigerian ports and respectfully refer the Court to defendants' communications to plaintiff for a full and accurate statement of their contents.

17. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph SEVENTEENTH of the Complaint.

18. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph EIGHTEENTH of the Complaint.

19. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph NINETEENTH of the Complaint.

20. In answer to the allegations contained in paragraph TWENTIETH of the Complaint, defendants repeat the answers above to the allegations contained in paragraphs ELEVENTH through THIRTEENTH of the Complaint.

21. Deny the allegations contained in paragraph TWENTY-FIRST of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

22. This Court is without jurisdiction of the subject matter of the claims alleged in the Complaint.

Second Affirmative Defense

23. This Court is without jurisdiction of the defendants Nigeria and Central Bank with respect to the claims alleged in the Complaint.

Third Affirmative Defense

24. The claims alleged in the complaint arise out of purely governmental acts of the Government of Nigeria; i.e., the imposition and implementation of a ports embargo in the Fall of 1975. Plaintiff seeks a redress of alleged grievances by virtue of these governmental acts. An adjudication of the claims alleged will require the Court to inquire into and pass upon the validity of or motive for governmental acts of Nigeria. The

act of state doctrine is applicable to the claims alleged and renders the claims non-justiciable.

Fourth Affirmative Defense

25. The Complaint fails to state a claim upon which relief may be granted.

WHEREFORE, defendants Nigeria and Central Bank demand judgment against plaintiff Chenax Majesty, Inc. dismissing the Complaint, and for such other and further relief as is deemed just and proper by this Court.

New York, New York
December 7, 1978

KISSAM, HALPIN & GENOVESE

By: _____
A Member of the Firm
Attorneys for Defendants
Federal Republic of Nigeria
and Central Bank of Nigeria
120 Broadway
New York, New York 10005
(212) 962-2000

E3

DEFENDANTS' NOTICE OF MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REFER TO JUDGE G. L. GOETTEL

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

77 Civ. 2809 (GLG)

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

77 Civ. 2348 (LWP)

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

NOTICE OF MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS

CHENAX MAJESTY, INC.,

Plaintiff,

77 Civ. 3045 (MEF)

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of James G. Simms, sworn to October 24, 1977, the affidavits and exhibits appended thereto, all pleadings, papers and proceedings had heretofore herein, Federal Republic of Nigeria and Central Bank of Nigeria, defendants in each of the above-captioned actions, will move this Court at a

hearing before the Honorable G. L. Goettel, United States District Judge, in Room 402 of the United States Courthouse, Foley Square, New York, New York, on the 18th day of November 1977 at 10:00 a.m. or as soon thereafter as counsel can be heard for an order transferring the actions commenced by plaintiff Decor by Nikkei International, Inc., presently assigned to the Honorable L. W. Pierce, and by plaintiff Chenax Majesty, Inc., presently assigned to the Honorable M. E. Frankel, to the calendar of the Honorable G. L. Goettel, before whom the action commenced by plaintiff East Europe Import-Export, Inc. is pending, and to consolidate these three actions on the grounds that they involve a common question of law or fact as provided in Federal Rules of Civil Procedure, Rule 42(a), and on the further ground that the Honorable G. L. Goettel has rendered an opinion as to the claims alleged herein by Decor by Nikkei International, Inc. and by Chenax Majesty, Inc., in connection with an unsuccessful application by both to intervene as additional parties plaintiff in National American Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria, Index No. 76 Civ. 2745 (GLG), which opinion is reported at 425 F.Supp. 1365 (SDNY, 1977); and for an order dismissing the complaints in the three captioned actions pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that, as to each of the claims alleged in the three captioned actions, this Court is without jurisdiction over the subject matter of the claim, and each of the plaintiffs has failed to state a claim upon which relief can be granted; and for such

other and further relief as the Court may deem appropriate.

New York, New York
October 24, 1977

KISSAM, HALPIN & GENOVESE

By _____
A Member of the Firm
Attorneys for Defendants
Federal Republic of Nigeria
and Central Bank of Nigeria
120 Broadway
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(212) 962-2000

TO: LEWIS S. SANDLER, ESQ.
Attorney for Plaintiffs
Decor by Nikkei International, Inc.
and Chenax Majesty, Inc.
620 Fifth Avenue
New York, New York 10020

BAILEY MARSHALL HOENIGER & FREITAG
Attorneys for Plaintiff
East Europe Import-Export, Inc.
345 Park Avenue
New York, New York 10022

AFFIDAVIT OF JAMES G. SIMMS, ESQ. IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 2809 (GLG)
DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 2348 (LWP)
CHENAX MAJESTY, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 3045 (MEF) AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES G. SIMMS, being duly sworn, deposes and says:

1. I am a member of Kissam, Halpin & Genovese, attorneys for Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank) defendants in each of the three above-captioned actions. I make this affidavit in support of the motion of Nigeria and Central Bank to

transfer the actions commenced by Decor by Nikkei International, Inc., presently assigned to the Honorable L. W. Pierce (Nikkei action), and Chenax Majesty, Inc., presently assigned to the Honorable M. E. Frankel (Chenax Majesty action), to the calendar of the Honorable G. L. Gottel and to consolidate these actions with the action brought by East Europe Import-Export, Inc., presently assigned to the Honorable G. L. Goettel (East Europe action) on the grounds that all three actions involve a common question of law or fact as provided in Federal Rules of Civil Procedure, Rule 42(a); and, in addition, I make this affidavit in support of the motion of Nigeria and Central Bank for a further order dismissing the complaint in each of the three captioned actions pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that, as to each of the claims alleged in the three captioned actions, this Court is without jurisdiction of the subject matter, and each plaintiff has failed to state a claim upon which relief may be granted.

2. The East Europe, Nikkei and Chenax Majesty actions each relate to a cement contract between plaintiff and Nigeria, and a letter of credit established by Central Bank in favor of plaintiff pursuant to the cement contract. Defendants Nigeria and Central Bank respectfully request the transfer of the Nikkei and Chenax Majesty actions to Judge Goettel for the further reason that there has been pending before Judge Goettel for more than one year an action which also relates to a cement contract with Nigeria and a letter of credit established by Central Bank - National American Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria, Index No. 76 Civ. 2745 (GLG). The National

American action has been vigorously litigated; and in February 1977, Judge Goettel rendered an opinion denying the motion of Nikkei and Chenax Majesty to intervene as additional parties plaintiff in the National American action. In their motion to intervene Nikkei and Chenax Majesty sought to assert the same claims alleged in their new subject actions; defendants Nigeria and Central Bank respectfully submit that Judge Goettel's opinion denying intervention, reported at 425 F.Supp. 1365 (S.D.N.Y. 1977), will have a significant bearing on the determination of Nigeria's and Central Bank's instant motion to dismiss the complaints in the East Europe, Nikkei and Chenax Majesty actions.

3. The East Europe, Nikkei and Chenax Majesty actions have all been commenced pursuant to the Foreign Sovereign Immunities Act of 1976, which added Chapter 97 (Sections 1602-1611) and new Section 1330 to Title 28 of the United States Code and which amended Sections 1332, 1391 and 1441 of that Title. These provisions of Title 28 are collectively Exhibit 1 hereto. Section 1330 defines the jurisdiction of the United States District Courts in actions against foreign states, how personal jurisdiction is to be obtained of a foreign state and the effect of an appearance by a foreign state in a particular action. There is no jurisdiction in the United States District Courts of claims against foreign states except as to non-jury civil actions in which the foreign state is not entitled to immunity either under Sections 1605-1607 of Title 28 or under any applicable international agreement. Sections 1605-1607 of Title 28 define the general exceptions to the jurisdictional immunity of a foreign state, the extent of liability of a

foreign state and immunity with respect to counterclaims respectively; these sections are discussed in further detail below.

4. The complaints in the East Europe, Nikkei and Chenax Majesty actions each allege the plaintiff entered into a contract with the Federal Ministry of Defense of Nigeria in 1975 pursuant to which plaintiff was to sell to Nigeria 240,000 metric tons of cement of stated specifications; that Nigeria through its financial arm, Central Bank, established an irrevocable documentary credit in favor of plaintiff for the full purchase price of the cement and for demurrage charges that might accrue with respect to voyages to Lagos, Nigeria; that each of the letters of credit were advised through Morgan Guaranty Trust Company of New York, 23 Wall Street, New York, New York (Morgan Guaranty); that after the letters of credit had been established, Nigeria and Central Bank amended the terms of the letters of credit with respect to the documentation to be presented for payment thereunder; that such action constituted an anticipatory breach of the letter of credit, thereby entitling each plaintiff to the damages alleged. The complaints in East Europe, Nikkei and Chenax Majesty are appended hereto as Exhibits 2, 3 and 4 respectively.

5. The cement contracts with East Europe and Nikkei each provide that the agreement is to be governed by the "Laws of U.S.A.", and that the letter of credit to be established in favor of each would be payable through First National City Bank in New York; the cement contract with Chenax Majesty provides that it is to be governed by the "Laws of Switzerland" and that the letter of credit to be established in favor of Chenax Majesty would be payable

through a German bank in Hamburg, West Germany. The cement contracts with East Europe, Nikkei and Chenax Majesty are Exhibits 5, 6 and 7 respectively.

6. Exhibit 8 hereto is a copy of an affidavit by Mr. J. O. Amao, Deputy Chief Accountant of Central Bank, sworn to December 22, 1976 and submitted originally by Nigeria and Central Bank in the National American action. The Amao affidavit states that the place of payment under the letters of credit established by Central Bank pursuant to cement contracts entered into by the Permanent Secretary of the Federal Ministry of Defense of Nigeria was, in each case, chosen solely at the request of and as an accommodation to the cement seller. Certain cement sellers requested that New York be designated the place for presentment of documents and payment under the letter of credit; other cement sellers chose places in Europe.

7. The documentary credits established by Central Bank in favor of East Europe, Nikkei and Chenax Majesty all provide that the letters of credit are subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce, Brochure No. 222 (UCP, 1962 Revision). As to each of the letters of credit, Morgan Guaranty acted solely in an advisory capacity; it was not required nor did it confirm the letters of credit on its own behalf. In all correspondence with East Europe, Nikkei or Chenax Majesty, Morgan Guaranty stated clearly that the information conveyed was solely an advice and was without engagement or responsibility on its part. Upon receipt from Central Bank of Central Bank's documentary credits in favor of each of the three plaintiffs, Morgan

Guaranty informed each by separate letter that the letter of credit had been established. Central Bank's documentary credit and Morgan Guaranty's written advice of the credit are together Exhibits 9 (East Europe), 10 (Nikkei) and 11 (Chenax Majesty) hereto. Each of the letters of credit bears a Central Bank designation number, and as to each Morgan Guaranty assigned its own reference number. In East Europe - Central Bank Credit No. CBN/BO/75/201, Morgan Guaranty Reference No. A-12122; in Nikkei - Central Bank Credit No. CBN/BO/75/169, Morgan Guaranty Reference No. A-11067; in Chenax Majesty - Central Bank Credit No. CBN/BO/75/79, Morgan Guaranty Reference No. A-08740.

8. Submitted herewith as Exhibit 12 is the unexecuted affidavit of his Excellency, the Honorable O. Jolaoso, Ambassador to the United States from Nigeria; the text of the affidavit has been reviewed and approved by Ambassador Jolaoso; the affidavit is being prepared in official form at the Nigerian Embassy in Washington, D.C.; Ambassador Jolaoso will execute the affidavit on October 25, 1977; and the affidavit will be submitted herein forthwith. The recent official visit to the United States of the Head of State of Nigeria, and the Veteran's Day public holiday have prevented Ambassador Jolaoso from formally executing the affidavit. Ambassador Jolaoso raises the defense of sovereign immunity as to all claims alleged against Nigeria and Central Bank in the East Europe, Nikkei and Chenax Majesty actions and in all other actions pending in this Court relating to cement contracts with Nigeria and letters of credit established by Central Bank pursuant thereto. The affidavit of Ambassador Jolaoso states that Central Bank was established in 1958 under the Central Bank of Nigeria Act of 1958 to operate as the financial arm of the Government of Nigeria. In addition, with respect to events in mid-1975, Ambassador Jolaoso states

that on July 29, 1975, a new Military Administration took office as the head of the Government of Nigeria. One of the first and basic preoccupations of the new Government of Nigeria was to adopt measures to resolve the port congestion in Lagos Harbor which was causing severe and dire disruption of vital commerce and which had become a critical threat to the economic and social survival of Nigeria. Importation of essential consumer goods, such as milk, sugar, salt and flour was prevented by the congestion of vessels principally carrying cement. The new Government of Nigeria enacted and published official pronouncements with the force of law relating to the critical port congestion, including Government Notice No. 1434 of August 9, 1975, which regulated the sailing and arrival of all vessels into Nigerian ports (this Government Notice is appended to the affidavit of Ambassador Jolaoso). In addition, the Government of Nigeria created the Nigerian Cement Contracts Negotiating Committee (Negotiating Committee) for the purpose of renegotiating the various cement contracts entered into by the previous Government of Nigeria; the Negotiating Committee conducted meetings with cement suppliers and successfully renegotiated many of the cement contracts.

9. The affidavit of Ambassador Jolaoso states further that each cement supplier was notified by the Government of Nigeria of the port congestion in Lagos, and of the provisions of Government Notice No. 1434 relating to sailings of vessels to Nigerian ports, and that each cement supplier was also invited to renegotiate its cement contract with the Negotiating Committee.

10. Defendants Nigeria and Central Bank respectfully submit that a determination of the claims alleged in each of the subject complaints will require this Court to review and pass upon the internal administrative and legislative acts of the Government of Nigeria relating to the Nigerian

ports congestion in 1975; that these acts of the Government of Nigeria were necessary to protect the economy of Nigeria, and that but for these official acts, commerce in essential consumer goods could not continue; that the official acts of the Government of Nigeria taken with respect to the cement suppliers was neither arbitrary nor confiscatory; and that these official acts of the Government of Nigeria constitute acts of state which are entitled to the protection of sovereign immunity.

11. The Negotiating Committee established guidelines for the renegotiation of the various cement contracts entered into by the Ministry of Defense of Nigeria. These guidelines included the acceptance by Nigeria of all vessels lying within Nigerian territorial waters before a specified date; payment at the full contract rate for all cement consigned to the vessels accepted by Nigeria - even though much of the cement was rendered useless by virtue of the length of time it had lain in these vessels (cement is a perishable commodity which absorbs moisture which causes it to lose it binding properties); the payment of demurrage on all vessels accepted by Nigeria, at the contracted rate of demurrage prorated with respect to a consignment of 10,000 tons of cement; the release and discharge of further deliveries under the cement contracts; and the offer to negotiate new cement contracts after the ports congestion had been cleared. Exhibit 13 hereto is the affidavit of Mr. A. O. Okafor, Secretary of the Negotiating Committee, sworn to December 16, 1976 and the exhibits thereto, submitted originally by Nigeria and Central Bank in the National American action. The Okafor affidavit identifies the agreements of

release and discharge entered into with National American and the written certification of the Negotiating Committee which sets forth the agreements reached with National American; at paragraph 4 of his affidavit, Mr. Okafor states: "These terms are within the guidelines established by the Negotiating Committee for resolving the cement contracts problems, and are typical of the agreements reached with other cement suppliers." At paragraph 2 of his affidavit, Mr. Okafor states: "The efforts of the Negotiating Committee, Federal Ministry of Defense and Central Bank, have resulted in the renegotiation of fully two-thirds of the cement contracts and the settlement and discharge of claims arising thereunder for cement and demurrage."

12. In the East Europe, Nikkei and Chenax actions, each plaintiff alleges that modifications were made to the terms of the letter of credit established by Central Bank (See, East Europe complaint, at paragraph 8; Nikkei complaint, at paragraph 11; and Chenax Majesty complaint, at paragraph "ELEVENTH"). In each complaint, plaintiff alleges that these modifications, which required additional documentation and endorsements from Nigeria on presentments of documents under the letter of credit for payment either for cement or demurrage, amounted to an anticipatory breach by Nigeria and Central Bank of the cement contract and the letter of credit. Nigeria and Central Bank respectfully submit that each of the modifications cited by plaintiffs in the instant actions were made pursuant to the official administrative and legislative acts of the Government of Nigeria taken for the purpose of clearing the ports congestion and allowing a continuation of commerce in essential consumer goods.

13. Title 28, United States Code, Section 1605 defines the general exceptions to the jurisdictional immunity of a foreign state, and the provisions of that section upon which East Europe, Nikkei and Chenax Majesty rely in alleging jurisdiction of their claims are set forth here:

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;..."

(See, East Europe complaint, paragraphs 1 and 2; Nikkei complaint, paragraphs 2 through 5; Chenax Majesty complaint, paragraphs SECOND through FIFTH). Defendants Nigeria and Central Bank respectfully deny that jurisdiction exists under the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. Section 1603 provides:

> "(d) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States."

Each of the three subject actions relates to a cement contract made in Nigeria and to be performed outside the United States; each of the letters of credit at issue provided for presentment of documents and payment in New York solely at the request of plaintiff; none of the claims is based upon a commercial activity carried on in the United States by Nigeria or Central Bank; Central Bank does not maintain an office in the United States nor are its employees present here; Morgan Guaranty is not the agent of Central Bank - as to each of the letters of credit at issue, Morgan Guaranty was an advising rather than a confirming bank as defined by UCP, 1962 Revision; nor did Nigeria or Central Bank perform any act outside the United States in connection with a commercial activity conducted elsewhere which caused a direct effect in the United States; and Nigeria and Central Bank have never waived their immunity with respect to the claims at issue. Nigeria and Central Bank respectfully submit that the opinion of Judge Goettel rendered in the National American action with respect to the application of Nikkei and Chenax Majesty to intervene as additional parties plaintiff discusses the same elements as are defined in the Foreign Sovereign Immunities Act of 1976 as the bases for jurisdiction over a foreign state and is significant in the determination of whether this Court has jurisdiction of the instant claims. Judge Goettel, in his opinion, found that no independent jurisdictional grounds existed as to the claims alleged by Nikkei and Chenax Majesty - which are the same claims as are alleged herein and which are substantially identical to the claims alleged by East Europe. Judge Goettel's opinion, as noted, is reported at 425 F.Supp. 1365 (S.D.N.Y. 1977); his Honor's discussion of the jurisdictional

grounds commences at page 1368; a copy of the opinion is annexed hereto as Exhibit 14.

14. East Europe has designated on its complaint that it demands a trial by jury. Title 28 U.S.C. Section 1330 specifically limits the original jurisdiction of the United States District Courts to "any nonjury civil action" against a foreign state with respect to which the foreign state is not entitled to immunity. East Europe's jury demand constitutes a further ground for the lack of jurisdiction to determine the claim alleged under the Foreign Sovereign Immunities Act of 1976.

15. For the above reasons, defendants Nigeria and Central Bank respectfully request that their motion to transfer and consolidate the East Europe, Nikkei and Chenax Majesty actions be granted and that, further, their motion to dismiss each of the subject complaints be granted in all respects.

James G. Simms

Sworn to before me this
24th day of October, 1977.

Notary Public

PETER J. DRANGINIS, JR.
NOTARY PUBLIC, State of New York
No. 24-4631979
Qualified in Kings County
Commission Expires March 30, 19..

EXHIBIT 5 TO SIMMS AFFIDAVIT -
EAST EUROPE CEMENT CONTRACT

Exhibit 5

THIS AGREEMENT is made the 28th. day of January, 1975

BETWEEN IBRAHIM M. DASUKI, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria (hereinafter called "the buyer") of the one part.

AND

East Europe Import Export Inc., 440, Park Avenue South, New York 10016, U.S.A.,

represented by
Charles Obiesie
whose registered place of business is
78, Ogunlana Drive, Surulere, Nigeria,
(hereinafter called "the seller")

of the other part.

WITNESSETH AS FOLLOWS:

1. The Buyer agrees to buy from the seller and the seller agrees to sell to the buyer cement on the terms and conditions hereinafter expressed.

(i) DESCRIPTION: The cement shall be Portland Cement conforming to B.S.S. 12/1958.

(ii) QUANTITY: 240,000 metric tons.

(iii) PRICE: The price shall be $ U.S. 59.50 per metric ton CIF Lagos/Apapa, making a total sum of $ U.S. 14,280,000.00

(iv) PACKING: In 6-Ply Kraft paper bags each containing 50 kgs net. Also 6-Ply empty spare bags, to be supplied free of cost, equal to 3 per cent of total number of filled bags.

(v) TERMS OF PAYMENT : By virtue of a Performance Bond, in the sum of $ U.S. 428,400.00.....(representing 3% of the total price in sub-clause (iii) above) already deposited by the seller with the Central Bank of Nigeria, Lagos, the buyer undertakes to establish, within fourteen (14) days from the date hereinbefore mentioned, an Irrevocable, Transferable, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through the First National City Bank, 40th. Street and Broadway, New York, U.S.A. Drafts drawn under the Letter of Credit shall be payable at sight. In the event that the Letter of Credit is not acceptable to the seller, the seller shall instruct the

..../2

buyer to make additional amendments there to. In the event that the buyer cannot comply, the Performance Bond of the seller shall be cancelled and returned at once at no cost to the seller, and the contract shall be cancelled.

It shall be the responsibility of the buyer to submit to the Central Bank of Nigeria relevant Customs Bills of Entry and other documents that are necessary for the transfer of the purchase price to the seller.

(vi) SHIPMENT: Shipment to commence within ~~four~~ six weeks after receipt of the Letter of Credit in New York by the seller. Delivery shall be at the rate of not less than 20,000 metric tons per mensem.

(vii) INSURANCE: Insurance by the seller shall be from Constanza ..... to Lagos Quay. The buyer shall insure the goods against all risks from the Lagos Quay to his warehouse.

(viii) UNLOADING: The buyer shall arrange the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from Customs and complying with all necessary formalities and shall pay all clearance charges, Customs duties and harbour dues.

(ix) DEMURRAGE: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the case of any greater or lesser quantity. At the elapse of such period, demurrage not exceeding ~~$ U.S. 3,100.00~~ 4,100.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the arrival at Lagos/ Apapa of each such consignment. and shall be paid in accordance /

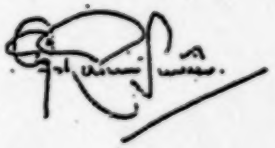
2. The construction, validity and performance of this contract shall be governed by the Laws of U.S.A., and all disputes which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient.

/ with normal international practice under the terms of the Letter of Credit. Such period shall be reckoned from the time of commencement of the next working period after presentation of notice of readiness to discharge by the master of the vessel, whether /

IN WITNESS WHEREOF IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria has hereunto set his hand and seal and ROBERT ROSS for and on behalf of East Europe Import Export Inc. has set his hand and seal the day and year first above appearing.

SIGNED SEALED AND DELIVERED by the said IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria.

In the presence of



SIGNED SEALED AND DELIVERED
by ROBERT ROSS
for and on behalf of
East Europe Import Export Inc.

in the presence of

CHARLES OBIESIE

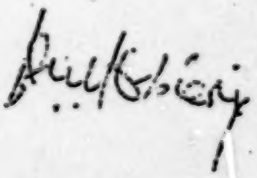


EXHIBIT 8 TO SIMMS AFFIDAVIT - AFFIDAVIT OF JACOB OLADELE AMAO, DEPUTY CHIEF ACCOUNTANT OF CENTRAL BANK OF NIGERIA SWORN TO DECEMBER 22, 1976

Exhibit 8

IN THE HIGH COURT OF LAGOS STATE
IN THE LAGOS JUDICIAL DIVISION

Index No.
26 CIV. 2745

BETWEEN:

NATIONAL AMERICAN CORPORATION .... PLAINTIFF

AND

1. FEDERAL REPUBLIC OF NIGERIA
2. CENTRAL BANK OF NIGERIA ..... DEFENDANTS

AFFIDAVIT

I, Jacob Oladele Amao, Male, Nigerian Citizen, Civil Servant of 69 Rasaq Balogun Street, Surulere, Lagos, Nigeria, being duly sworn, state as follows:

1. I am the Deputy Chief Accountant of the Central Bank of Nigeria with responsibility for administering foreign accounts of the Federal Republic of Nigeria.

2. I make this affidavit in opposition to any claim against the Federal Republic of Nigeria (Nigeria) and the Central Bank of Nigeria (Central Bank) alleging that Nigeria or Central Bank were doing business in the State of New York by virtue of the fact that certain letters of credit established by Central Bank pursuant to cement contracts entered into by the Permanent Secretary of the Federal Ministry of Defence of Nigeria were made payable in New York.

3. The place of payment of all such letters of credit was, in each case, chosen solely at the request of and as an accommodation to the cement seller. Certain cement sellers, including National American Corporation, JLM International, Inc., Chenex Majesty, Inc., Nikkei

..../2

International, Inc. and Kaisir Trading Corporation, requested that New York City be the place for payments under letters of credit established in their favour. Other cement sellers chose places of payment in Europe.

.....
DEPONENT

Sworn to at the Lagos High Court Registry this 22 day of December, 1976.

BEFORE ME

.....
COMMISSIONER FOR OATHS

HIGH COURT OF LAGOS
Deputy Office
Date 22/12/76

09 13 5 6/2
Plan 3407285
22/12/76

I, Anthony Olayinka Okuribido, Chief Registrar of the High Court of Lagos State hereby certify that Mr. V. O. Idown whose signature appears above is a Commissioner for Oaths in the Lagos State.

Olayinka Okuribido
CHIEF REGISTRAR
HIGH COURT, LAGOS 22/12/76

EXHIBIT 9 TO SIMMS AFFIDAVIT -
AUGUST 13, 1975 LETTER FROM MORGAN GUARANTY
TO EAST EUROPE AND EAST EUROPE LETTER OF CREDIT
DATED AUGUST 4, 1975

Exhibit 9

3-74-4M

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

FORM 11-4-946D

2

August 13, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A-12122

East Europe Import Export Inc.,
440 Park Avenue South
New York, N.Y. 10016

This refers to our preliminary advice of August 6, 1975.

Dear Sirs:

We enclose copy of Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria
letter of August 4, 1975 addressed to us advising the establishment of their Irrevocable Credit No. CBN/BO/75/201 in your favor

for U. S. $14,280,000.00 (FOURTEEN MILLION TWO HUNDRED AND EIGHTY THOUSAND U. S. DOLLARS).....

Except as otherwise expressly stated therein the credit is subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce, Brochure No. 222.

Your drafts must indicate that they are drawn under Irrevocable Credit No. CBN/BO/75/201 of the Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria
and must be presented to our Commercial Credits Department, 15 Broad Street, New York, New York 10015 with specified documents, not later than March 31, 1976 on which date the credit expires.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

P. S. Any availments made hereunder must be accompanied by the attached advice.

This credit is issued in your favor and / or transferees. This credit is transferable only to second beneficiaries abroad. Should you desire to transfer same, such transfer will be subject to the return to us of this advice together with your written instructions on either of the enclosed forms and your assuming our usual transfer charge and a certificate of your bankers as indicated on the attached forms.

OFFICE COPY - NOT NEGOTIABLE

81a

CENTRAL BANK OF NIGERI
Tinubu Square
Lagos

PRIVATE MAIL BAG 12194 : CABLES : CENBANK :

TELEPHONE

Date: 4 AUG 1975

DOCUMENTARY CREDIT 4 AUG 1975

Confirmation of Telex of:

The Commercial Credit Dept.,
Morgan Guaranty Trust Company,
23 Wall Street,
New York, U.S.A.

(Correspondent Bank)

CREDIT NO.
CBN/BO/75/201

Dear Sirs,

We hereby request you to advise our irrevocable/transferable abroad/~~revolving~~ Documentary Credit in favour of East Europe Import. Export Inc., 440 Park Avenue South, N.Y. 10016 U.S.A.

for U.S.$ 14,280,000.00

Fourteen million two hundred and eighty thousand U.S.Dollars.
(Amount in words)

available by their draft(s) at Sight (No. of days) for 100.00 of the CIF/FOB Invoice drawn on yourselves accompanied by the following documents (at least in duplicate unless otherwise indicated).

------ Commercial Invoice in quadruplicate

------ Certificate of Origin in triplicate

------ Insurance Policy or Certificate covering ALL RISKS as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%

------ Full set clean on Board Bills of Lading made out to order and endorsed in blank, marked "Freight Prepaid/Collected" dated latest 29th February, 1976 clauses, notify The Permanent Secretary, Ministry of Defence, Lagos

Covering shipment (s) of: 240,000 S.T.F. Metric tons of Portland Cement to be purchased by Ministry of Defence, Lagos as per contract agreement signed on the [illegible] January, 1975

From: United States of America Port to [Lagos/Apapa Port] .....

Part shipment is Prohibited/Permitted

[Transhipment is Prohibited/Permitted]

This credit is valid in .....New York..... until

.....31st March, 1976.....for presentation for
(date)

payment in accordance with the conditions endorsed hereon.

Draft(s) presented must be drawn under this letter of credit (stating its number and date) and the amount(s) entered thereon must be endorsed by the correspondent bank.

We undertake that all drafts drawn in compliance with the terms of this credit will be honoured on receipt of the agreed shippin documents. The correspondent bank is required to send the original documents to us by Express Registered Airmail(duplicate by following airmail).

Please advise beneficiary (without adding your confirmation) of our authority given to you to pay on sight of documents.

Additional Instructions: Part payments allowed. Payments against documents. Credit to be advised through First National City Bank, 40th Street and Broadway, New York, U.S.A. All documents are to be made and addressed to the Permanent Secretary, Ministry of Defence, Lagos.

Except otherwise stated this credit is subject to uniform custom and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222

Yours faithfully,

Bills Manager.

Countersigned:

Asst. Chief of Banking Operations.

EXHIBIT 10 TO SIMMS AFFIDAVIT - JULY 23, 1975
LETTER FROM MORGAN GUARANTY TO NIKKEI AND NIKKEI
LETTER OF CREDIT DATED JULY 14, 1975

Exhibit 10

E-75-4M

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK

FORM 11-4-946D

INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

2

July 23, 1975

This relates to our preliminary advice dated July 8, 1975.

On all communications please refer to OUR REFERENCE NUMBER
A 11067

Nikkei International Inc.
110 E 23rd Street
New York, New York 10010

Dear Sirs:

We enclose copy of Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria letter of July 14, 1975 addressed to us advising the establishment of their Irrevocable Credit No. CBN/DO/75/169 in your favor

for US$14,400,000.00 (FOURTEEN MILLION FOUR HUNDRED THOUSAND U.S. DOLLARS)--

Except as otherwise expressly stated therein the credit is subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce, Brochure No. 222.

Your drafts must indicate that they are drawn under Irrevocable Credit No. CBN/DO/75/169 of the Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria and must be presented to our Commercial Credits Department, 15 Broad Street, New York, New York 10015 with specified documents, not later than May 31, 1976 on which date the credit expires.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

Any availments hereunder must be accompanied by the attached advice.

This credit is issued in your favor and/or transferee. This credit is transferable only to second beneficiaries abroad. Should you desire to transfer same, such transfer will be subject to the return to us of this advice together with your written instructions on either of the enclosed forms and a certificate of your bankers as indicated on the attached forms. Our transfer charges shall be for account of buyers. As shipment to commence within 45 days after receipt of letter of credit, this advice is subject to amendment.

OFFICE COPY - NOT NEGOTIABLE

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos
PRIVATE MAIL BAG 12194 : CABLES : CENBANK :
TELEPHONE

Date: 14 JUL 1975

DOCUMENTARY CREDIT

Confirmation of Telex of: 15 JUL 1975

The Commercial Credit Department,
Morgan Guaranty Trust Company,
New York,
U.S.A.

(Correspondent Bank)

CREDIT NO.
CBN/LC/75/109

Dear Sirs,

We hereby request you to advise our irrevocable/transferable abroad/~~[illegible]~~ Documentary Credit in favour of Nikkei International Inc., 110 East 23rd Street, New York, N.Y. 10010, U.S.A.

for U.S.$14,400,000.00

Fourteen million four hundred thousand U.S. Dollars.
(Amount in words)

available by their draft(s) at ....Sight.... for 100 %
(No. of days)
of the CIF/~~[illegible]~~ Invoice drawn on yourselves accompanied by the following documents(at least in duplicate unless otherwise indicated).

------ Commercial Invoice in quadruplicate

------ ~~[illegible]~~

------ Insurance ~~[illegible]~~ Certificate ~~[illegible]~~

------ Full set clean on Board Bills of Lading made out to order and endorsed in blank, marked "Freight Prepaid/Collected" dated latest 15th May, 1976. claused "notify The Permanent Secretary, Ministry of Defence, Lagos.

Covering Shipment (s) of: 240,000 metric tons of Portland Cement conforming to B.S.S. 12/1958 plus or minus 10% at seller's option at U.S.$60.00 per metric ton to be purchased by Ministry of Defence, Lagos as per contract agreement signed on 21st April, 1975.

From: Barcelona and /or Tiracon Ports to Lagos/Apapa Ports.

Part shipment is ~~Prohibited~~/Permitted

Transhipment is Prohibited/~~Permitted~~

This credit is valid in ....New York..... until

31st May, 1976 .....for presentation for
(date)

payment in accordance with the conditions endorsed hereon.

Draft(s) presented must be drawn under this letter of credit (stating its number and date) and the amount(s) entered thereon must be endorsed by the correspondent bank.

We undertake that all drafts drawn in compliance with the terms of this credit will be honoured on receipt of the agreed shipping documents. The correspondent bank is required to send the original documents to us by Express Registered Airmail(duplicate by following airmail).

Please advise beneficiary (without adding your confirmation) of our authority given to you to pay on sight of documents.

Additional Instructions: Part payments allowed. Payments against documents. Credit to be advised through First National City Bank, 23rd Street and Lexington Avenue, New York, N.Y. 10010, U.S.A. All documents are to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos.

Special Instructions

Please see attached Appendix.

Except otherwise stated this credit is subject to Uniform Customs and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222

Yours faithfully,

Bill Manager.

Countersigned:

14/7/75

Asst. Chief of Banking Operations.

Timber
Lagos
PRIVATE MAIL BAG [illegible]; CABLES: [illegible]
TELEPHONE [illegible]

A P P E N D I X

In respect of CNI/80/75/169

Special Instructions:

1) Packing: Packing shall be in 6-ply kraft paper bags each containing 50 kgs G/W. Also 3-ply empty spare bags to be supplied Free of cost, equal to 3% of total number of filled bags comprising each consignment.

2) Shipment: Shipment shall commence within 45 days after receipt of the letter of credit in New York by the seller. Delivery shall be at the rate of 20,000 metric tons per month plus/minus 10% at buyer's option, or plus such additional quantity as the seller may be able to deliver.

3) Insurance: Insurance (F.P.A.) by the seller shall be from Barcelona and/or Piraeus to the Lagos/Apapa ports. The buyer shall insure the goods against all risks during the discharge at the Lagos/Apapa Ports and therefrom to his warehouse.

4) Unloading: The buyer shall arrange the discharge of the cargo from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from customs and complying with all necessary formalities and shall pay all clearance charges, customs duties, town dues and anchorage dues.

5) Demurrage: Unloading of each consignment shall be completed within 10 days where such consignment is of 10,000 metric tons pro rata in the case of any greater or lesser quantity. At the elapse of such period, (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour-Master, whether the vessel is berthed or not), demurrage not exceeding U.S.$4,000.00 per diem shall be for the account of the buyer provided that the seller shall have given due notice to the buyer by cable of the departure from the port of loading of each consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the letter of credit on presentation at the beneficiary's bank of Time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's Agents in Lagos.

6) Concon Party terms are acceptable.

7) All Bank and transfer charges are for the account of the buyer.

EXHIBIT 11 TO SIMMS AFFIDAVIT - MAY 8, 1975 LETTER FROM MORGAN GUARANTY TO CHENAX AND CHENAX LETTER OF CREDIT DATED APRIL 25, 1975

Exhibit 11

2-75-4M

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK

INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

FORM 11-4-9468

2

May 8, 1975

Chenax Majesty Inc. of
1 Union Square West
New York, N. Y. 10003

On all communications please refer to
OUR REFERENCE NUMBER
A-08740

Dear Sirs:

This refers to our telex of April 22, 1975 and of today thru Schroder, Munchmeyer, Hengst & Co., Ballindam 33, D-2000 Hamburg 1, Western Germany.

We are instructed to advise you of the establishment by Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria of their IRREVOCABLE Credit No. CBN/DO/75/79 in your favor

for U.S. $14,400,000.00 (FOURTEEN MILLION FOUR HUNDRED THOUSAND U.S. DOLLARS) (plus or minus ten percent)

available upon presentation to us of your drafts at sight on us, for 100% of the C.I.F. invoice value, accompanied by:

Commercial Invoice in quadruplicate describing the merchandise as indicated below.

Insurance Certificate in duplicate covering ALL RISKS as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%. Insurance (against all risks, 2% deductible) by the Seller shall be from Barcelona and/or Tarragona to the Lagos/Apapa Port.

Full set (2/2) clean on board Bills of Lading issued to order, blank endorsed, marked notify The Permanent Secretary, Ministry of Defence, Lagos, marked freight prepaid dated latest May 15, 1976. Charter Bills of Lading acceptable.

Evidencing shipment of 240,000 metric tons of cement at $60.00 per metric ton conforming to Spanish Specification P.350 plus or minus 10% at Seller's option as per agreement signed on March 20th, 1975. from Spain to Lagos/Apapa Port, Shipment to commence within 45 days after receipt of the letter of credit in Hamburg by the seller. (and the letter of credit is subject to our amendment* Delivery shall be at the rate of 20,000 metric tons per month plus or minus 10% at Seller's option.
*in this respect).
Partial shipments and payment permitted. Transhipment prohibited.

This credit is issued in your favor and/or transferee. This credit is transferable to second beneficiaries including abroad. Should you desire to transfer same, such transfer will be subject to the return to us of this advice together with your written instructions on either of the enclosed forms. Our transfer charges are for the buyer's account.

This letter of credit is confirmed by the Central Bank of Nigeria, Lagos.

All documents to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos, Nigeria.

Our principals state: "Demurrage: Unloading of each consignment of cement (which shall be the responsibility of the buyer) shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour master whether the vessel is berthed or not) demurrage of U.S. $4,100.00 per diem

- continued -

OFFICE COPY - NOT NEGOTIABLE

2-75-4M

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK

INTERNATIONAL BANKING DIVISION

23 WALL STREET, NEW YORK, N. Y. 10015

FORM 11-4-9460

May 8, 1975

2

Chenax Majesty Inc. of
1 Union Square West
New York, N. Y. 10003

On all communications please refer to
OUR REFERENCE NUMBER
A-02740

shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer by cable of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the Beneficiary's Banker, of time-sheets and statements of facts duly certified as correct by the ship's master and by the Ship's agents in Lagos."

Except as otherwise expressly stated herein, this advice is subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce, Brochure No. 222.

Your drafts must indicate that they are drawn under the aforementioned Irrevocable Credit No. CBN/NO/75/79 dated April 25, 1975 of the Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria and must be presented to our Commercial Credits Department, 15 Broad Street, New York, N. Y. 10015 with specified documents not later than May 31, 1976, on which date this advice expires.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

OFFICE COPY - NOT NEGOTIABLE

Private Mail Bag: 12194 - CABLES: CONBANK

91a

CONFIDENTIAL

Date: 25th April, 1975.

DOCUMENTARY CREDIT

CONFIRMATION OF T.LEX OF: 21st April, 1975.

THE PRESIDENT,
MORGAN GUARANTY TRUST CO.,
23, WALL STREET,
NEW YORK,
U. S. A.

(Correspondent Bank)

CREDIT NO.
CBN/20/75/79

Dear Sirs,

We hereby request you to open and advise our confirmed/irrevocable/ transferable/~~revocable~~ abroad Documentary Credit in favour of Chenax Majesty Inc. of 1, Union Square West, New York, N.Y. 10003, U. S. A.

for an amount of U.S.$14,400,000.00 ± 10%

Fourteen million, four hundred x thousand U. S. A. Dollars plus or minus ten percent
(Amount in words)

available by their draft(s) at SIGHT for 100 %
(No. of days)

of the CIF/~~C&F~~ Invoice drawn on yourselves accompanied by the following documents (at least in duplicate unless otherwise indicated).

_____ Commercial Invoice in quadruplicate

_____ ~~Certificate of Origin in triplicate~~

_____ Insurance ~~Policy~~ Certificate covering ALL RISKS as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%.

_____ Full set clean on Board Bills of Lading made out to order and endorsed in blank, marked "Freight ~~Prepaid~~/~~Payable~~" dated latest 15th May, 1976 Claused "notify The Permanent Secretary, Ministry of Defence, Lagos".

Covering Shipment(s) of:

240,000 metric tons of cement at $60.00 per metric ton conforming to Spanish Specification P.350 plus or minus 10% at Seller's option as per agreement signed on the 20th March, 1975.

CONFIDENTIAL

From ..... SPAIN ..... 924 ..... to ..... Lagos/Apapa Port .....

Part Shipment is ~~Prohibited~~/Permitted

Transhipment is Prohibited/~~Permitted~~

This credit is valid in ..... United States of America ..... until

..... 31st May, 1976 ..... for presentation for payment in
(date)

accordance with the conditions endorsed hereon.

Draft(s) presented must be drawn under this letter of credit (stating its number and date), and the amount(s) entered thereon must be endorsed by the presenting bank.

We undertake that all drafts drawn in compliance with the terms of this credit will be honoured on receipt of the agreed shipping documents. The correspondent bank is required to send the original documents to us by Express Registered Airmail (duplicate by following airmail).

This letter of credit is confirmed by the Central Bank of Nigeria, Lagos.

Additional Instructions:

Part payment allowed. Payments against presentation of Shipping documents.

Credit to be advised through beneficiary's Banker: Schroeder, Hennchmeyer, Heugut & Co., D-2000 Hamburg 1, Ballindamm 33, Western Germany

All documents to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos, Nigeria.

Special Instructions:

Please see attached Appendix.

Except otherwise stated this credit is subject to uniform customs and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222.

Yours faithfully,

[illegible]

24/2/75

Countersigned:

[illegible]

Asst. Chief of Banking Operations.

000052

A P P E N D I X

CONFIDENTIAL

In Respect of Letter of Credit No. CBN/50/75/79

Special Instructions:

(1) Shipment: Shipment is to commence within 45 days after receipt of the letter of credit in Hamburg by the seller. Delivery shall be at the rate of 20,000 metric tons per monsem plus or minus 10% at Seller's option.

(2) Insurance: Insurance (against All Risks, 2% deductible) by the Seller shall be from Barcelona and/or Tirragona to the Lagos/Apapa Port.

(3) Demurrage: Unloading of each consignment of cement (which shall be the responsibility of the buyer) shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour master whether the vessel is berthed or not) demurrage of U.S.$1,100.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer by cable of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation of at the Beneficiary's Banker, of time-sheets and statements of facts duly certified as correct by the ship's master and by the Ship's agents in Lagos.

(4) Bill of Lading: Charter Bills of Lading acceptable.

(5) All bank and transfer charges in respect of the credit are for the buyer's account.

EXHIBIT 13 TO SIMMS AFFIDAVIT - AFFIDAVIT OF AUGUSTINE O. OKAFOR, SECRETARY OF NIGERIA'S CEMENT CONTRACTS NEGOTIATING COMMITTEE, SWORN TO DECEMBER 16, 1976 AND ATTACHMENTS THERETO

Exhibit 13

IN THE [illegible] STATE
IN THE LAGOS JUDICIAL DIVISION

6.16/11/76

INDEX NO.
76 JIV. 2745

BETWEEN:

NATIONAL AMERICAN CORPORATION ..... PLAINTIFF

AND

1. FEDERAL REPUBLIC OF NIGERIA
2. CENTRAL BANK OF NIGERIA } ..... DEFENDANTS

AFFIDAVIT

I, AUGUSTINE OGOCHUKWU CHAFOR, Male, Nigerian Citizen, Civil Servant of 28 Shobande Street, Akoka, Lagos, Nigeria, being duly sworn, state as follows:

1. I am the Secretary of the Nigeria's Cement Contracts Negotiating Committee. I make this affidavit in support of the positions of the Federal Republic of Nigeria (Nigeria) and the Central Bank of Nigeria (Central Bank) in opposition to the claims alleged against Nigeria and Central Bank by National American Corporation (National American) arising out of the cement contract between the Permanent Secretary of the Federal Ministry of Defence of Nigeria and National American dated April 3, 1975 and the Letter of Credit established pursuant thereto by Central Bank, identified as CBN/LC/75/100.

2. Nigeria's Cement Contracts Negotiating Committee (Negotiating Committee) was established by the Government of Nigeria. The Negotiating Committee is made up of members from various Ministries of the Government of Nigeria. The Negotiating Committee, together with the Federal Ministry of Defence and with Central Bank, has been working to resolve the critical port congestion in Lagos Harbour.

..../

resulting from shipments of cement pursuant to the cement contracts entered into by the Federal Ministry of Defence. The efforts of the Negotiating Committee, Federal Ministry of Defence and Central Bank, have resulted in the renegotiation of fully two-thirds of the cement contracts and the settlement and discharge of claims arising thereunder for cement and demurrage.

3. In early February 1976 the Federal Ministry of Defence and Central Bank entered into Agreements of Discharge with National American and International Trade and Finance Espanola, S.A. (Intrafinsa) relating to National American's cement contract and the Letter of Credit established pursuant thereto. Copies of these Agreements of Discharge are attached hereto.

4. Subsequent to the execution of the Agreements of Discharge, the Negotiating Committee concluded negotiations with National American and Intrafinsa, the terms of which are reflected in the attached copy of Negotiating Committee's written certification, dated February 17, 1976. These terms are within the guidelines established by the Negotiating Committee for resolving the cement contracts problems, and are typical of the agreements reached with other cement suppliers.

5. As a result of a general investigation ordered by the Government of Nigeria to determine the identity of those cement suppliers responsible for having submitted falsified or unsatisfactory documentation in support of demurrage claims or whose vessels had departed Nigerian territorial waters before unloading cement cargo and without permission, it was discovered that seven of the twelve additional American/Intrafinsa vessels accepted by the Negotiating Committee in its settlement negotiations with National

..../3

American/Intrafinsa had departed Nigerian territorial waters with their cement cargo and without permission.

6. On May 19, 1976 the Negotiating Committee notified National American by cable of the missing vessels and requested National American to explain the circumstances of the missing vessels and their cargo. To date no response has been received from National American. A copy of the Negotiating Committee's cable is attached hereto together with a copy of a letter dated July 20, 1976 from the Federal Ministry of Transport to the Governor of Central Bank which identifies the seven vessels and their cement cargo. All the cement on board the missing vessels had been paid for in full in Nigeria.

7. The Negotiating Committee, in accordance with the attached settlement agreements, has not approved payment of demurrage to National American by virtue of the fact that seven of its vessels, with cement cargo, have departed Nigerian territorial waters without permission or explanation.

8. I make this affidavit conscientiously believing the same to be true and correct.

.....
DEPONENT

Sworn to at the Lagos High Court Registry this 16th day of December, 1976.

BEFORE ME

.....
COMMISSIONER FOR OATHS

I hereby certify that Mr. V. O. Idowu whose signature is appended herewith is a Commissioner for Oaths in the Lagos State

CHIEF REGISTRAR
HIGH COURT, LAGOS

16/12/76

AGREEMENT OF DISCHARGE

THIS AGREEMENT is made the 6th day of Feb. 1976 One thousand nine hundred and seventy six BETWEEN THE PERMANENT SECRETARY FEDERAL MINISTRY OF DEFENCE whose address is at Republic House, Marina, Lagos (hereinafter called "Permdefence") of the one part AND National American Corp. 1 E. 57th St., New York, N.Y., USA & International Trade & Finance Espanola SA., Avenida de Brasi 5, Madrid, Spain represented by Doris D. Delia (hereinafter called the "Supplier"O of the other part

W H E R E A S by a Contract dated 14th May 1976 made between the Permdefence and the Supplier the Supplier undertook to supply for reward 240,000 metric tonnes of cement for the consideration and demurrage provisions in the said contract CBN/BO/75/100

AND WHEREAS a total of 70,830 metric tonnes of cement have either been delivered under the said Contract or are at present

AND WHEREAS the parties have agreed that owing to the present congestion of Nigerian ports any further deliveries of cement or any further performance of the terms of the said Contract have become impossible

AND WHEREAS the Permdefence and the Supplier have decided upon mutual release and discharge from the terms of the said Contract

NOW it is hereby agreed as follows:

Each of the parties hereto hereby releases and discharges the other of them from all sums of money actions proceedings accounts claims and demands whatsoever which each of them now has or at any time heretofore had or may have against the other for or on account of or in relation to any act omission cause matter or thing whatsoever relating to the said Contract

AND the Supplier hereby indemnifies the Permdefence against all claims demands actions proceedings costs loss damages and expenses which may be brought or made against Permdefence or which may be suffered by Permdefence as a result of this Contract (see Provisio 1&2 on back of this page)

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first above-written

Provided: 1. That the Central Bank shall within 30 days of the execution of this agreement pay to the Beneficiaries the full value of the cement already delivered as reflected in the bills of lading and commercial invoices already in the possession of the Morgan Guarantee Trust Co. in New York.

2. That demurrage payments shall be made to the beneficiaries within 14 days of the presentation of the documents to the Nigerian Ports Authority and shall so continue until the final discharge of each vessel at a Nigerian Port.

THE COMMON SEAL of the within-named
PERMANENT SECRETARY FEDERAL
MINISTRY OF DEFENCE was hereunto affixed our
presence:

(1) Signature:

Address: Ministry of Defence, Lagos

Occupation: Federal Civil Servant.

(2) Signature:

Address: Ministry of Defence, Lagos

Occupation: Federal Civil Servant

SIGNED SEALED AND DELIVERED BY
the within-named
in our presence:

Director:

Secretary

6 FEB 1979

INTERNATIONAL TRADE & FINANCE
ESPAÑOLA, S. A.
-INTRAFINSA-

by:

AGREEMENT OF DISCHARGE

B E T W E E N CENTRAL BANK OF NIGERIA a bank incorporated under the Laws of the Federal Republic of Nigeria and having its registered office at Tinubu Square, Lagos (hereinafter called "Centralbank") of the one part and National American Corp. & International Trade & Finance Espaniola SA. represented by Doris D. Delia (hereinafter called the "Beneficiary") of the other part

W H E R E A S by a letter of Credit No. CBN/BO/75/100 dated 14th May 1975 Centralbank undertook payment for the supply of metric tonnes of cement and demurrage in the manner provided in the said original Letter of Credit AND WHEREAS a total of 70,830 metric tonnes of cement have either been delivered under the said Letter of Credit or are at present awaiting delivery in vessels lying within Nigerian territorial waters

AND WHEREAS the parties have agreed that owing to the present congestion of Nigerian ports any further deliveries of cement or any further performance of the terms of the Letter of Credit have become impossible

AND WHEREAS the Centralbank and the Beneficiaries have decided upon mutual release and discharge from the terms of the said Letter of Credit

NOW it is hereby agreed as follows:

Each of the parties hereto hereby releases and discharges the other of them from all sums of money actions proceedings accounts claims and demands whatsoever which each of them now has or at any time heretofore had or may have against the other for or on account of or in relation to any act omission cause matter or thing whatsoever relating to the said Letters of Credit

And the Beneficiaries hereby indemnify the Centralbank against all claims demands actions proceedings costs loss damages and expenses which may be brought or made against Centralbank or which may be suffered by Centralbank as a result of this Letter of Credit(see Proviso 1&2 on back of this page)

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year above-written

Provided:

1. That the Central Bank shall within 30 days of the execution of this agreement pay to the Beneficiaries the full value of the cement already delivered as reflected in the bills of lading and commercial invoices already in the possession of the Morgan Guarantee Trust Co. in New York

2. That demurrage payments shall be made to the Beneficiaries within 14 days of the presentation of the documents to the Nigerian Ports Authority and shall so continue until the final discharge of each vessel at a Nigerian Port.

THE COMMON SEAL of the within-named CENTRAL BANK OF NIGERIA was hereunto affixed in our presence:

Governor:

Secretary

THE COMMON SEAL of the within-named Beneficiary was hereunto affixed in our presence:

6 FEB. 2015

INTERNATIONAL TRADE & FINANCE ESPAÑOLA, S. A. -INTERFINSA-

Director:

Secretary:

CEMENT CONTRACTS NEGOTIATING COMMITTEE

We hereby certify that we have concluded negotiations with National American Corporation of 1 E. 57th St., New York, N.Y. USA & Intrafinsa, Avenida de Brasil 5, Madrid, Spain represented by Doris D. Delia and that we have agreed as follows:

1. That the balance of 169,170 metric tonnes of cement under contract with the Permanent Secretary Ministry of Defence be cancelled without any payment of compensation costs and indemnities however arising and that any letter of credit issued in furtherance of the contract be construed accordingly

2. That National American Corp., 1 E. 57th St., New York, N.Y. USA be invited to negotiate for the supply of cement in the event of a resumption of cement importation

3. That subject to the presentation of satisfactory documents all existing cargo and demurrage obligations be met on the basis of pro rata construction of all demurrage clauses

4. That the vessels listed in the Schedule at present awaiting discharge of cargo be accepted in accordance with paragraph 3 of this agreement

5. That National American Corp., & International Trade & Finance undertake to return to the Central Bank of Nigeria the original letter of credit within 14 days of the resumption of payments as stipulated in paragraph 3

SCHEDULE

Name	metric tons	time arrived
1. Cretan Life	500	13/7/75
2. Naimbana	2,730	4/9/75
3. Rio Doro	10,500	6/10/75
4. Jotina	5,600	12/9/75
5. Joboy	7,500	21/9/75
6. Cherryfield	10,800	8/10/75
7. Aristotle	8,000	3/10/75
8. Astrid	3,200	16/10/75
9. Ardenal	5,700	17/10/75
10. Sandrina	5,300	22/10/75
11. Buna	6,800	11/11/75
12. Nikolaos H.	4.200	12/11/75

DATED the 17th day of February 1976

Fred Ebe

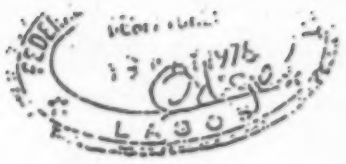
D. A. Okwuraiwe

V. O. Kukoyi

Lt-Col. M. Magoro

G. O. Mogaji

H. F. David-West



T1959/35/C4/T/33

19/5/76

NATIONAL AMERICAN CORPORATION
1 EAST 57TH STREET N YORK
N Y10022 U S A

THE CEMENT CONTRACTS NEGOTIATING COMMITTEE HAS BEEN INFORMED THAT SOME OF YOUR VESSELS HAVE LEFT NIGERIA'S TERRITORIAL WATERS WITHOUT PERMISSION STOP REQUESTS YOU COME TO EXPLAIN CIRCUMSTANCES OF MISSING SHIPS AND THEIR CARGO

COMMITTEE SECRETARY
c/o SECTRANS LAGOS

(A. O. OKAFOR)
for Permanent Secretary,
Fed. Ministry of Transport.

T/24

FEDERAL MINISTRY OF [illegible]

[illegible] DIVISION

LAGOS.

P.M.B. No. 12577

Telegrams SECTRANS

Telephone 52546

Ref. No. T1959/35/C4/T/163

Date 28th July, 1976

The Governor,
Central Bank of Nigeria,
Tinubu Square,
LAGOS.

D.C.B.O. II

P.L.O. Foreign [illegible]

29/7/76

CENTRAL BANK OF NIGERIA

(Attention: Principal Legal Officer)

Dear Sir,

Re: National American Corporation .. Plaintiff

-against-

Federal Republic of Nigeria; and
Central Bank of Nigeria ... Defendants

I am directed to refer to your letter of 23rd July, 1976 and to confirm that there has been no change in the position since May 1976 inspite of our cablegram (copy attached for easy reference) to the company alerting it of the situation. Seven vessels belonging to the company are still on our missing ships list. The particulars of the vessels, according to the information made available by a representative of the company to the Cement Contracts Negotiating Committee, are as follows:-

	Name of Vessel	Tonnage	Date of Arrival
(1)	Jotina	5600	12/9/75
(2)	Joboy	7500	21/9/75
(3)	Astrid	3200	16/10/75
(4)	Ardenal	5700	17/10/75
(5)	Sandrina	5300	22/10/75
(6)	Euna	6800	1/11/75
(7)	Nikolaos H.	4200	12/11/75.

Yours faithfully,

(A. O. OKAFOR)
for Permanent Secretary.

DEFENDANTS' AMENDED NOTICE OF MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REFER TO JUDGE G. L. GOETTEL

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 2809 (GLG)

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 2348 (LWP)

AMENDED NOTICE OF MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS

CHENAX MAJESTY, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 3045 (MEF)

S I R S :

PLEASE TAKE NOTICE that upon the affidavits of James G. Simms, sworn to October 24, 1977 and November 3, 1977 (annexed), the affidavits and exhibits appended thereto, all pleadings, papers and proceedings had heretofore herein, Federal Republic of Nigeria and Central Bank of Nigeria, defendants in each of the above-captioned actions, will move this Court at a hearing before the Honorable G. L.

Goettel, United States District Judge, in Room 402 of the United States Courthouse, Foley Square, New York, New York, on the 18th day of November 1977 at 10:00 a.m. or as soon thereafter as counsel can be heard for an order transferring the actions commenced by plaintiff Decor by Nikkei International, Inc., presently assigned to the Honorable L. W. Pierce, and by plaintiff Chenax Majesty, Inc., presently assigned to the Honorable M. E. Frankel, to the calendar of the Honorable G. L. Goettel, before whom the action commenced by plaintiff East Europe Import-Export, Inc. is pending, and to consolidate these three actions on the grounds that they involve a common question of law or fact as provided in Federal Rules of Civil Procedure, Rule 42(a), and on the further ground that the Honorable G. L. Goettel has rendered an opinion as to the claims alleged herein by Decor by Nikkei International, Inc. and by Chenax Majesty, Inc., in connection with an unsuccessful application by both to intervene as additional parties plaintiff in National American Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria, Index No. 76 Civ. 2745 (GLG), which opinion is reported at 425 F.Supp. 1365 (SDNY, 1977); and for an order dismissing the complaints in the three captioned actions pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that, as to each of the claims alleged in the three captioned actions, this Court is without jurisdiction over the subject matter of the claim or over the defendants, and each of the plaintiffs has failed to state a claim upon which relief can be

granted; and for such other and further relief as the Court may deem appropriate.

New York, New York
November 3, 1977

KISSAM, HALPIN & GENOVESE

By James B. Simmons
A member of the Firm
Attorneys for Defendants
Federal Republic of Nigeria
and Central Bank of Nigeria
120 Broadway
New York, New York 10005
(212) 962-2000

TO: LEWIS S. SANDLER, ESQ.
Attorney for Plaintiffs
Decor by Nikkei International, Inc.
and Chenax Majesty, Inc.
620 Fifth Avenue
New York, New York 10020

BAILEY MARSHALL HOENIGER & FREITAG
Attorneys for Plaintiff
East Europe Import-Export, Inc.
345 Park Avenue
New York, New York 10022

SECOND AFFIDAVIT OF JAMES G. SIMMS, ESQ., IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER AND CONSOLIDATE AND TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 2809 (GLG)
DECOR BY NIKKEI INTENRATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 2348 (LWP)
CHENAX MAJESTY, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 3045 (MEF) SECOND AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES G. SIMMS, being duly sworn, deposes and says:

1. I am a member of Kissam, Halpin & Genovese, attorneys for the Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank), defendants in each of the three above captioned actions. I make this second affidavit in support of the motion of Nigeria and Central Bank to transfer the actions commenced by Decor by Nikkei International, Inc., presently assigned to the Honorable

L.W. Pierce (Nikkei action), and by Chenax Majesty, Inc., presently assigned to the Honorable M.E. Frankel (Chenax Majesty action), to the calendar of the Honorable G.L. Goettel and to consolidate these actions with the action brought by East Europe Import-Export, Inc., presently assigned to the Honorable G.L. Goettel (East Europe action), on the ground that all three actions involve a common question of law or fact as provided in Federal Rules of Civil Procedure, Rule 42(a); and in addition, I make this affidavit in support of the motion of Nigeria and Central Bank for a further order dismissing the complaint in each of the three captioned actions pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that as to each of the claims alleged in the three captioned actions, this Court is without jurisdiction of the subject matter and of the defendants, and each plaintiff has failed to state a claim upon which relief may be granted.

2. In support of this motion, Nigeria and Central Bank submitted the affidavit of your deponent, sworn to October 24, 1977, and the affidavits and exhibits appended thereto (Simms affidavit). Exhibit 12 to the Simms affidavit is the unexecuted affidavit of His Excellency, the Honorable O. Jolaoso, Ambassador of Nigeria to the United States. The Simms affidavit, at paragraph 8, explains that Ambassador Jolaoso had reviewed and approved the subject affidavit; and that the executed affidavit would be submitted after it had been prepared in official form by the Nigerian Embassy in Washington, D.C. Exhibit 1 hereto is the executed affidavit of Ambassador Jolaoso, sworn to October 25, 1977. Appended thereto is a copy of Nigeria's Government Notice No. 1434, entitled "Regulations on Sailings and Arrivals of Vessels into Nigerian Ports", dated August 9, 1975.

3. On December 19, 1975, Nigeria's Ports (Emergency Provisions) Decree 1975; Decree No. 40 of 1975, became effective; a copy of the Decree is annexed hereto as Exhibit 2. The Explanatory Note which follows the provisions of the Ports Emergency Decree states that:

> "As an important measure towards ports decongestion, the Decree makes it obligatory for the owner or agent of the owner of every ship intending to enter into any port in Nigeria to supply certain information concerning that ship and its movements to the Nigerian Ports Authority at least two months before the departure of the ship for Nigerian ports. The Authority may after receipt of the required information issue an entry notice to the ship concerned.
>
> If the master of a ship contravenes the provisions of the Decree he shall be liable to imprisonment for two years without the option of a fine."

The regulations with respect to the sailings and arrivals of vessels into Nigerian ports contained in the Ports Emergency Decree, the violation of which became a criminal offense pursuant to the Decree, are substantially the same regulations as became effective pursuant to Government Notice No. 1434, dated August 9, 1975, which is identified in Ambassador Jolaoso's affidavit and appended thereto (Exhibit 1 hereto). It is respectfully submitted that the ports congestion in Nigeria remained critical through 1975; and that it became necessary for the Government of Nigeria to impose criminal sanctions with respect to violations of the regulations on sailings and arrivals of vessels into Nigerian ports, so as to permit continued commerce in essential consumer goods.

4. The plaintiffs in each of the three captioned actions allege jurisdiction under the Foreign Sovereign Immunities Act of 1976, Public Law 94-583. A statement of

the legislative history and purpose and a section-by-section analysis of the Immunities Act is contained in 1976 U.S. Code Congressional and Administrative News page 6604, et seq., a copy of which is annexed hereto as Exhibit 3.

James G. Simms

Sworn to before me this
3rd day of November, 1977.

Notary Public

PETER J. DRAWBRIDGE, JR.
NOTARY PUBLIC, State of New York
No. 24-4631979
Qualified in Kings County
Commission Expires March 30, 19[illegible]

EXHIBIT 1 TO SIMMS SECOND AFFIDAVIT -
AFFIDAVIT OF HON. OLUJIMI JOLAOSO, AMBASSADOR TO
THE UNITED STATES FROM NIGERIA SWORN TO OCTOBER 25, 1977

Exhibit 1

EMBASSY OF NIGERIA
2201 M STREET, N. W.
WASHINGTON, D. C. 20037

AFFIDAVIT

District of Columbia): ss.:

OLUJIMI JOLAOSO, being duly sworn, deposes and says:

1. I am the Ambassador to the United States from the Federal Republic of Nigeria. I make this affidavit on behalf of the Federal Republic of Nigeria (Nigeria) and the Central Bank of Nigeria (Central Bank), for use in several actions pending in the United States District Court for the Southern District of New York wherein Nigeria and Central Bank are defendants, which actions relate to cement contracts entered into by the Permanent Secretary of the Federal Ministry of Defense of Nigeria and letters of credit established by Central Bank pursuant to these cement contracts (the New York litigation).

2. I, on behalf of the Government of Nigeria and on behalf of Central Bank, assert sovereign immunity as a defense to the claims alleged by the plaintiffs in the New York litigation and as a defense to any application by any of the plaintiffs in the New York litigation to attach, or in any way to proceed against, any monies or other property of the Government of Nigeria or of Central Bank.

3. Central Bank was established in 1958 under the Central Bank of Nigeria Act 1958. Section 4 (1) of the Act

provides that:

> "The principal objects of the Bank shall be to issue legal tender currency in Nigeria, to maintain external reserves to safeguard the international value of that currency, to promote monetary stability and a sound financial structure in Nigeria and to act as banker and financial adviser to the Federal Government."

4. Central Bank is a department and organ of the Government of Nigeria and is the only agent of the Government authorized to hold funds of the Government of Nigeria extra-territorially. Central Bank acts as banker and financial advisor to the Government of Nigeria; it has no authority to exercise, and does not exercise, any judgment with respect to the financial transactions of the Government of Nigeria, but acts in accordance with the directives and requests of the Federal Ministry of Finance of the Government of Nigeria.

5. In August 1975, the Nigerian port of Lagos was completely congested by vessels principally carrying cement; these vessels were either berthed for unloading or were lying in Nigerian territorial waters awaiting clearance for berthing. Almost all available berths for unloading were preempted by the vessels discharging cement and as a result, the new Military Administration of the Federal Government of Nigeria which came into power on July 29, 1975, was greatly concerned by the scarcity of essential consumer goods (milk, sugar, salt, flour and other essentials). The congestion in the port of Lagos was causing a severe and dire disruption of vital commerce and by August 1975 was a critical threat to the economic and social survival of Nigeria. The new Government of Nigeria acted by adopting official measures with the force of law to deal with the vessels already in Nigerian territorial waters, to regulate the arrival of

new vessels and to allocate available berthing and warehouse facilities to allow for the importation of essential consumer goods. The Government published "Regulations on Sailings and Arrivals of Vessels into Nigerian Ports", Government Notice No. 1434,dated August 9,1975, issued by the Permanent Secretary, Federal Ministry of Transport, Lagos, Nigeria, a copy of which is appended hereto as an exhibit. In addition, the new Government of Nigeria communicated with each of the cement suppliers who had contracted with the Federal Ministry of Defense of Nigeria to advise of the port congestion and the substance of Government Notice No. 1434, and to invite each of the cement suppliers to renegotiate the partially performed or unperformed cement contracts, a necessity dictated by the critical ports congestion. The Government of Nigeria established the Cement Contracts Negotiating Committee for the purpose of meeting with the cement suppliers; and since the organization of this Committee, meetings have been conducted and many of the cement contracts have been successfully renegotiated.

Olujimi Jolaoso

Sworn to before me this
25th day of October,1977.

EMBASSY OF NIGERIA D.C. WASHINGTON

Commissioner for Oaths

Government Notice No. 1434

REGULATIONS ON SAILINGS AND ARRIVALS OF VESSELS INTO NIGERIAN PORTS

All Shipping Companies/Agents operating in Nigeria are requested to advise their Overseas Principals of the following regulations regarding arrivals of vessels in Nigerian Ports.

(1) With effect from 15th August, 1975, all Shipping Agents must register with the Nigerian Ports Authority before undertaking their activities in Nigeria.

(2) All shipping Companies/Agents must furnish the Nigerian Ports Authority, *at least two months prior to the departure of their vessels from the loading ports*, the following vital information :—

(a) Port/ports of sailing and estimated time of departure ;

(b) Port/ports of discharge in Nigeria ;

(c) Estimated dates of arrival in Nigerian Port/ports ;

(d) Detail information about cargo commodities to be imported into Nigeria ;

(e) Total deadweight/freight tonnage of cargo, e.g. general or bulk, carried in such vessels ;

(f) Description of the vessels, i.e. length, breadth and draught of such vessels.

(3) On receipt of the above information, the Nigerian Ports Authority will co-ordinate all sailing as well as regulate the arrivals of vessels in Nigerian ports.

(4) The information supplied will enable the Authority to confirm and approve such sailings or in the alternative, alter and fix a more suitable date(s) acceptable to the Authority.

(5) After the confirmation or alteration of the departure dates approved by the Authority, the Shipping Companies/Agents shall convey this information to their various Principals Overseas who in turn will be expected to arrange suitable sailings which should conform with the Authority's bookings.

A reconstituted Ports Operation Committee will be charged with the responsibility for allocating berths to ships which have obtained clearance with the Nigerian Ports Authority.

The Committee will, among others, consist of the Nigerian Ports Authority officials and some Shipping Companies/Agents' representatives and will normally meet once weekly.

There will also be weekly publication announcing estimated dates of arrival of vessels in Nigerian Ports and indicating their respective berths. This is to facilitate a pre-plan operation by all interested organisations.

Failure of any Shipping Company/Agent to comply with these regulations shall result in the Authority refusing service to their vessels.

Until the problem of port congestion is resolved the Ministry of Finance has been requested to regulate the process by which it provides automatic foreign exchange convers to private ship charterers.

All enquiries in respect of this release should be forwarded to the appropriate Port Managers.

T. A. COKER,
Permanent Secretary,
Federal Ministry of Transport,
Lagos

9th August, 1975.

NIKKEI NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	REFER TO JUDGE PIERCE 77 Civ. 2348 PLAINTIFF'S NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of TETSUO OZAWA, duly sworn to November 9, 1977, the exhibits annexed thereto, the complaint herein, and all other papers and proceedings heretofore had herein (including but not limited to defendants' notice of motion to transfer and consolidate and to dismiss, and supporting affidavits and exhibits thereto), plaintiff herein will cross-move this Court on the day of , 197 , at 10:00 a.m. or as soon thereafter as counsel can be heard, at the United States Courthouse, Foley Square, New York, New York, for an order

(a) pursuant to F.R.Civ.P. 56(a) and (c), granting plaintiff summary judgment on the issue of liability, and determining that defendant FEDERAL REPUBLIC OF NIGERIA ("NIGERIA") breached (anticipatorily or otherwise) the contract between it and plaintiff pursuant to which it agreed to purchase from plaintiff, at $60.00 per ton, 240,000 metric tons of Portland cement (plus or minus 10% at plaintiff's option), C.I.F. Lagos/Apapa, Nigeria, and to cause defendant CENTRAL BANK OF NIGERIA ("CBN") to establish, through a New York bank, a confirmed,

irrevocable letter of credit in plaintiff's favor for $14,400,000, i.e. the aggregate contract price, and further determining that defendant CBN breached said confirmed, irrevocable letter of credit thus established in plaintiff's favor at Morgan Guaranty Trust Company of New York;

(b) pursuant to F.R.Civ.P. 56(a), granting plaintiff summary judgment for $1,852,000 representing the liquidated minimum loss of profits which plaintiff sustained with respect to 240,000 metric tons, as to which plaintiff had contracted with Productos Fontanet, S.A. to supply and deliver the same to defendant Nigeria at a cost to plaintiff of $54.00 per ton for the first 8,500 tons (which was paid), and $52.00 per metric ton for the next 111,500 tons, resulting in a profit to plaintiff on the latter tonnage of $8.00 per ton or $892,000. Since the contract with Productos Fontanet, S.A. gave plaintiff an option to purchase the second 120,000 tons of cement required by plaintiff's contract with defendant Nigeria at $52.00 per metric ton, plaintiff would have, realized a minimum profit on this additional 120,000 tons of $960,000 resulting in a minimum total profit on the 231,500 tons of $1,852,000; and

(c) setting down for assessment of damages, or inquest, the other damages suffered by plaintiff, including but not limited to loss of additional profits on the 144,000 metric tons (inclusive of the 10%, or 24,000 tons, plaintiff had the option of selling to Nigeria) plaintiff was not obligated to purchase from Productos Fontanet, S.A. and interest on the lost profits; and

(d) granting plaintiff such other, further, and different relief as may be just and proper in the premises.

DATED: New York, N.Y.
November 10, 1977

LEWIS S. SANDLER
Attorney for Plaintiff
620 Fifth Avenue
New York, New York 10020
(212) 765-1010

TO:

KISSAM, HALPIN & GENOVESE
Attorneys for Defendants
120 Broadway, New York 10005
(212) 962-2000

NIKKEI RULE 9(g) STATEMENT

PLAINTIFF-MOVANT'S STATEMENT, PURSUANT TO LOCAL GENERAL RULE 9(g), OF THE MATERIAL FACTS AS TO WHICH MOVANT CONTENDS THERE IS NO GENUINE ISSUE TO BE TRIED

1. Plaintiff and defendant Nigeria entered into a written contract dated April 23, 1975, for the sale by plaintiff and the purchase by Nigeria of 240,000 metric tons of Portland cement (plus or minus 10% at plaintiff's option) at U.S. $60.00 C.I.F. Lagos/Apapa, Nigeria, or an aggregate purchase price of $14,400,000 (Exhibit "A" to Ozawa aff.).

2. Pursuant to paragraph 1.(v) of said contract, defendant CBN, on or about July 14, 1975, established an irrevocable, transferable, divisible, and confirmed letter of credit (designated "CBN/BO/75/169") through First National City Bank, 23rd and Lexington Avenue, New York, New York in favor of plaintiff for $14,400,000 payable on sight drafts accompanied by specified documents, and caused Morgan Guaranty Trust Company ("Morgan"), 23 Wall Street, New York, New York to advise plaintiff of the establishment of said letter of credit (Exh."B" to Ozawa aff.).

3. Plaintiff duly commenced to perform the terms and conditions of said contract on its part; specifically, in or about September, 1975, plaintiff

(a) contracted with Productos Fontanet, S.A. to supply and deliver to Nigeria, in accordance with the terms and specifications of the contract between plaintiff and Nigeria 240,000 metric tons of cement, the first 8,500 tons of cement C.I.F. Lagos/Apapa, at a cost to plaintiff of $54.00 per ton and the next 115,000 tons at $52.00 per ton. Furthermore, plaintiff had the option of purchasing the second 120,000 tons of cement under the contract with defendant Nigeria for $52.00 per ton, resulting in a profit to plaintiff of $8.00 per ton on all but the first 8,500 tons;

b) caused a vessel, to be loaded at a Spanish port with the first 8,500 tons of cement supplied by Productos Fontanet, S.A. and to make ready for departure for Lagos/Apapa in or about September, 1975; and caused Morgan to make payment for the first 8,500 tons of cement from the letter of credit.

4. In late August of 1975, defendant CBN had cabled plaintiff that

> "in light present congestion at Lagos and other Nigerian ports Government has suspended importation cement for three months from 18 Aug x You are required to defer all further chartering and loading of ships as now scheduled under terms your agreement . . . (Exhibit "D").

5. Plaintiff never agreed, consented or assented to said purported unilateral alteration and change in its contract with Nigeria.

6. In late September, 1975, Morgan was instructed by defendant CBN to refuse payments under plaintiff's and other similar CBN letters of credit unless plaintiff and the other cement contractors similarly situated agreed (a) to give two months' advance notice to the Nigerian Ports Authority prior to the departure of each ship engaged to transport cement to Nigeria pursuant to the terms of said contracts; (b) not to ship any cement or further cement to Nigeria under said contracts unless prior clearance for each proposed shipment had been obtained from defendants; and (c) to other material changes in the terms of said contracts for the sale and delivery of cement to Nigeria and in the related letter of credit.

7. Morgan advised plaintiff of its receipt of said instructions from CBN, (Exhibits "E" and "F" to Ozawa aff.).

8. Plaintiff never agreed, consented or assented to said purported unilateral alterations and changes in the confirmed

irrevocable letter of credit for $14,400,000 established in its favor by defendant CBN.

9. Plaintiff has duly performed all the terms and conditions on its part of its contract with Nigeria and of the letter of credit established by defendant CBN in plaintiff's favor pursuant thereto, until prevented and excused from further performance by defendants' breaches (anticipatory or otherwise).

10. With respect to all but the first 8,500 tons of cement, plaintiff has never received any payment from Nigeria or CBN pursuant to said contract or letter of credit.

11. That portion of plaintiff's damages which represents plaintiff's loss of profits on 231,500 out of the 240,000 tons of cement (plus 10% at plaintiff's option) is liquidated, and amounts to $1,852,000 as set forth in paragraph 4(a) hereof.

AFFIDAVIT OF TETSUO OZAWA IN SUPPORT OF NIKKEI MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

Docket No. 77 C. 2348

A F F I D A V I T

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

TETSUO OZAWA, being duly sworn, deposes and says:

1. I am President of plaintiff, DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC. and I am personally familiar with all the facts set forth herein. I make this affidavit in support of plaintiff's motion for summary judgment on the issue of liability, and for partial summary judgment in the amount of $1,852,000 against defendants, which represents the liquidated portion of plaintiff's damages as to which no assessment of damages is required. The summons, complaint and notice of suit have been served on defendants pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Sections 1330, 1332, 1391, 1441 and 1602-1611. Defendants, prior to answer, have moved to dismiss the actions by reason of sovereign immunity and lack of subject matter jurisdiction. A copy of the complaint is annexed to defendants' moving papers.

2. Plaintiff is a New York corporation having a principal place of business in the County, City and State of New York.

3. Defendant, FEDERAL REPUBLIC OF NIGERIA ("Nigeria") is a foreign government located on the continent of Africa and, upon information and belief, defendant, CENTRAL BANK OF NIGERIA ("CBN") is a foreign banking institution having its principal place of business at Tinubu Square, Lagos, Nigeria.

4. Upon information and belief, Morgan Guaranty Trust Company ("Morgan") is a banking institution organized under the laws of the State of New York, and is authorized and licensed to do business in the State of New York. It has a principal place of business at 23 Wall Street, New York, New York.

5. On or about April 23, 1975, Nigeria entered into an agreement with plaintiff for the purchase of 240,000 metric tons of Portland cement (plus or minus 10% at plaintiff's option), at a price of $60.00 U.S. per metric ton C.I.F. Lagos, Nigeria for a total sum of $14,400,000. (the "Cement Contract"). A copy of the Cement Contract is annexed hereto as Exhibit "A".

6. Pursuant to the terms of the Cement Contract (Paragraph (v) thereof), on or about July 14, 1975, CBN issued and established at Morgan an irrevocable transferrable documentary credit identified as "CBN/BO/75/169" in the amount of $14,400,000. (hereinafter called "Letter of Credit"). The Letter of Credit was established to effect and guarantee Nigeria's payment of (1) the purchase price of the cement, (2) demurrage expenses at the rate of $4,100.00 per day, per ship, incurred in connection with the said Cement Contract. A copy of the Letter of Credit is annexed hereto as Exhibit "B".

7. On or about September 11, 1975, plaintiff entered into an agreement with Productos Fontanet, S.A. to furnish to Nigeria 120,000 metric tons of Portland Cement at a cost to plaintiff of $54.00 per metric ton for the first 8,500 tons and $52.00 per metric tons for the remaining 111,500 tons, resulting in a profit to plaintiff on the latter tonnage of $8.00 per ton

(Exhibit "C"). The contract gave plaintiff an option to purchase an additional 120,000 tons of the cement required under the Cement Contract at the $52.00 price. Therefore plaintiff would have also realized a minimum profit of $8.00 per ton on the second 120,000 tons. However, after October of 1975, when the balance would have been shipped, the price of the cement had fallen to $45.00 per metric ton. Consequently, plaintiff would have been able to make a profit of $15.00 per metric ton under the Cement Contract on the balance of 144,000 metric tons (inclusive of the additional 10%, or 24,000 tons, plaintiff had the option of selling to Nigeria pursuant to the Cement Contract).

8. In late August, defendant CBN cabled plaintiff as follows:

> "in light present congestion at Lagos and other Nigerian ports Government has suspended importation cement for three months from 18 Aug. x You are required to defer all further chartering and loading of ships as now scheduled under terms your agreement..." (Exhibit "D").

9. Nevertheless, during September, 1975, 8,500 tons of Portland Cement were loaded onto a vessel to be shipped to Nigeria pursuant to the Cement Contract. Upon loading the cement on the vessel, appropriate documents were issued which were presented to Morgan and payment thereunder was duly effected.

10. On or about September 30, 1975 and on or about October 22, 1975, Morgan advised plaintiff that it had been instructed by CBN that the irrevocable Letter of Credit had been amended so that Morgan was instructed to refuse payment unless documents presented for payment had been certified by CBN and unless plaintiff were to submit documents accompanied by a CBN certificate confirming that (1) plaintiff gave 2 months advance notice to the Nigerian Ports Authority prior to the departure of

each ship engaged to transport the ship, (2) clearance for said departures had been given. These amendments effectively revoked the Letter of Credit. These conditions, self-imposed by the defendants, were unauthorized, unilateral and wrongful amendments to the irrevocable Letter of Credit and the Cement Contract and constituted an anticipatory breach by Nigeria and CBN of their irrevocable obligations under the Cement Contract and the Letter of Credit. Copies of the September 30, 1975 and October 22, 1975 letters which quote from CBN's instructions to Morgan, are annexed hereto as Exhibits "E" and "F" respectively.

11. I understand that approximately 60 Letters of Credit similar to that issued to plaintiff had been issued by CBN for the purchase of Portland Cement by Nigeria. During November, 1975 and, again, in February, 1976, all of the letter of credit holders were summoned to Lagos, Nigeria in a purported effort to resolve what was in fact a flagrant breach of contract by Nigeria and CBN with regard to all of the letter of credit holders. Rather than offer a reasonable settlement, Nigeria attempted to induce all of the letter of credit holders to sign general releases. I attended the meetings on behalf of plaintiff and refused to sign such a release. I have made frequent demands of Nigeria and CBN to settle the dispute arising from their breach of contract, with absolutely no results. Nigeria and CBN have absolutely refused to respond in any manner whatsoever to plaintiff's letters or requests.

12. The liquidated damages suffered by plaintiff by reason of lost profits are $8.00 per ton on 231,500 tons of cement or $1,852,000. Additionally, plaintiff would have realized additional profits above $8.00 per ton on the latter 120,000 tons of the aforesaid 231,500 tons for which plaintiff has received no moneys. Furthermore, plaintiff had the option of selling to

Nigeria an additional 24,000 tons of cement at $60.00 per ton pursuant to the Cement Contract on which plaintiff would have made profits of as much as $15.00 per ton. Lastly, plaintiff incurred many incidental expenses arising from defendants' breach and is entitled to interest on its lost profits.

13. Plaintiff is undoubtedly entitled to summary judgment with respect to the issue of liability and with respect to profits it would have realized on 231,500 tons of cement of $8.00 per ton namely $1,852,000.00. I believe there is no meritorious defense to plaintiff's claim and that there are no set-offs or counterclaims available to defendants.

W H E R E F O R E, I respectfully urge the Court to grant to plaintiff judgment against defendants as follows:

(a) granting plaintiff summary judgment on the issue of liability, and determining that defendant Nigeria breached the aforesaid cement contract and defendant CBN the aforesaid irrevocable, confirmed letter of credit established by it in favor of plaintiff;

(b) granting plaintiff a present final, partial judgment for $1,852,000, representing the liquidated portion of plaintiff's damages as to which no assessment of damages or inquest is required, with interest; and

(c) setting down for early hearing and determination the assessment of the balance of plaintiff's damages, i.e. that portion of plaintiff's damages which is not liquidated and as to which an evidentiary hearing and assessment are required.

I further respectfully pray that, if and when this Court grants summary judgment to plaintiff for $1,852,000, that judgment be finalized pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The breaches of Nigeria and CBN are two years old; plaintiff has made every good faith effort to negotiate a

reasonable resolution of this controversy without receiving even the courtesy of a response. The breaches by Nigeria and CBN have placed plaintiff in a virtually insolvent financial position, and I believe it is clear that there is no just reason for any further delay in entering final judgment on the wholly liquidated portion of plaintiff's claim.

TETSUO OZAWA

Sworn and subscribed to before me this ____ day of November, 1977.

Notary Public

EXHIBIT B TO OZAWA AFFIDAVIT -
NIKKEI LETTER OF CREDIT DATED JULY 14, 1975
(ALSO REPRODUCED HEREIN AT PAGES 85a - 87a)

EXHIBIT "B"

Tinubu Square
Lagos
PRIVATE MAIL BAG 12194 : CABLES : CENBANK :
TELEPHONE

132a

Date: 14 JUL 1975

DOCUMENTARY CREDIT

Confirmation of Telex of: 13 JUL 1975

The Commercial Credit Department,
Morgan Guaranty Trust Company,
New York,
U.S.A.

(Correspondent Bank)

CREDIT NO.
CBM/BW/75/169

Dear Sirs,

We hereby request you to advise our irrevocable/transferable abroad/~~[illegible]~~ Documentary Credit in favour of Nikkei International Inc., 110 East 23rd Street, New York, N.Y. 10010, U.S.A.

for U.S.$14,400,000.00

Fourteen million four hundred thousand U.S. Dollars.
(Amount in words)

available by their draft(s) at ....Sight.....for 100.....%
(No. of days)
of the CIF/~~[illegible]~~ Invoice drawn on yourselves accompanied by the following documents(at least in duplicate unless otherwise indicated).

------ Commercial Invoice in quadruplicate

------ ~~[illegible]~~

------ Insurance ~~[illegible]~~ Certificate ~~[illegible]~~

------ Full set clean on Board Bills of Lading made out to order and endorsed in blank, marked "Freight Prepaid/Collected" dated latest 15th May, 1976.
The Permanent Secretary, Ministry of Defence, Lagos. claused "notify

Covering Shipment (s) of: 240,000 metric tons of Portland Cement conforming to B.S.S. 12/1958 plus or minus 10% at seller's option at U.S.$60.00 per metric ton to be purchased by Ministry of Defence, Lagos as per contract agreement signed on 21st April, 1975.

From: Barcelona and /or Piraeus Ports to Lagos/Apapa Ports.

Part shipment is ~~Prohibited~~/Permitted

Transhipment is Prohibited/~~Permitted~~

This credit is valid in New York until 31st May, 1976 for presentation for (date)

payment in accordance with the conditions endorsed hereon.

Draft(s) presented must be drawn under this letter of credit (stating its number and date) and the amount(s) entered thereon must be endorsed by the correspondent bank.

We undertake that all drafts drawn in compliance with the terms of this credit will be honoured on receipt of the agreed shipping documents. The correspondent bank is required to send the original documents to us by Express Registered Airmail(duplicate by following airmail).

Please advise beneficiary (without adding your confirmation) of our authority given to you to pay on sight of documents.

Additional Instructions: Part payments allowed. Payments against documents. Credit to be advised through First National City Bank, 23rd Street and Lexington Avenue, New York, N.Y. 10010, U.S.A. All documents are to be made and Directed: to The Permanent Secretary, Ministry of Defence, Lagos.

Special Instruction:

Please see attached Appendix.

Except otherwise stated this credit is subject to uniform customs and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222

Yours faithfully,

Bill Manager.

Countersigned:

14/7/75

Asst. Chief of Banking Operations.

Tinubu Square
Lagos
PRIVATE MAIL BAG 12134 : CABLES : CENBANK
TELEPHONE

APPENDIX

In respect of CBN/DO/75/169

Special Instructions:

1) Packing: Packing shall be in 6-ply kraft paper bags each containing 50 kgs G/W. Also 3-ply empty spare bags to be supplied Free of cost, equal to 3% of total number of filled bags comprising each consignment.

2) Shipment: - Shipment shall commence within 45 days after receipt of the letter of credit in New York by the seller. Delivery shall be at the rate of 20,000 metric tons per season minus 10% at seller's option, or plus such additional quantity as the seller may be able to deliver.

3) Insurance: Insurance (F.P.A.) by the seller shall be from Barcelona and/or Piraeus to the Lagos/Apapa Ports. The buyer shall insure the goods against all risks during the discharge at the Lagos/Apapa Ports and therefrom to his warehouse.

4) Unloading: The buyer shall arrange the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from customs and complying with all necessary formalities and shall pay all clearance charges, customs duties, and harbour and anchorage dues.

5) Demurrage: Unloading of each consignment shall be completed within 10 days where such consignment is of 10,000 metric tons, or pro rata in the case of any greater or lesser quantity. At the elapse of such period, (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour-Master, whether the vessel is berthed or not), demurrage not exceeding U.S.$4,100.00 per diem shall be for the account of the buyer provided that the seller shall have given due notice to the buyer by cable of the departure from the port of loading of each consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the letter of credit on presentation at the beneficiary's bank of Time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's Agents in Lagos.

6) Concon Party terms are acceptable

7) All Bank and transfer charges are for the account of the buyer.

EXHIBIT C TO OZAWA AFFIDAVIT - CONTRACT C-703

EXHIBIT "C"

CONTRACT C-703

THIS AGREEMENT made as of September 11, 1975 between NIKKEI INTERNATIONAL, INC., 110 East 23rd Street, New York, New York, hereinafter referred to as "BUYER", and GOODSONS AND COMPANY, INC., 91 East Atteridge Road, Lake Forest, Illinois, PRODUCTOS FONTANET, S.A., Palma de Mallorca, Spain, hereinafter jointly and severally referred to as "SELLER".

W I T N E S S E T H:

Subject to the conditions hereinafter set forth:

1. BUYER agrees to buy from SELLER, and SELLER agrees to sell to BUYER, cement on the terms and conditions hereinafter expressed.

A. DESCRIPTION. The cement shall be Portland Cement conforming to BSS 12/1958 of European origin. The SELLER shall provide with the necessary documents a Superintendent confirmation (preferrably Lloyds of London) of the quality and quantity of cement.

B. QUANTITY. 120,000 Metric Tons. BUYER shall have an option to purchase another 120,000 metric tons from SELLER.

C. PRICE. $54.00 U.S. per metric ton C. I. F. F. P. A. from any Mediterranean and/or European port (s) to Lagos, Apapa, for the first 8,500 tons and $52.00 U.S. for the balance, making a total sum of Six Million Two Hundred Fifty-Seven Thousand U.S. Dollars ($6,257,000).

D. PACKING. Packing in six (6) ply Kraft paper bags

S.I.

D. PACKING. Packing in six (6) ply Kraft paper bags to be supplied free of cost equal to three percent (3%) of total number of filled bags comprising each consignment.

E. TERMS OF PAYMENT. As a condition to this agreement and to the transfer of any credit hereunder, SELLER shall provide BUYER with a performance guarantee insuring BUYER AGAINST SELLER's default hereunder. The performance guarantee of this contract shall be issued by Banco de Bilbao (or any subsequent bank acceptable to BUYER) and shall be payable to and callable by BUYER at a New York City bank designated by BUYER. Such bond shall provide for payment of sum of 3% of the total CIF invoice (such 3% amount being $173,940.00) and shall further conform to the terms set forth in Exhibit "A" hereto. Upon such satisfaction of BUYER, BUYER will transfer an established irrevocable Letter of Credit (CBN/BO/75/169) from the Central Bank of Nigeria advised through the Morgan Guaranty Trust, New York, New York, U.S.A., for the total purchase price for 100,000 tons (the amount for 20,000 tons having already been transferred) (less $1.00 per ton for Agent's (Goodson's) commission) in favor of the SELLER. Drafts drawn under said Letter of Credit shall be payable at sight at the Morgan Guaranty Trust Co. No transfer of the Letter of Credit shall be required until a shipping schedule has been furnished by BUYER in accordance with the directives of the Nigerian government. The guar-

antee of Banco de Bilbao, or any other bank mutually acceptable to BUYER and SELLER will become effective only upon transferring of the Letter of Credit by BUYER. Said performance Bond for supply of cement to be supplied by SELLER for the benefit of BUYER shall also be callable by BUYER (See EXHIBIT B) at a prime bank existing under a U.S. Federal or State Charter, or a prime European bank. Bank and transfer charges incurred in transferring said Letter of Credit to the SELLER's bank shall be borne by BUYER (See EXHIBIT C).

F. SHIPMENT. The first shipment of 8,500 metric tons has been made and paid for. Delivery shall be at the rate of not less than 20,000 metric tons per month plus or minus 10% (ten percent) at SELLER's option.

G. INSURANCE. Insurance to be provided by SELLER from port of loading to Lagos Quay. Type of insurance shall be F.P.A. from any ports of loading described herein for full original invoice value (contract price $60.00) ~~plus ten percent (10%)~~.

H. UNLOADING. Unloading of each consignment of cement shall be completed within 10 days where such consignment is of 10,000 metric tons or pro rata in the case of any greater or lesser quantity. At the elapse of such period

(which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour Master (whether the vessel is berthed or not) demurrage shall commence.

I. DEMURRAGE. Demurrage not exceeding USD 4100.00 per diem shall be for the account of the BUYER, provided that the SELLER shall have given due notice to the BUYER by cable of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit on presentation at the beneficiary's bankers of time sheets and statements of facts duly certified as correct by the ship's master and by the ships agents in Lagos. Cost and responsibility of discharge of each consignment shall be for the BUYER's account.

J. RETURN OF CREDIT. SELLER hereby agrees that in the event of SELLER's default under this Agreement, SELLER shall immediately upon the request of BUYER, return the advice of the Letter of Credit to Morgan Guaranty Company of New York for cancellation and shall promptly execute all documents necessary for such return. If SELLER is in default and BUYER so requests the return of the advise of any transfer of credit and SELLER fails or refuses within 10 days of the request to comply; BUYER may unilaterally cancel the transfer with respect to any balance of credit outstanding.

If there are no shipments made pursuant to this contract for four (4) consecutive months by reason of SELLER's failure to perform or if SELLER shall fail substantially to conform with requirements of the Nigerian Government*, such shall constitute a default and this Agreement shall be forthwith cancelled, null and void and any credit transferred or assigned hereunder shall be immediately reassigned or otherwise restored to BUYER.

2. The construction, validity and performance of this Contract shall be governed by the Laws of the State of New York and those of the United States of America, and all non-litigated disputes between the parties hereto which may arise under, out of, in connection with, this contract shall be submitted to the American Arbitration Association and in the event that the State of Nigeria shall be a third party to any such non-litigated dispute, then this Contract shall be submitted by Arbitration to the International Chamber of Commerce, Paris, France, in accordance with its rules at the date of submission. The parties hereby agree that service of any notices in connection with any such arbitration at their addresses as was recited in this contract shall constitute valid and sufficient notice.

* But Force Majeure shall relieve Seller of any liability to Buyer.

3. If the Letter of Credit is rendered void or unenforceable, and is not superceded or replaced by a substantially similar document, BUYER shall have the option to cancel this Agreement.

NIKKEI INTERNATIONAL, INC.

WITNESS: _____

By: _____
Testsuo Ozawa, President

PRODUCTOS FONTANET, S.A.

WITNESS: _____

By: _____
Salvador Moll

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

On the 11th day of September, 1975, before me personally came TESTSUO OZAWA, to me known who acknowledged to me that he resides at 428 West 259th Street, Riverdale, New York; that he is the President of NIKKEI INTERNATIONAL, INC., the corporation described in, and which executed the foregoing instrument, and that he signed his name thereto by order of the Board of Directors.

LEWIS S. RANDLER
Notary Public, State of New York
No. 31-8775277
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

On the 11th day of September, 1975, before me personally came SALVADOR MOLL, to me known who acknowledged to me that he resides in Spain; that he is the authorized agent of PRODUCTOS FONTANET, S.A., the corporation described in, and which executed the foregoing instrument, and that he signed his name thereto by order of the Board of Directors.

LEWIS S. RANDLER
Notary Public, State of New York
No. 31-8775277
Qualified in New York County
Commission Expires March 30, 1976

EXHIBIT D TO OZAWA AFFIDAVIT -
AUGUST 1975 TELEX FROM CENTRAL BANK OF NIGERIA
TO NIKKEI

EXHIBIT "D"

USSK ML NELS 081

LAGOS 81/30 27 2342

LT

NIKE INTERNATIONAL INCORPORATION 110 EAST 23RD STREET

NEWYORKNY10010USA

BS/101/S16 X CEMENT X IN LIGHT PRESENT CONGESTION AT LAGOS AND OTHER NIGERIAN PORTS GOVERNMENT HAS SUSPENDED IMPORTATION CEMENT FOR THREE MONTHS FROM 18 AUG X YOU ARE REQUIRED TO DEFER ALL FURTHER CHARTERING AND LOADING OF SHIPS AS NOW SCHEDULED

COL LT 110 23RD 10010 BS/101/S16 18

IMA7283 NIKE PASE 2/30

UNDER TERMS YOUR AGREEMENT X ANTICIPATE NEW AGREEMENT WILL BE NEGOTIATED WITH YOU SHORTLY IN ORDER RESCHEDULE DELIVERY PROS-RAMME FOR BALANCE OF CEMENT ALREADY ORDERED X PENDER

F E EYIEYIEN

COL F E

RCA Global Communications

EXHIBIT E TO OZAWA AFFIDAVIT - SEPTEMBER 30, 1975
LETTER FROM MORGAN GUARANTY TO NIKKEI

EXHIBIT "E"

[redacted]

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

September 30, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A -11067

Nikkei International Inc.
110 E. 23rd Street
New York, N. Y. 10010

Dear Sirs:

We are informed by Central Bank of Nigeria, Lagos, Nigeria that they have amended their Irrevocable Credit No. CBN/BO/75/169 established in your favor [redacted] as follows:

All commercial invoices presented must be certified invoices and must be certified by the beneficiaries or their agents.

All others terms and conditions remain unchanged.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

EXHIBIT F TO OZAWA AFFIDAVIT - OCTOBER 22, 1975
LETTER FROM MORGAN GUARANTY TO NIKKEI

EXHIBIT "F"

148a

THE GUARANTY TRUST COMPANY
OF NEW YORK
140 WALL STREET, NEW YORK, N.Y. 10015.

New York October 22, 197-

INTERNATIONAL BANKING DIVISION

IN REPLYING PLEASE REFER TO
Commercial Credits

Re: Central Bank of Nigeria, Lagos
L/C
Our Ref.

We refer to our letter of September 30, 1975 and quote below a portion of a text of further cable we received from the Central Bank of Nigeria, Lagos:

"REFER TO OUR CABLE REGARDING REGISTRATION AND TWO MONTHS CLEARANCE FOR SHIPS SAILING TO NIGERIA STOP THIS REGULATION WILL NOW APPLY ONLY TO SHIPS CARRYING CEMENT STOP NO PAYMENT SHOULD BE MADE UNDER OUR LETTERS OF CREDIT FOR ANY SHIP CARRYING CEMENT UNLESS OF OUR SPECIFIC AUTHORISATION STOP WE ARE AWARE OF OUR OBLIGATIONS AND WE HAVE DISCUSSED WITH ALL THE BENEFICIARIES OF LETTERS OF CREDIT FOR CEMENT THE AMENDMENTS WE PROPOSE TO THE LETTERS OF CREDIT STOP IN VIEW OF OUR PORTS SITUATION WE CANNOT ACCEPT ANY DEFIANCE OF OUR GOVERNMENTS ORDER ON AUGUST 28TH TO EXPEDITE TO STOP SHIPMENT OF CEMENT STOP PAYMENT SHOULD THEREFORE NOT BE MADE FOR CEMENT SHIPS STOP WE SHALL ADVISE YOU THE AMOUNT OF DEMURRAGE DUE ON EACH SHIP AFTER NECESSARY DOCUMENTS HAVE BEEN CHECKED AND CERTIFIED STOP"

This is for your information and is without engagement or responsibility on our part.

Yours very truly,

Authorized Signature

EAST EUROPE NOTICE OF MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

Please Refer to Judge Goettel after Docketing

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------X

77 Civ. 2809 (GLG)

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

SERVED 11/4/77 By Hand

FILED -

DOCKET 11/4/77

DIARY 11/4/77

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of ROBERT ROSS, duly sworn to November 3, 1977, the exhibits annexed thereto, the complaint herein, and all other papers and proceedings heretofore had herein (including but not limited to defendants' notice of motion to transfer and consolidate and to dismiss, and supporting affidavits and exhibits thereto), plaintiff herein will move this Court (Hon. Gerard L. Goettel, U.S.D.J.) on the 18th day of November, 1977, at 10:00 a.m. or as soon thereafter as counsel can be heard, in Room 402, United States Courthouse, Foley Square, New York, N.Y. 10007, for an order

(a) pursuant to F.R.Civ.P. 56(a) and (c), granting plaintiff partial summary judgment on the issue of liability, and determining that defendant FEDERAL REPUBLIC OF NIGERIA ("Nigeria") breached (anticipatorily or otherwise) the contract between it and plaintiff pursuant to which it agreed to purchase from plaintiff, at $59.50 per ton, 240,000 metric tons of Portland cement, C.I.F. Lagos/Apapa, Nigeria, and to cause defendant CENTRAL BANK OF NIGERIA ("CBN") to establish, through MORGAN GUARANTY TRUST COMPANY OF NEW YORK ("Morgan Guaranty"), a confirmed, irrevocable letter of credit in plaintiff's favor for $14,280,000, i.e. the aggregate contract price, and further

determining that defendant CBN breached (anticipatorily or otherwise) said confirmed, irrevocable letter of credit thus established in plaintiff's favor through Morgan Guaranty;

(b) pursuant to F.R.Civ.P. 56(a), granting plaintiff summary judgment for $990,000, representing the liquidated loss of profits which plaintiff sustained with respect to 120,000 out of said 240,000 metric tons, as to which plaintiff had contracted with INTERNATIONAL TRADE AND FINANCE ESPANOLA, S.A. ("Espanola") to supply and deliver the same to defendant Nigeria at a cost to plaintiff of $51.25 per ton, and a profit to plaintiff of $8.25 per ton, or an aggregate liquidated profit to plaintiff on said 120,000 tons of $990,000;

(c) setting down for assessment of damages, or inquest, the other damages suffered by plaintiff, including but not limited to loss of profits on the remaining 120,000 out of the 240,000 metric tons covered by said contract and letter of credit; and

(d) granting plaintiff such other, further, and different relief as may be just and proper in the premises.

Dated: New York, N.Y.
November 4, 1977

Yours, etc.,

BAILEY MARSHALL HOENIGER & FREITAG
Attorneys for Plaintiff
345 Park Avenue
New York, N.Y. 10022
Tel.No.: (212) 826-2305

TO: KISSAM, HALPIN & GENOVESE
Attorneys for Defendants
120 Broadway
New York, N.Y. 10005
Tel.No.: (212) 962-2000

EAST EUROPE RULE 9(g) STATEMENT

PLAINTIFF-MOVANT'S STATEMENT, PURSUANT TO LOCAL GENERAL RULE 9(g), OF THE MATERIAL FACTS AS TO WHICH MOVANT CONTENDS THERE IS NO GENUINE ISSUE TO BE TRIED

1. Plaintiff and defendant Nigeria entered into a written contract dated January 28th, 1975, for the sale by plaintiff and the purchase by Nigeria of 240,000 metric tons of Portland cement at U.S. $59.50, C.I.F. Lagos/Apapa, Nigeria, or an aggregate purchase price of $14,280,000 (Exh. A to Ross aff.).

2. Pursuant to ¶1.(v) of said contract, defendant CBN, on or about August 4, 1975, established an irrevocable, transferable, divisible, and confirmed letter of credit (designated "CBN/BO/75/201") through First National City Bank, 40th Street and Broadway, New York, N.Y. in favor of plaintiff for $14,280,000, payable on sight drafts accompanied by specified documents, and caused Morgan Guaranty Trust Company ("Morgan"), 23 Wall Street, New York, N.Y. to advise plaintiff of the establishment of said letter of credit (Exh. B to Ross aff.).

3. Morgan advised plaintiff in writing of the establishment of said $14,280,000 credit on August 13, 1975 (Exh. C-1 to Ross aff.), and further advised plaintiff of an amendment to said letter of credit, which amendment plaintiff had expressly requested, on September 8, 1975 (Exh. C-2 to Ross aff.).

4. Plaintiff duly commenced to perform the terms and conditions of said contract on its part; specifically, in or about September, 1975, plaintiff

(a) contracted with International Trade and Finance Espanola, S.A. ("Espanola" or "Intrafinsa") to supply and deliver to Nigeria, in accordance

with the terms and specifications of the contract between plaintiff and Nigeria, 120,000 tons of cement C.I.F. Lagos/Apapa, at a cost to plaintiff of $51.25 per ton, or an aggregate of $6,150,000, and at a liquidated profit to plaintiff of $8.25 per ton, or an aggregate profit of $990,000 (120,000 x $8.25) on said 120,000 tons; and caused Morgan to transfer $6,150,000 out of plaintiff's $14,280,000 credit to Intrafinsa's credit, and to advise it accordingly, which Morgan did (Exh. D to Ross aff.);

(b) contracted with the German Democratic Republic ("GDR"), through its agency, Bergbau Handel, to supply 30,000 metric tons of cement, conforming to the specifications of plaintiff's contract with Nigeria, at a cost of $27.00 per ton, F.O.B. East Germany, or an aggregate F.O.B. price for said 30,000 tons of $810,000; and caused Morgan to transfer $810,000 out of plaintiff's $14,280,000 credit to Bergbau Handel's credit, and to advise it accordingly, which Morgan did (Exh. E to Ross aff.); and

(c) through Intrafinsa, caused a vessel, the M/V Torania, to be loaded at a Spanish port with the first 10,500 tons of cement out of the 120,000 tons being supplied by Intrafinsa, and to make ready for departure for Lagos/Apapa on October 10, 1975.

5. Shortly prior to the scheduled departure of the M/V Torenia, defendant CBN cabled plaintiff that

> "in light present congestion at Lagos and other Nigerian ports Goverment [sic] has uspended [sic] importation cement for three months from 08 Aug x You are required to defer all further chartering and loading of ships as now scheduled under terms yor [sic] agreement. . . .". (Exh. F to Ross aff.).

6. Plaintiff never agreed, consented or assented to said purported unilateral alteration and change in its contract with Nigeria.

7. At about the same time, Morgan was instructed by defendant CBN to refuse payments under plaintiff's and other similar CBN letters of credit unless plaintiff and the other cement contractors similarly situated agreed (a) to give two months' advance notice to the Nigerian Ports Authority prior to the departure of each ship engaged to transport cement to Nigeria pursuant to the terms of said contracts; (b) not to ship any cement or further cement to Nigeria under said contracts unless prior clearance for each proposed shipment had been obtained from defendants; and (c) to other material changes in the terms of said contracts for the sale and delivery of cement to Nigeria and in the related letter of credit.

8. Morgan advised plaintiff of its receipt of said instructions from CBN, and of the fact that it would follow said instructions by CBN. (Exh. G to Ross aff.).

9. Plaintiff never agreed, consented or assented to said purported unilateral alterations and changes in the

confirmed, irrevocable letter of credit for $14,280,000 established in its favor by defendant CBN.

10. Plaintiff has duly performed all the terms and conditions on its part of its contract with Nigeria and of the letter of credit established by defendant CBN in plaintiff's favor pursuant thereto, until prevented and excused from further performance by defendants' breaches (anticipatory or otherwise) as set forth in ¶6 hereof.

11. Plaintiff has never received any payment whatever from Nigeria or CBN pursuant to said contract or letter of credit, whether for sale and delivery of cement, for demurrage or otherwise.

12. That portion of plaintiff's damages which represents plaintiff's loss of profits on the first 120,000 out of the 240,000 tons of cement is liquidated, and amounts to $990,000, as set forth in ¶4(a) hereof.

AFFIDAVIT OF ROBERT ROSS IN SUPPORT OF EAST EUROPE MOTION FOR PARTIAL SUMMARY JUDGMENT SWORN TO NOVEMBER 3, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------X

77 Civ. 2809 (GLG)

AFFIDAVIT OF ROBERT ROSS IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT ROSS, being duly sworn, deposes and says:

1. I am the President of EAST EUROPE EXPORT-IMPORT, INC. ("East Europe"), the plaintiff herein, and am personally familiar with all matters herein set forth, since I was in charge of the Nigerian cement transaction from its inception. I make this affidavit in support of plaintiff's motion for (a) partial summary judgment on the issue of liability, and (b) partial summary judgment for $990,000 against defendants, which represents the liquidated portion of plaintiff's damages as to which no assessment of damages is required.

2. Under date of January 28, 1975, plaintiff and the FEDERAL REPUBLIC OF NIGERIA ("Nigeria") entered into a contract for the sale and delivery by plaintiff and the purchase by Nigeria of 240,000 metric tons of Portland cement at U.S. $59.50 per ton, C.I.F. Lagos/Apapa, Nigeria, or an aggregate purchase price of $14,280,000. A copy of said contract is annexed hereto as Exhibit A. As the Court will note, the contract calls for the establishment by CENTRAL BANK OF NIGERIA ("CBN") of an irrevocable, transferable, divisible, and confirmed letter of credit in

favor of plaintiff through a prime New York City bank for $14,280,000, payable on sight drafts.

3. Pursuant to ¶1.(v) of said contract, defendant CBN, on or about August 4, 1975, established an irrevocable, transferable, divisible, and confirmed letter of credit, designated "CBN/BO/75/201," through First National City Bank, 40th Street and Broadway, New York, N.Y., in favor of plaintiff for $14,280,000 (Exhibit B hereto), and caused MORGAN GUARANTY TRUST COMPANY OF NEW YORK ("Morgan") to advise plaintiff of the establishment of said letter of credit. Said advice from Morgan is annexed hereto as Exhibit C-1.

4. On September 8, 1975, Morgan further advised plaintiff that a technical amendment ot said letter of credit, which plaintiff had specifically requested from CBN, had been approved and granted. A copy of said advice from Morgan is annexed hereto as Exhibit C-2.

5. It should be noted that plaintiff, as reflected in ¶1.(v) of the contract, had posted a Performance Bond with Nigeria to secure its performance and that that same subparagraph called for the letter of credit of $14,280,000 to be established in plaintiff's favor by CBN within 14 days from the contract date, which is January 28, 1975. However, as previously seen, the letter of credit was not actually established by CBN until the beginning of August, 1975. I further respectfully call this Court's attention to the fact that the contract itself is obviously a form contract, mimeographed by Nigeria, with blank spaces for the name of the supplier, the quantity, price per ton, total contract price, and other similar variables.

6. Paragraph 1.(vi) of the contract provides:

> "SHIPMENT: Shipment to commence within ~~four~~ six weeks after receipt of the Letter of Credit in New York by the seller. Delivery shall be at the rate of not less than 20,000 metric tons per mensem."

Accordingly, promptly after East Europe was advised by Morgan of the establishment of CBN's irrevocable, confirmed letter of credit, East Europe set about to perform its part of the contract, so that shipment could begin within six weeks of September 8, 1975, the date on which the CBN letter of credit was amended and became effective in its final form.

Specifically, East Europe negotiated with INTERNATIONAL TRADE AND FINANCE ESPANOLA, S.A. ("Intrafinsa") to supply and deliver the first 120,000 out of the 240,000 metric tons of cement. On September 24, 1975, a written agreement was entered into between East Europe and Intrafinsa,

> "for the purchase of 120,000 metric tons of BSS 12/1958 Portland Cement at a price of $51.25 per metric ton, CIF Lagos/Apapa, or other Nigerian ports, to be packed in six ply Kraft paper bags each containing 50 kg net. Also, six ply empty spare bags to be supplied free of cost, equal to 3% of the total number of filled bags."

Shipment by Intrafinsa was scheduled to start well within the six-week period following September 8, 1975, and, as will be seen hereafter, the first vessel, carrying the first 10,500 metric tons of the cement so contracted for with Intrafinsa, the M/V Torenia, was loaded and destined to leave for Nigeria from a Spanish port on October 10, 1975. Pursuant to the East Europe - Intrafinsa contract, East Europe assigned $6,150,000 out of its $14,280,000 credit to Intrafinsa, and caused Morgan to so advise Intrafinsa. The documents showing said transfer and Morgan's advice thereof to Intrafinsa are annexed hereto as Exhibit D. Had Nigeria and CBN not breached their contract and letter of credit with East Europe, East Europe would have realized a liquidated profit of $8.25 per ton ($59.50 minus $51.25 equals

$8.25) on said 120,000 metric tons, or a total liquidated profit of $990,000 on said 120,000 tons.

East Europe had entered into the contract with Intrafinsa at a relatively modest profit to itself in order to make sure that the delivery schedule of 20,000 tons per month to Nigeria, commencing six weeks after the effective date of the letter of credit, would be met. It was East Europe's plan to obtain the remaining 120,000 tons from suppliers at a price which after adding the cost of freight and insurance to Nigeria, would yield a substantially higher profit than $8.25 per ton on said remaining 120,000 tons. Pursuant to said plan, East Europe contracted with the GERMAN DEMOCRATIC REPUBLIC (East Germany, sometimes referred to as "GDR"), through its agency, Bergbau Handel (which means "Mine Trading") to supply 30,000 metric tons of cement, conforming to the specifications laid down in the East Europe - Nigeria contract, at a cost of $27 per ton, FOB East Germany, or an aggregate FOB price of $810,000 for said 30,000 tons. Pursuant to said contract with the GDR's Bergbau Handel, plaintiff caused Morgan to transfer $810,000 out of plaintiff's $14,280,000 credit to Bergbau Handel's credit, and to advise Bergbau Handel accordingly. The documents reflecting said transfer and Morgan's advice to Bergbau Handel are annexed hereto as Exhibit E.

7. Shortly prior to the scheduled departure of the M/V Torenia from a Spanish port for Nigeria, loaded with the first 10,500 metric tons of cement from Intrafinsa, defendant CBN cabled plaintiff that

> "in light present congestion at Lagos and other Nigerian ports Goverment [sic] has uspended [sic] importation cement for three months from 08 Aug x You are required to defer all further chartering and loading of ships as now scheduled under terms yor [sic] agreement. . . .".

The actual cable is annexed hereto as Exhibit F.

8. East Europe never agreed, consented or assented to said purported unilateral alteration and change in its January 28, 1975 contract with Nigeria.

9. At about the same time, Morgan advised East Europe that it had been instructed by CBN to refuse payments under the supposedly confirmed and irrevocable letter of credit established by CBN in plaintiff's favor unless plaintiff agreed to give two months' advance notice to the Nigerian Ports Authority prior to the departure of each ship transporting cement to Nigeria pursuant to the terms of the Nigeria - East Europe contract, and unless East Europe further agreed not to ship any cement or further cement to Nigeria under said contract unless prior clearance for each proposed shipment had first been obtained from the defendants. Morgan's written advice to plaintiff of said instructions, and of the fact that Morgan would honor and abide by said instructions, is annexed hereto as Exhibit G.

10. East Europe never agreed, consented or assented to said purported unilateral alterations and changes in the confirmed, irrevocable letter of credit for $14,280,000 established in its favor by CBN.

11. East Europe duly performed all the terms and conditions on its part of the January 28, 1975 cement contract with Nigeria, and of the confirmed, irrevocable $14,280,000 letter of credit established in plaintiff's favor by CBN thereunder, until excused and prevented from further performance by the defendants' anticipatory breaches thereof, as set forth above.

12. The M/V Torenia was off-loaded in Spain, and no vessels carrying East Europe's cement ever reached Nigeria. Plaintiff has never received any payment whatever from Nigeria or CBN pursuant to the cement contract or the CBN letter of credit, whether for the sale and delivery of cement, for demurrage, or otherwise.

13. East Europe negotiated patiently and in utmost good faith for an amicable resolution of its claim for the very substantial damages which it had suffered, through the Washington law firm of Clifford, Glass, McIlwain & Finney (formerly Clifford, Warnke, Glass, McIlwain & Finney) for approximately a year and a half, and these negotiations included a trip by one of the partners of said law firm to Lagos. In the spring of this year, East Europe was reluctantly forced to recognize that there was no inclination on the part of Nigeria and its Central Bank to work out an amicable resolution of this controversy, and that their sole purpose appeared to be continual delay; and thereupon this action was instituted. I am informed that the defendants herein have raised the issue of sovereign immunity, as they have apparently done in every other action and proceeding that has been brought against them, not only in the United States but also in the United Kingdom, in West Germany, and perhaps elsewhere. My attorneys advise me that in every case, not only in this Court but also in the Court of Appeal in England and in the Landgericht, Frankfurt, West Germany, said plea has been rejected. I am further advised that in a suit by Nada Istablishment, which likewise held a 240,000-ton cement contract at a price substantially identical to that in the East Europe contract, the Landgericht in Frankfurt, West Germany, entered judgment on the merits for plaintiff for about $13,000,000, including demurrage. I have also been advised through the law

offices of Samuel Pisar, 20, Place de la Madeleine, Paris, that one case which that firm had been handling "was settled through negotiation, and a substantial sum was paid by the Nigerian Government," and that the other case being handled by that firm is now before the International Chamber of Commerce Court of Arbitration for decision, and that claimant there has claimed $10,000,000 in damages.

Mr. Hoeniger has furnished me with a copy of the motion recently made by the defendants to dismiss this complaint for alleged lack of subject matter jurisdiction, and on the grounds of purported sovereign immunity, and the supporting affidavits of James G. Simms and of Ambassador O. Jolaoso. These affidavits, either expressly or by implication, substantially admit all of the operative facts hereinabove stated, and in effect rely on the supposed sovereign immunity of the defendants -- referred to as such or as "acts of state" -- as their sole defense. Clearly, there is no genuine or triable issue with respect to any material fact, and the only issues are those of law.

14. I believe that there is no genuine defense to East Europe's claim, and that the same is meritorious in all respects. To my knowledge, there are no set-offs or counterclaims of any kind which Nigeria or CBN have against East Europe, and indeed it would be difficult to see how they could have any, since they have never paid East Europe even one cent.

15. There has been no previous application by East Europe for the relief herein requested, or any part thereof.

Accordingly, I respectfully pray for partial summary judgment in favor of plaintiff and against the defendants as follows:

(a) granting plaintiff summary judgment on the issue of liability, and determining that defendant Nigeria breached the aforesaid cement contract and defendant CBN the aforesaid irrevocable, confirmed letter of credit established by it in favor of plaintiff;

(b) granting plaintiff a present final, partial judgment for $990,000, representing the liquidated portion of plaintiff's damages as to which no assessment of damages or inquest is required, with interest; and

(c) setting down for early hearing and determination the assessment of the balance of plaintiff's damages, i.e. that portion of plaintiff's damages which is not liquidated and as to which an evidentiary hearing and assessment are required.

I further respectfully pray that, if and when this Court grants summary judgment to East Europe for $990,000, that judgment be finalized pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The breaches by Nigeria and CBN are two years old; East Europe negotiated in utmost good faith for a year and a half through a leading Washington law firm for an amicable resolution of this controversy, to no avail. The breaches by Nigeria and CBN have placed East Europe in a strained financial position, and I believe it is clear that there is no just reason for any further delay in entering final judgment on the wholly liquidated portion of plaintiff's claim.

Robert Ross
ROBERT ROSS

Sworn and subscribed to before me
this 3rd day of November, 1977.

Notary Public
JANE PALAZZOLO
Notary Public, State of New York
No. 41-8258945
Qual. in Queens County
Commission Expires March 30, 1979

EXHIBIT B TO ROSS AFFIDAVIT -
EAST EUROPE LETTER OF CREDIT DATED AUGUST 4, 1975
(ALSO REPRODUCED HEREIN AT PAGES 81a - 82a)

EXHIBIT B

CENTRAL BANK OF NIGE
Tinubu Square
Lagos
PRIVATE MAIL BAG 12196 : CABLES : CENBA
TELEPHONE

Date: 4 AUG 1975

DOCUMENTARY CREDIT 4 AUG 1975

Confirmation of Telex of:

The Commercial Credit Dept.,
Morgan Guaranty Trust Company,
23 Wall Street,
New York, U.S.A.

(Correspondent Bank)

CREDIT NO.
CBN/DO/75/201

Dear Sirs,

We hereby request you to advise our irrevocable/transferabl abroad/~~[illegible]~~ Documentary Credit in favour of East Europe Import. Export Inc., 440 Park Avenue South, N.Y. 10016 U.S.A.

for U.S.$ 14,280,000.00

Fourteen million two hundred and eighty thousand U.S.Dollars.
(Amount in words)

available by their draft(s) at Sight (No. of days) for 100 % of the CIF/FOB Invoice drawn on yourselves accompanied by the following documents(at least in duplicate unless otherwise indicated).

- Comm[illegible] Invoice in quadruplicate
- [illegible] Origin in triplicate
- Insurance Policy or Certificate [illegible] Clauses [illegible] for [illegible] Value plus at least 10[illegible]

[illegible] on Board Bills of [illegible]

[illegible] February, 1975 [illegible]

[illegible]

From: United States of America to Lagos/Apapa Port

Part shipment is Prohibited/Permitted

Transhipment is Prohibited/Permitted

This credit is valid in New York until 31st March, 1976 (date) for presentation for payment in accordance with the conditions endorsed hereon.

Draft(s) presented must be drawn under this letter of credit (stating its number and date) and the amount(s) entered thereon must be endorsed by the correspondent bank.

We undertake that all drafts drawn in compliance with the terms of this credit will be honoured on receipt of the agreed shipping documents. The correspondent bank is required to send the original documents to us by Express Registered Airmail(duplicate by following airmail).

Please advise beneficiary (without adding your confirmation) of our authority given to you to pay on sight of documents.

Additional Instructions: Part payments allowed. Payments against documents. Credit to be advised through First National City Bank, 40th Street and Broadway, New York, U.S.A. All documents are to be mais and addressed : the Permanent Secretary, Ministry of Defence, Lagos.

No. .....

Except otherwise stated this credit is subject to uniform customs and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222

Yours faithfully,

Bills Manager.

Countersigned:

Asst. Chief of Banking Operations.

EXHIBIT C-1 TO ROSS AFFIDAVIT -
AUGUST 13, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE
(ALSO REPRODUCED HEREIN AT PAGE 80a)

EXHIBIT C-1

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

FORM 11-4...

August 13, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A-12122

East Europe Import Export Inc.,
440 Park Avenue South
New York, N.Y. 10016

This refers to our preliminary advice of August 6, 1975.

Dear Sirs:

We enclose copy of Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria letter of August 4, 1975 addressed to us advising the establishment of their Irrevocable Credit No. CBN/BO/75/201 in your favor for U. S. $14,280,000.00 (FOURTEEN MILLION TWO HUNDRED AND EIGHTY THOUSAND U. S. DOLLARS).....

Except as otherwise expressly stated therein the credit is subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce, Brochure No. 222.

Your drafts must indicate that they are drawn under Irrevocable Credit No. CBN/BO/75/201 of the Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria and must be presented to our Commercial Credits Department, 15 Broad Street, New York, New York 10015 with specified documents, not later than March 31, 1976 on which date the credit expires.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

P. S. Any availments made hereunder must be accompanied by the attached advi...

This credit is issued in your favor and / or transferees. This credit transferable only to second b...ficiaries abroad. Should you desire to transfer same, such transfer will be subject to the return to us of this advice together with your ... instructions on either of the enclo... forms and your assuming our usual transfer charge and a certificate of beneficiary as indicated on the attached forms.

EXHIBIT C-2 TO ROSS AFFIDAVIT -
SEPTEMBER 8, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE

EXHIBIT C-2

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

(2-5)

September 8, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A 12122

East Europe Import Export Inc.
440 Park Avenue South
New York, N.Y. 10016

Dear Sirs:

We are informed by Central Bank of Nigeria, Lagos, Nigeria

that they have amended their Credit No. CBN/BD/75/201

established in your favor [illegible]

as follows:

1. Shipment to be made from any port except those ports not permitted on contract.
2. Demurrage is payable at any time upon presentation to Morgan Guaranty of the following documents, Time Sheets and statement of facts duly certified as correct by the ships master and ship agent.
3. Charter Party bill of lading acceptable.
4. Insurance to cover F.P.A. Risk only.

We enclose to our principals for the [illegible] of ports which are not permitted by contract and in the meantime no drawings will be honored hereunder.

All others terms and conditions remain unchanged.

THIS LETTER IS SOLELY AN ADVICE AND CONFERS NO [illegible] BY US.

Yours very truly,

Authorized Signature

COPY FOR CREDIT FILES -- NOT NEGOTIABLE
PLEASE HOLD (illegible)

EXHIBIT C-2

EXHIBIT D TO ROSS AFFIDAVIT -
OCTOBER 3, 1975 TELEX AND LETTER FROM MORGAN GUARANTY TO
BANCO INTERNACIONAL DE COMERCIO AND INTRAFINSA

EXHIBIT D

BANCO INTERNACIONAL DE COMERCIO
MADRID
SPAIN

JURICEX

10/3/75

664 45 663

COML CREDITS

REFERENCE OUR CABLE SEPTEMBER 25 1975 NUMBER A 12122/B FAVOR INTERAFRICA
PLEASE TELEMESSE MR. ARRAU WE ARE AIRMAILING YOU OUR ADVICE A 12122/B FOR $6,150,000.00
#1
FAVOR [INTERNATIONAL TRADE & FINANCE ESPANOLA, S.A. AVENIDA DE BRASIL 5, MADRID 20, SPAIN]
ACCORDANCE INSTRUCTIONS FROM [EAST EUROPE IMPORT EXPORT, INC. 440 PARK AVENUE SOUTH, NEW YORK
3.4 10016] NEW YORK TRANSFERRING PORTION OF IRREVOCABLE TRANSFERRABLE LETTER OF CREDIT IN THEIR
FAVOR ESTABLISHED BY [#6 THE CENTRAL BANK OF NIGERIA, TINUBU SQUARE, LAGOS, NIGERIA] THEIR NO.
#5 [CBN/CO/75/201] AVAILABLE UPON PRESENTATION TO US OF INTERNATIONAL TRADE & FINANCE ESPANOLA :
DRAFTS AT SIGHT ON US [#8 FOR 100% OF THE CIF INVOICE VALUE] ACCOMPANIED BY [#9 COMMERCIAL INVOICE .
QUADRUPLICATE DESCRIBING THE MERCHANDISE AS INDICATED HEREIN] [#10 INSURANCE POLICY OR CERTIFICA
COVERING F.P.A. RISK ONLY FOR [127.5% OF CIF INVOICE VALUE] [#12 FULL SET CLEAN ON BOARD BILLS OF LADING
MADE OUT TO ORDER AND ENDORSED IN BLANK MARKED FREIGHT PREPAID DATED] LATEST JANUARY 15 1976

EXHIBIT D

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

International Trade & Finance Espanola S.A.
Avenida de Brasil 5
Madrid 20, Spain

October 3, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A-12122/3

Att: Mr. Arrau, President

This refers to our cable of today thru Banco Internacional de Comercio, Madrid, Spain.

Dear Sirs:

In accordance with instructions received from East Europe Import Export, Inc., 440 Park Avenue South, New York, N. Y. 10016 we advise that The Central Bank of Nigeria Tinubu Square, Lagos, Nigeria have established their Irrevocable Credit No. CBN/20/75/2 in favor of East Europe Import Export, Inc. out of which there is transferred to you the sum of:-

U.S.$6,150,000.00 (SIX MILLION ONE HUNDRED FIFTY THOUSAND U.S. DOLLARS)

available upon presentation to us of your drafts at sight on us for 100% of the CIF val accompanied by:

Commercial Invoice in quadruplicate describing the merchandise as indicated below,

Insurance Policy or Certificate covering F.P.A. risk only for 127.8% of CIF invoice val

Full set clean on board bills of lading made out to order and endorsed in blank marked freight prepaid dated not later than January 15, 1976, marked notify The Permanent Secr ry, Ministry of Defense, Lagos. Charter Party Bill of Lading acceptable.

Evidencing shipment CIF to Lagos/Apapa Port of: 120,000 M.T. Portland Cement to be purc by Ministry of Defense, Lagos as per contract agreement signed on January 26, 1975 U.S. Dollars 51.25 per M.T. from any Port except those Ports not permitted on contr

Partial shipments are permitted.

Transhipments are prohibited.

All documents are to be made out addressed "The Permanent Secretary, Ministry of Defens Lagos".

Our principals state: "The following is incorporated under additional instructions: demurrage clause: unloading of each consignment of cement shall be completed within ten days the case of any greater/lesser quantity stop at the elapse of such period demurrag not exceeding US Dlrs. 4,100 per diem shall be for the account of the buyer provided th the seller shall have given due notice to the buyer of the arrival at Lagos/Apapa of ca such consignment and shall be paid in accordance with normal international practice und the terms of the letter of credit. Such period shall be reckoned from the time of co- mencement of the next working period after presentation of notice of readiness to dis- charge by the master of the vessel whether berthed or otherwise and demurrage is payabl at any time upon presentation to Morgan Guaranty Trust Company of New York of the follo documents: time sheets and statement of facts duly certified as correct by the ships and ships agent".

We cabled several times to our principals regarding clarification of ports of shipments this advice is subject to an amendment in this respect and in the meantime no drawing w be honored hereunder.

Except as otherwise expressly stated herein, this advice is subject to the Uni Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce, Brochure No. 222.

-CONTINUED ON PAGE 2-

OFFICE COPY - NOT NEGOTIABLE

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

2

October 3, 1975

On all communications please refer to OUR REFERENCE NUMBER
A-12122/B

International Trade & Finance Espanola S.A.
Avenida de Brasil 5
Madrid 20, Spain

Att: Mr. Arrau, President

-PAGE 2-

Your drafts must indicate that they are drawn under the aforementioned Irrevocable Credit No. CBN/DO/75/201 of the Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria and must be presented to our Commercial Credits Department, 15 Broad Street, New York, N. Y. 10015 with specified documents, not later than January 31, 1976 on which date this advice expires.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

P.S. Any payments hereunder are also subject to further cable instructions dated September 19th, September 25th, September 29th and September 30th from the Central Bank of Nigeria which we are quoting to you in our letter dated October 3rd 1975 enclosed herewith.

All commercial invoices must be certified invoices and must be certified by the beneficiaries or their agents.

OFFICE COPY - NOT NEGOTIABLE

EXHIBIT E TO ROSS AFFIDAVIT -
SEPTEMBER 10, 1975 LETTER FROM
MORGAN GUARANTY TO BERGBAU HANDEL

EXHIBIT E

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

MAIL TO

September 10, 1975

Berghau Handel
Berlin,
G.D.R.

On all communications please refer to OUR REFERENCE NUMBER
A 12122/A

This refers to our wire of today thru Deutsche Handelsbank A.G., 103 Berlin, G.D.R.

Dear Sirs:

In accordance with instructions received from East Europe Import Export In 440 Park Avenue South, New York 10016, we advise that Central Bank of Nigeria, Tin Square, Lagos, Nigeria have established their IRREVOCABLE Credit No. CBN/EO/75/201 favor of East Europe Import Export Inc., out of which there is transferred to you sum of:-

U.S.$110,000.00(ONE HUNDRED TEN THOUSAND U.S.DOLLARS)

available upon presentation to us of your drafts at sight on us, for 100% of the C invoice value, accompanied by:

Commercial Invoice in quadruplicate - describing the merchandise as indicated belo

Insurance Policy or Certificate in duplicate for invoice value plus 2½% coverin F.P.A. risk from any port except those ports not permitted in contract to Lagos/Ap Port.

Full set 2/2 clean on board bills of lading made out to order and endorsed in blan marked "Freight Prepaid", marked notify the Permanent Secretary, Ministry of Defen Lagos, dated not later than October 15, 1975. Charter Party bill of lading accept

Evidencing shipment of: 30000 CMTS. METRIC TONS OF PORTLAND CEMENT AT $27.00 M.T DE PURCHASED BY MINISTRY OF DEFENCE, LAGOS AS PER CONTRAC AGREEMENT SIGNED ON JANUARY 20, 1975 BUT ANY PORTS PORTS NOT PERMITTED ON CONTRACT TO LAGOS/APAPA PORT THAN OCTOBER 15, 1975.(To be cabled to our principals for ch of ports which are not permitted by contract and in the e NO BANKING WILL BE RECORDED HEREUNDER.

Partial shipments and payments permitted Transhipment prohibited

All documents are to be made and addressed: The Permanent Secretary Ministry of D: Lagos.

Our principals state:"Demurrage clause: unloading of each consignment of cement s be completed within ten days the case of any greater or lesser quantity. At the of such period Demurrage not exceeding U.S.$1,100 per diem shall be for the accou the buyer provided that the seller shall have given due notice to the buyer of th arrival at Lagos/Apapa of each such consignment and shall be paid in accordance, normal international practice under the terms of the Letter of Credit. Such period shall be reckoned from the time of commencement of the next working period after presentation of notice of readiness to discharge by the master of the vessel whet berthed or otherwise. Demurrage is payable at any time upon presentation to Buyers

COPY FOR CLIENT'S FILES - NOT NEGOTIABLE
PLEASE READ IMMEDIATELY UPON RECEIPT

EXHIBIT 2

176a

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

MAIL TO

September 10, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A 12122/A

Berliner Handel
Berlin
G.D.R.

- 2 -

Trust Company of New York
Guaranty of the following documents: time sheets and statement of facts duly c
correct by the ships master and ship agent".

Except asotherwise expressly stated herein, this advice is subject to t
Uniform Customs and Practice for Documentary Credits (1962 Revision), Internatio
Chamber of Commerce, Brochure No.222.

Your drafts must indicate that they are drawn under the aforementioned
Irrevocable Credit No. CBN/BD/75/201 dated August 4, 1975, of the Central Bank
Nigeria, Tinubu Square, Lagos, Nigeria, and must be presented to our Commercial
Credits Department, 15 Broad Street, New York, N.Y. 10015 with specified document
not later than October 31, 1975 on which date this advice expires.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

COPY FOR CLIENT'S FILES - NOT NEGOTIABLE
PLEASE READ IMMEDIATELY UPON RECEIPT

EXHIBIT F TO ROSS AFFIDAVIT -
SEPTEMBER 1975 TELEX FROM
CENTRAL BANK OF NIGERIA TO EAST EUROPE

EXHIBIT F

ORES NL NGLS 083

LAGOS 83/82 27 2356

LT

EAST EUROPE IMPORT IECO 440 PARKAVENUE SOUTH

NEWYORK10016USA

BG/101/S 16 X CEMENT X IN LIGHT PRESENT CONGESTION AT LAGOS AND OTHER NIGERIAN PORTS GOVERMENT HAS USPENDED IMPORTATION CEMENT FOR THREE MONTHS FROM 08 AUG X YOU ARE REQUIRED TO DEFER ALL FURTHER CHARTERING AND LOADING OF SHIPS AS

COL LT 440 10016 BG/101/S 16 18

TMA7655 LT EAS PAGE2/32

NOW SCHEDULED UNDER TERMS YOR AGREEMENT X ANTICIPATE NEW AGREEMENT WILL BE NEGOTIATED WITH YOU SHORTLY IN ORDER RESCHEDULE DELIVERY PROGRAMME FOR BALANCE OF CEMENT ALREADY ORDERED X

PERMDEF F E EYIEYIEN

COL CYD

#

EXHIBIT F

EXHIBIT G TO ROSS AFFIDAVIT -
SEPTEMBER 30, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE

EXHIBIT G

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 WALL STREET, NEW YORK, N.Y. 10015

New York September 30, 1975

INTERNATIONAL BANKING DIVISION

IN REPLYING PLEASE REFER TO

Commercial Credits

East Europe Import Export Inc.
340 Park Avenue South
New York, New York 10016

Gentlemen:

Re: Central Bank of Nigeria, Lagos
L/C CBN/BO/75/201
Our Ref: A 12122

We quote below text of cables we received from the Central Bank of Nigeria, Lagos:

"PLEASE STOP DEMURRAGE PAYMENTS AGAINST SPECIFIED DOCUMENTS UNLESS SUCH DOCUMENTS HAVE BEEN CERTIFIED FOR PAYMENT BY THE CENTRAL BANK OF NIGERIA"

"RE PAYMENT OF DEMURRAGE THE INSTRUCTIONS RELATES TO ALL CREDITS IN FORCE NOW STOP WE ARE NOT STOPPING PAYMENT COMPLETELY BUT WE WANT YOU TO HAVE OUR CLEARANCE BEFORE ANY PAYMENT IS MADE STOP THE DOCUMENTS STATING THE NUMBER OF DAYS THE SHIP HAS BEEN AT UR WHARF WITHOUT BEING DISCHARGED MUST CARRY THE STAMP AND SIGNATURE OF THE CENTRAL BANK BEFORE YOU CAN MAKE ANY PAYMENT OF DEMURRAGE OF ALL OUTSTANDING AND FUTURE CREDITS STOP WE ARE FULLY AWARE OF OUR OBLIGATIONS UNDER ARTICLE 3 OF UNIFORM CUSTOMS AND PRACTICE AND DO NOT INTEND TO TAKE ANY ARBITRARY AND UNILATERAL ACTION STOP YOU WILL AGREE THAT THE PAYMENT OF DEMURRAGE HAS TO BE BASED ON THE NUMBER OF DAYS THE SHIP STAYS AT OUR PORT WITHOUT BEING DISCHARGED STOP THIS FACT HAS TO CERTIFIED AND IT IS TO ENSURE THAT THE NUMBER OF DAYS IS CORRECTLY CERTIFIED THAT WE INSIST ON CLEARANCE WITH US STOP PLEASE MAKE OUR POSITION CLEAR TO THE BENEFICIARIES STOP ALL VALID CLAIMS FOR DEMURRAGE WILL BE PAID AFTER CERTIFICATION STOP ON NO ACCOUNT SHOULD ANY SUPPLIER INSTRUCT THE SHIP OWNER TO SAIL AWAY WITH THE CARGOES AS THE LIEN CANNOT BE ARBITRARILY EXERCISED WHEN WE HAVE NOT REFUSED PAYMENT STOP ALL SUPPLIERS ARE BEING INVITED TO NIGERIA FOR DISCUSSION STOP"

"WE INSIST THAT SPECIFIED DOCUMENTS PRESENTED IN SUPPORT OF DEMURRAGE CLAIMS SHOULD BE SENT TO CENTRAL BANK OF NIGERIA FOR CERTIFICATION BEFORE PAYMENTS ARE MADE ON SUCH DOCUMENTS"

"THE NIGERIAN FEDERAL MILITARY GOVERNMENT HAS DIRECTED THAT IN VIEW OF OUR PORT SITUATION SHIPPING COMPANIES MUST GIVE TWO MONTHS NOTICE TO THE NIGERIAN PORTS AUTHORITY BEFORE SAILING STOP IN VIEW OR THIS YOU ARE REQUESTED NOT TO PAY AGAINST DOCUMENTS PRESENTED IN RESPECT OF LETTERS OF CREDIT WE HAVE OPENED UNLESS SUCH DOCUMENTS ARE ACCOMPANIED BY CERTIFICATES CONFIRMING THAT CLEARANCE HAS BEEN OBTAINED FOR THE

contd.....

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK

September 30, 1975

SHIPS TO SAIL TO NIGERIA STOP THUS WHEN DOCUMENTS ARE PRESENTED NO PAYMENT SHOULD BE MADE UNTIL WE CONFIRM TO YOU THAT THE SHIP HAS OBTAINED NECESSARY CLEARANCE TO SAIL TO NIGERIA STOP YOU SHOULD THEREFORE NOTIFY US OF THE NAME OF THE SHIP FOR WHICH DOCUMENTS HAVE BEEN PRESENTED SO THAT WE CAN ASCERTAIN CLEARANCE AND ADVISE YOU TO PAY ACCORDINGLY"

This is for your information and is without engagement or responsibility on our part.

Yours very truly,

Authorized Signature

CHENAX NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

CHENAX MAJESTY, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------x

REFER TO JUDGE PIERCE

77 Civ. 3045

PLAINTIFF'S NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Dr. UCHE AKUBA, sworn to November 10, 1977, the exhibits annexed thereto, the complaint herein, and all other papers and proceedings heretofore had herein (including but not limited to defendants notice of motion to transfer and consolidate and to dismiss, and supporting affidavits and exhibits thereto), plaintiff herein will cross-move this Court at the United States Courthouse, Foley Square, New York, New York, for an order

(a) pursuant to F.R. Civ. P. 56(a) and (c), granting plaintiff summary judgment on the issue of liability, and determining that defendant FEDERAL REPUBLIC OF NIGERIA ("NIGERIA") breached the contract between it and plaintiff pursuant to which it agreed to purchase from plaintiff, at $60.00 per ton, 240,000 metric tons of Portland cement (plus or minus 10% at plaintiff's option), C.I.F. Lagos/ Apapa, Nigeria, and to cause defendant CENTRAL BANK OF NIGERIA ("CBN") to establish, through a New York bank, a confirmed irrevocable letter of credit in plaintiff's favor

for $14,400,000, i.e. the aggregate contract price, and further determining that defendant CBN breached said confirmed, irrevocable letter of credit thus established in plaintiff's favor at Morgan Guaranty Trust Company of New York;

(b) pursuant to F.R.Civ. P. 56(a), granting plaintiff summary judgment for $1,188,000 representing the liquidated minimum loss of profits which plaintiff sustained with respect to 264,000 metric tons (inclusive of the 10%, or 24,000 tons, plaintiff had the option of selling to Nigeria) as to which plaintiff had contracted with Transcommerce Warenhandels GmbH & Co. KG of Hamburg, Germany to supply and deliver the same to defendant Nigeria at a profit to plaintiff of U.S. $4.50 per ton;

(c) setting down for assessment of damages, or inquest, the other damages suffered by plaintiff; and

(d) granting plaintiff such other, further and different relief as may be just and proper in the premises.

DATED: New York, New York
April 21, 1978

LEWIS S. SANDLER
Attorney for Plaintiff
620 Fifth Avenue
New York, New York 10020
(212) 765-1010

TO:

KISSAM, HALPIN & GENOVESE
Attorneys for Defendants
120 Broadway
New York, New York 10005
(212) 962-2000

CHENAX RULE 9(g) STATEMENT

PLAINTIFF-MOVANT'S STATEMENT, PURSUANT TO LOCAL GENERAL RULE 9(g), OF THE MATERIAL FACTS AS TO WHICH MOVANT CONTENDS THERE IS NO GENUINE ISSUE TO BE TRIED

1. Plaintiff and defendant Nigeria entered into a written contract dated March 20, 1975, for the sale by plaintiff and the purchase by Nigeria of 240,000 metric tons of Portland cement (plus or minus 10% at plaintiff's option) at U.S. $60.00 C.I.F. Lagos/Apapa, Nigeria, or an aggregate purchase price of $14,400,000 (Exhibit "A" to Akuba aff.).

2. Pursuant to paragraph 1.(v) of said contract, defendant CBN, on or about May 8, 1975, established an irrevocable, transferable, divisible, and confirmed letter of credit (designated "CBN/80/75/79") through Morgan Guaranty Trust Company ("Morgan"), 23 Wall Street, New York, New York in favor of plaintiff for $14,400,000 payable on sight drafts accompanied by specified documents, and caused Morgan to advise plaintiff of the establishment of said letter of credit (Exh. "B" to Akuba aff.).

3. In anticipation of the contract, on March 12, 1975 plaintiff duly commenced to perform the terms and conditions of said contract on its part by contracting with Transcommerce Warehandels GmbH & Co. KG to supply and deliver to Nigeria, in accordance with the terms and specifications of the contract between plaintiff and Nigeria approximately 240,000 metric tons of cement, C.I.F. Lagos/Apapa, at a profit to plaintiff of $4.50 per ton.

4. In August of 1975, defendant CBN cabled plaintiff that

> "in light present congestion at Lagos and other Nigerian ports Government has suspended importation cement for three months from 18 Aug x You are required to defer all further chartering and loading of ships as now scheduled under terms your agreement . . . (Exhibit "D").

5. Plaintiff never agreed, consented or assented to said purported unilateral alteration and change in its contract with Nigeria.

6. In late September, 1975, Morgan was instructed by defendant CBN to refuse payments under plaintiff's and other similar CBN letters of credit unless plaintiff and the other cement contractors similarly situated agreed (a) to give two months' advance notice to the Nigerian Ports Authority prior to the departure of each ship engaged to transport cement to Nigeria pursuant to the terms of said contracts; (b) not to ship any cement or further cement to Nigeria under said contracts unless prior clearance for each proposed shipment had been obtained from defendants' and (c) to other material changes in the terms of said contracts for the sale and delivery of cement to Nigeria and in the related letter of credit.

7. Plaintiff never agreed, consented or assented to said purported unilateral alterations and changes in the confirmed irrevocable letter of credit for $14,400,[illegible] established in its favor by defendant CBN.

8. Plaintiff has duly performed all the terms and conditions on its part of its contract with Nigeria and of the letter of credit established by defendant CBN in plaintiff's favor pursuant thereto, until prevented and excused from further performance by defendants' breaches (anticipatory or otherwise).

9. Plaintiff has never received any payment from Nigeria or CBN pursuant to said contract or letter of credit.

10. That portion of plaintiff's damages which represents plaintiff's loss of profits on 264,000 tons of cement (inclusive of the 10% at plaintiff's option) is liquidated, and amounts to $1,188,000 as set forth in paragraph 3 hereof.

AFFIDAVIT OF DR. UCHE AKUBA IN SUPPORT OF CHENAX MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT, SWORN TO DECEMBER 3, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHENAX MAJESTY, INC., : Docket No. 77 Civ. 3045

Plaintiff, - : AFFIDAVIT

- against - :

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, :

Defendants.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Dr. UCHE AKUBA, being duly sworn, deposes and says:

1. I am president of plaintiff CHENAX MAJESTY, INC. and I am personally familiar with all the facts set forth herein. I make this affidavit in support of plaintiff's motion for summary judgment on the issue of liability, and for partial summary judgment in the amount of $1,188,000 against defendants, which represents the liquidated portion of plaintiff's damages as to which no assessment of damages is required. The summons, complaint and notice of suit have been served on defendants pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Sections 1330, 1332, 1391, 1441 and 1602-1611. Defendants, prior to answer, have moved to dismiss the actions by reason of sovereign immunity and lack of subject matter jurisdiction. A copy of the complaint is annexed to defendants' moving papers.

2. Plaintiff is a New York corporation having a principal place of business in the County, City and State of New York.

3. Defendant, FEDERAL REPUBLIC OF NIGERIA ("Nigeria") is a foreign government located on the continent of Africa and, upon information and belief, defendant CENTRAL BANK OF NIGERIA ("CBN") is a foreign banking institution having its principal place of business at Tinubu Square, Lagos, Nigeria.

4. Upon information and belief, Morgan Guaranty Trust Company ("Morgan") is a banking institution organized under the laws of the State of New York, and is authorized and licensed to do business in the State of New York. It has a principal place of business at 23 Wall Street, New York, New York.

5. On or about March 20, 1975, Nigeria entered into an agreement with plaintiff for the purchase of 240,000 metric tons of Portland cement (plus or minus 10% at plaintiff's option), at a price of $60.00 U.S. per metric ton C.I.F. Lagos, Nigeria for a total sum of $14,400,000. (the "Cement Contract"). A copy of the Cement Contract is annexed hereto as Exhibit "A".

6. Pursuant to the terms of the Cement Contract (paragraph 1(v) thereof), on or about May 8, 1975, CBN issued and established at Morgan an irrevocable transferrable documentary credit identified as "CBN/BO/75/79" in the amount of $14,400,000. (hereinafter called "Letter of Credit"). At plaintiff's request the Letter of Credit was amended on June 10,1975 and August 1, 1975. The Letter of Credit was established to effect and guarantee Nigeria payment of (1) the purchase price of the cement, (2) demurrage expenses at the rate of $4,100.00 per day, per ship, incurred in connection with the said Cement Contract. A copy of the Letter of Credit and amendments thereto is annexed hereto as Exhibit "B".

7. The Letter of Credit specifies that payments be made at Morgan Guaranty Trust Company in New York. This is contrary

to plaintiff's request and to the Cement Contract, paragraph 1(v), that the Letter of Credit be payable at Schroeder, Huenchmeyer Hengst & Co., ("Schroeder"), a bank in West Germany. In fact, Nigeria, while granting to plaintiff other requests for amendments to the Letter of Credit, refused to accede to plaintiff's request that it be made payable in Germany.. (See Akuba affidavit submitte in opposition to defendants' motion to dismiss.) Copy annexed.

8. On or about March 12, 1975, in anticipation of the Letter of Credit, plaintiff had entered into an agreement with Transcommerce Warehandels G.m.b.H. & Co. K.G. of Hamburg, Germany ("Transcommerce") to furnish to Nigeria approximately 240,000 metric tons of Portland Cement at a profit to plaintiff of $4.50 per metric ton. The contract is confirmed by letter of March 12, 1975 from Transcommerce's bank, Schroeder, and the performance bond required by the Cement Contract was issued. (Exhibit "C").

9. On August 12, 1975, before the first shipment of cement could depart, plaintiff received news reports that Nigeria had stopped all cement shipments to Lagos. This was confirmed shortly thereafter when defendant CBN cabled plaintiff as follows:

> "in light present congestion at Lagos and other Nigerian ports Government has suspended importation cement for three months from 18 Aug. x You are required to defer all further chartering and loading of ships as now scheduled under terms your agreement ..." (Exhibit "D").

10. CBN thereafter instructed Morgan that the irrevocable Letter of Credit had been amended so that Morgan was to refuse payment unless documents presented for payment had been certified by CBN and unless plaintiff were to submit documents accompanied by a CBN certificate confirming (1) plaintiff gave 2 months advance notice to the Nigerian Ports Authority prior to the departure of each ship engaged to transport the ship, (2) clearance for said departures had been given. These amendments effectively revoked the Letter of Credit. These conditions,

self-imposed by the defendants, were unauthorized, unilateral and wrongful amendments to the irrevocable Letter of Credit and the Cement Contract and constituted an anticipatory breach of Nigeria and CBN of their irrevocable obligations under the Cement Contract and the Letter of Credit.

11. I understand that approximately 60 Letters of Credit similar to that issued to plaintiff had been issued by CBN for the purchase of Portland Cement by Nigeria. During November, 1975 and, again, in February, 1976, all of the letter of credit holders were summoned to Lagos, Nigeria in a purported effort to resolve what was in fact a flagrant breach of contract by Nigeria and CBN with regard to all of the letter of credit holders. Rather than offer a reasonable settlement, Nigeria attempted to induce all of the letter of credit holders to sign general releases. I attended the meetings on behalf of plaintiff and refused to sign such a release. I have made frequent demands of Nigeria and CBN to settle the dispute arising from their breach of contract, with absolutely no results. Nigeria and CBN have absolutely refused to respond in any manner whatsoever to plaintiff's letters or requests.

12. The liquidated damages suffered by plaintiff by reason of lost profits are $4.50 per ton on 264,000 tons of cement (inclusive of 10% or 24,000 tons). Plaintiff also incurred many incidental expenses arising from defendants' breach and is entitled to interest on its lost profits.

13. Plaintiff is undoubtedly entitled to summary judgment with respect to the issue of liability and with respect to profits it would have realized on 264,000 tons of cement of $4.50 per ton, namely $1,188,000.00. I believe there is no meritorious defense to plaintiff's claim and that there are no set-offs or counterclaims available to defendants.

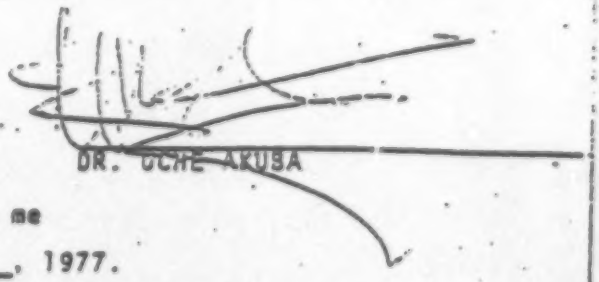
W H E R E F O R E , I respectfully urge the Court to grant to plaintiff judgment against defendants as follows:

(a) granting plaintiff summary judgment on the issue of liability, and determining that defendant Nigeria breached the aforesaid cement contract and defendant CBN the aforesaid irrevocable, confirmed letter of credit established by it in favor of plaintiff;

(b) granting plaintiff a present final, partial judgment for $1,188,000 representing the liquidated portion of plaintiff's damages as to which no assessment of damages or inquest is required, with interest; and

(c) setting down for early hearing and determination the assessment of the balance of plaintiff's damages, i.e. that portion of plaintiff's damages which is not liquidated and as to which an evidentiary hearing and assessment are required.

I further respectfully pray that, if and when this Court grants summary judgment to plaintiff for $1,188,000, that judgment be finalized pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The breaches of Nigeria and CBN are two years old; plaintiff has made every good faith effort to negotiate a reasonable resolution of this controversy without receiving even the courtesy of a response. The breaches by Nigeria and CBN have placed plaintiff in a virtually insolvent financial position, and I believe it is clear that there is no just reason for any further delay in entering final judgment on the wholly liquidated portion of plaintiff's claim.



DR. UCHE AKUBA

Sworn and subscribed to before me
this 3rd day of December, 1977.

Notary Public

LEWIS S. SANDLER
Notary Public, State of New York
No. 31-4533111
Qualified in New York County

EXHIBIT B TO AKUBA AFFIDAVIT -
CHEMAX LETTER OF CREDIT DATED APRIL 25, 1975
(ALSO REPRODUCED HEREIN AT PAGES 91a - 93a)
AND JUNE 10, 1975 AND AUGUST 1, 1975 LETTERS
FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY

Private Mail Bag 12194 - CABLES: CENBANK

000050

CONFIDENTIAL

192a

Date: 25th April, 1975.

DOCUMENTARY CREDIT

CONFIRMATION OF T.L.U.X OF: 21st April, 1975.

THE PRESIDENT,
MORGAN GUARANTY TRUST CO.,
23, WALL STREET,
NEW YORK,
U. S. A.

(Correspondent Bank)

CREDIT NO.
CBN/20/75/79

Dear Sirs,

We hereby request you to open and advise our confirmed/irrevocable/transferable/~~irrevocable~~ abroad Documentary Credit in favour of Chenar Majesty Inc. of 1, Union Square West, New York, N.Y. 10003, U. S. A.

for an amount of U.S.$14,400,000.00 ± 10%

Fourteen million, four hundred x thousand U. S. A. Dollars plus or minus ten percent (amount in words)

available by their draft(s) at ..... SIGHT ..... for ..... 100 ..... %
(No. of days)

of the CIF/~~FOB~~ Invoice drawn on yourselves accompanied by the following documents (at least in duplicate unless otherwise indicated).

_____ Commercial Invoice in quadruplicate

_____ ~~Certificate of Analysis in triplicate~~

_____ Insurance ~~Endorsed~~ Certificate covering ALL RISKS as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%.

_____ Full set clean on Board Bills of Lading made out to order and endorsed in blank, marked "~~Freight Prepaid/Freight Forward~~" dated latest 15th May, 1976 Claused "notify The Permanent Secretary, Ministry of Defence, Lagos".

Covering Shipment(s) of:

240,000 metric tons of cement at $60.00 per metric ton conforming to Spanish Specification P.350 plus or minus 10% at Seller's option as per agreement signed on the 20th March, 1975.

From ..... SPAIN ..... 193a ..... to ..... Lagos/Apapa ..... CONFIDENTIAL

Part Shipment is ~~Prohibited~~/Permitted

Transhipment is Prohibited/~~Permitted~~

This credit is valid in ..... United States of America ..... until

..... 31st May, 1976 ..... for presentation for payment in
(date)

accordance with the conditions endorsed hereon.

Draft(s) presented must be drawn under this letter of credit (stating its number and date), and the amount(s) entered thereon must be endorsed by the presenting bank.

We undertake that all drafts drawn in compliance with the terms of this credit will be honoured on receipt of the agreed shipping documents. The correspondent bank is required to send the original documents to us by Express Registered Airmail (duplicate by following airmail).

This letter of credit is confirmed by the Central Bank of Nigeria, Lagos.

Additional Instructions:

Part payment allowed. Payments against presentation of Shipping documents.

Credit to be advised through beneficiary's Banker: #4 Schroeder, Hennchmeyer, Heuget & Co., D-2000 Hamburg 1, Ballindamm 33, Western Germany

All documents to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos, Nigeria.

Special Instructions:

Please see attached Appendix.

Except otherwise stated this credit is subject to uniform customs and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222.

Yours faithfully,

/Illegible

24/2/75

Countersigned:

Asst. Chief of Banking Operations.

CENTRAL BANK OF NIGERIA, LAGOS. 194a

000052

A P P E N D I X

CONFIDENTIAL

In Respect of Letter of Credit No. CBN/70/75/79

Special Instructions:

(1) Shipment: Shipment is to commence within 45 days after receipt of the letter of credit in Hamburg by the seller. Delivery shall be at the rate of 20,000 metric tons per consignment plus or minus 10% at Seller's option.

(2) Insurance: Insurance (against All Risks, 2% deductible) by the Seller shall be from Barcelona and/or Tarragona to the Lagos/Apapa Port.

(3) Demurrage: Unloading of each consignment of cement (which shall be the responsibility of the buyer) shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour master whether the vessel is berthed or not) demurrage of U.S.$4,100.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer by cable of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation of at the Beneficiary's Banker, of time-sheets and statements of facts duly certified as correct by the ship's master and by the Ship's agents in Lagos.

(4) Bill of Lading: Charter Bills of Lading acceptable.

(5) All bank and transfer charges in respect of the credit are for the buyer's account.

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos
PRIVATE MAIL BAG 12194 CABLES: CENBANK
TELEPHONE

Our Ref: CBN/BO/75/79 0814 10th June, 1975.

The President,
The Commercial Credits Department,
Morgan Guaranty Trust Company,
23 Wall Street,
New York,
U.S.A.

Dear Sir,

Letter of credit for U.S.$14,400,000.00 in favour of Chenax Majesty Inc. of 1, Union square West, New York, N.Y. 10003, U.S.A.

We confirm our cable of today and request you to please amend the subject credit as follows:-

1) ADD THE FOLLOWING TO THE SPECIFICATION OF CONSIGNMENT "FUZ 350; B.S.S. 12/1958 AND B.S.S. 12/1971
2) 3 - PLY OR 4 - PLY SPARE BAGS ARE ACCEPTABLE
3) IN ADDITION TO BARCELONA AND TARRAOPNA BOTH IN SPAIN, ADD THAT OTHER SPANISH PORTS ARE ACCEPTABLE
4) SHIPMENT IS TO START WITHIN 45 DAYS AFTER RECEIPT OF THE FINAL AMENDMENTS TO THIS LETTER OF CREDIT BY THE BENEFICIARY'S BANKERS
5) SHIPMENT DATE AND VALIDITY DATE TO READ 15TH JUNE, 1976 AND 31ST JUNE, 1976 RESPECTIVELY

OTHER TERMS AND CONDITIONS OF THE CREDIT REMAIN UNCHANGED

Yours faithfully,

Bills Manager

Countersigned:

Asst. Chief of Banking Operations.

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos
PRIVATE MAIL BAG 12126 : CABLES : CENBANK :
TELEPHONE . . . . . .

Our Ref: CBN/BO/75/79

Your Ref: A-08740

- 1 AUG 15

The Commercial Credits Department,
Morgan Guaranty Trust Company,
23 Wall Street,
New York, U.S.A.

Dear Sir,

Letter of credit for U.S.$14,400,000 i.f.o. Chenax Majesty Inc. of 1 Union Square West, New York.

We confirm our cable of today requesting you to please amend subject credit as follows:-

1). Specifications of cement to read "Cement conforming to any one or more of these specifications is acceptable Puz 350; P350; BSS 12/1958; BSS 12/1971".

2). Delete "Delivery" on line two of appendix (1) and insert "Shipment"

3). Cement shipped and insured from any European or American Port is acceptable.

Please advise beneficiary. All other terms and conditions of the credit remain unchanged.

Yours faithfully,

Bills Manager.

Countersigned:

Asst. Chief of Banking Operations.

EXHIBIT C TO AKUBA AFFIDAVIT -
MARCH 12, 1975 LETTER FROM
SCHRODER, MUNCHMEYER, HENGST & CO. TO CHENAX,
AND MARCH 14, 1975 LETTER FROM
SCHRODER, MUNCHMEYER, HENGST & CO.
TO CENTRAL BANK OF NIGERIA

SCHRÖDER, MÜNCHMEYER, HENGST & CO. BANK

KREDITABTEILUNG

HAMBURG FRANKFURT OFFENBACH

CHENAX MAJESTY, INC.,
1, Union Square,
New York, N.Y. 10003,

U.S.A.

2 Hamburg 1
Ballindamm 33
Postfach 10 52 03
Tel. (0 40) 32 95-1
Durchwahl:

HAMBURG

March 12, 1975
Kni/ra.

Gentlemen:

re.: Transcommerce Warenhandels GmbH & Co. KG, Hamburg 1 - Prospective Contract for 240.000 m/tons Portland Cement to be delivered to Ministry of Defence, Lagos/Nigeria

We are informed that the following agreement has been reached between yourselves and Transcommerce Warenhandels GmbH & Co. KG, of Hamburg 1, Kattrepel 2, Western Germany:

Transcommerce will receive from Chenax Majesty an irrevocable commitment in writing to cooperate exclusively with Transcommerce on any matters relating to and to transfer an order to deliver approx. 240.000 metric tons of Portland Cement BSS 12/1958 or equivalent in 50 kgs 6-ply paper bags at US-Dollars 60.00 per metric ton, CIF-APAPA/LAGOS, Nigeria, to the Federal Ministry of Defence, Lagos, Nigeria, under the following provisions:

1. Transcommerce provide a bank confirmation acceptable by Chenax Majesty whereby Transcommerce undertake to pay the sum of US-Dollars 4,50 per metric ton of cement that Transcommerce or its principals, assignees or agents deliver to the Federal Ministry of Defence, Lagos, Nigeria on the said order.

2. The said order is to be delivered in 12 monthly lots of approx. 20.000 metric tons resulting in a total payment by Transcommerce to Chenax Majesty of approx. US-Dollars 1.080.000,-- payable in proportionate instalments as the delivery of the cement is made.

3. Each proportional instalment becomes due and shall be paid in full immediately each draft covering a shipment, drawn against the L/C covering this order is negotiated.

.../-2

SCHRÖDER, MÜNCHMEYER, HENGST & CO. BANK

Blatt 2 zum Schreiben vom 12.3.75 an CHENAX MAJESTY INC., New York

4. The above irrevocable commitment by Chena... remains subject to an acceptable 3 percent Bond to be prepared by Transcommerce withi... days from receipt of the order together wi... factory Demurrage Arrangement acceptable t...

5. Failure on the part of Chenax Majesty to p... Demurrage Arrangements acceptable by Trans... renders this agreement null and void.

To the above, we hereby add our irrevocable confir... follows:

We, Schroeder, Muenchmeyer, Hengst & Co. Bank, Ballindamm 33, Western-Germany, hereby confir... received irrevocable instructions from our cl... commerce Warenhandels GmbH & Co. KG, Hamburg, ... that, under the provisions of

a) the Letter of Credit to be established by ... confirmed by first-class bank of internati... is being advised to sellers through oursel...

b) the documents for each contracted partship... total lot of 240.000 m/tons cement are bei... against the aforesaid Letter of Credit thr...

we hereby irrevocably guarantee to pay into y... No. 051-85967-0 with Barclays Bank of New Yor... Avenue, New York, N.Y. 10017/USA (or into any ... that you may indicate) an amount of US$ 4,50 ... metric ton of cement shipped under the above ... concluded. Such payments will be made by us o... proceeds of documents negotiated through us u... of Credit to be established and will only be ... soon as funds are at our disposal.

The total payments to you, which are schedule... ments corresponding to the actual contracted ... shall not exceed

US$ 1.080.000,--

(U.S.Dollars: Onemillioneighty ...

...sty Inc. ...ormance ...orking ...satis- ...nscommat... ...e ...rce ...n as ...000 Hamburg ...t we have ...Trans- ...he extent ...s and ...standing, ...and ... of the ...rawn ...us, ...account ...0 Park ...r account ...ach ...tract to be ... the ... the Lett... ...ted as ...instal- ...hipments, ...and-onl...

/-3

SCHRÖDER, MÜNCHMEYER, HENGST & CO. BANK

Blatt 3 zum Schreiben vom 12.3.75 an CHENAX MAJESTY INC., New York

and shall only be made upon receipt of the order referred to in the above agreement by Transcommerce Warenhandels GmbH & Co. KG, of Hamburg 1, Kattrepel 2, Western-Germany, and after all other provisions of the above agreement having fully been met.

Yours faithfully,

SCHRÖDER, MÜNCHMEYER, HENGST & CO.

(P. Hiort) (U. Knille)

77

SCHRÖDER, MÜNCHMEYER, HENGST & CO. BANK

KREDITABTEILUNG

HAMBURG FRANKFURT OFFENBACH

The Chief of Banking Operations,
CENTRAL BANK OF NIGERIA,
Private Mail Bag 12194,
Tinubu Square,
Lagos,
NIGERIA.

2 Hamburg 1
Ballindamm 33
Postfach 10 59 03
Tel. (0 40) 32 95-1
Durchwahl:

HAMBURG

March 14, 1975
Kni./br.

Dear Sir,

re.: Letters No. Bg/101/S.8 and Bg/S.8/999 dated 29th January and 4th February, 1975 from the Ministry of Defence, Lagos
Supply of 240.000 metric tons of Portland Cement

Our clients Chenax Majesty Inc. of 1, Union Square, New York, N.Y.10003, U.S.A./Transcommerce Warenhandels GmbH & Co. KG, D-2000 Hamburg 1, Kattrepel 2, Western Germany, received from the Ministry of Defence, Lagos, Nigeria, the above order to supply 240, 000 metric tons of Portland Cement.

Provided that and as soon as buyers will have established a revolving Letter of Credit acceptable to us, the following Performance Bond will become effective:

Quote

The Central Bank of Nigeria,
Lagos / NIGERIA

PERFORMANCE BOND

Dear Sirs,

Based on the order given by the Ministry of Defence, Lagos, Nigeria, with their letter of January 29, 1975, No. Bg/101/S.8/904, and the alterations given in the letter of February 4, 1975, No. Bg/101/S.8/999 to supply to the Ministry of Defence, Lagos, Nigeria, 240,000 metric tons of Portland Cement, B.S.S. 12/1958, at a total price of U.S. Dollars 14,400,000.00 CIF-LAGOS/APAPA, we, Chenax Majesty Inc. of 1, Union Square, New York, N.Y.10003, USA/Transcommerce Warenhandels GmbH & Co.KG, D-2000 Hamburg1, Kattrepel 2, Western Germany, guarantee the Government of the Federal Republic of Nigeria (hereinafter called "the buyer") for the sum of

US$ 36,000.--

... -/2

SCHRÖDER, MÜNCHMEYER, HENGST & CO. BANK

Blatt 2 zum Schreiben vom 14.3.75 an The Chief of Banking Operations,
Central Bank of Nigeria, Lagos/NIGERIA

Continued:

(United States Dollars: Thirtysixthousand-only)

representing one-twelfth of 3 (three) percent of the total purchase price (US$ 14,400,000.00), and we undertake to pay to you upon receipt of a first demand in writing from The Permanent Secretary, Ministry of Defence, Lagos, Nigeria, any amount up to but not exceeding this sum in the event of our failing to perform in accordance with the terms advised to us in the Ministry of Defence's letter No. Bg/101/S.8/904 dated January 29, 1975 and No. Bg/101/S.8/999 dated February 4, 1975. This Performance Bond shall revolve eleven times month by month. The total obligation herein shall in no case exceed four hundred and thirty two thousand United States Dollars (US$ 432,000.00). This Performance Bond will be decreased simultaneously and proportionally by the quantities of any cargo duly delivered. The guarantee conveyed herein becomes effective only when a revolving Letter of Credit covering this order has been established and our bankers have accepted same. This Performance Bond shall be deemed to expire on the date of delivery of the last consignment of cement as specified in the said terms.

Authorized Representatives:
Chenax Majesty Inc./Transcommerce WarenHandels GmbH & Co.KG.

Unquote

Under the above provisions, the Performance Bond as above bears our following irrevocable confirmation:

Quote

We, Schroeder, Muenchmeyer, Hengst & Co., Bank of D-2000 Hamburg 1, Ballindamm 33, Western Germany, hereby guarantee the performance by Chenax Majesty Inc. of 1, Union Square, New York, N.Y.10003, USA/Transcommerce Warenhandels GmbH & Co.KG, of D-2000 Hamburg 1, Kattrepel 2, Western Germany, of the above conditions and undertake to pay to the buyer on confirmation of default by The Permanent Secretary, Ministry of Defence, Lagos, Nigeria, any amount up to but not exceeding the said sum of US$ 36,000.00 (United States Dollars: Thirty six thousand-only, for each monthly delivery on demand by the buyer in the event of default on the part of Chenax Majesty Inc./Transcommerce Warenhandels GmbH & Co.KG, under the terms advised in the said ministry's letter No. Bg/101/S.8/904 dated January 29, 1975 and No. Bg/101/S.8/999 dated February 4, 1975.

SCHRÖDER, MÜNCHMEYER, HENGST & CO.

Unquote

SCHRÖDER, MÜNCHMEYER, HENGST & CO. BANK

Blatt 3 zum Schreiben vom 14.3.75 an The Chief of Banking Operations,
Central Bank of Nigeria, Lagos/NIGERIA

79

We now look forward to the receiving the revolving Letter of Credit to be established by order of the buyer and having to be acceptable to us.

With kind regards,

yours very truly,
SCHRÖDER, MÜNCHMEYER, HENGST & CO.

(P. Hiort) (U. Knille)

EXHIBIT D TO AKUBA AFFIDAVIT - AUGUST 1975 TELEX
FROM CENTRAL BANK OF NIGERIA TO CHENAX

NNHN

ZCZC SKC0246 RMB9027 UXS310 LWA552:TMA6499

URSK HL NGLS 078

LAGOS 78/77 26 0257

LT

CHENAX MAJESTY INCO

1 UNION SQUAREWEST

NEWYORKNY 10003USA

BG/101/S 16 X CEMENT X IN LIGHT PRESENT CONGESTION AT LAGOS AND OTHER NIGERIAN PORTS GOVERNMENT HAS SUSPENDED IMPORTATION CEMENT FOR THREE MONTHS FROM 18 AUG X YOU ARE REQUIRED TO DEFER ALL FURTHER CHARTERING AND LOADING OF SHIPS AS NOW SCHEDULED

OL LT 1 NY10003USA BG/101/S 16 X 18 AUG X YOU

MA6499 LT CHENAX PAGE2/27

DER TERMS YOUR AGREEMENT X ANTICIPATE NEW AGREEMENT WILL BE EGOTIATED WITH YOU SHORTLY IN ORDER RESCHEDULE DELIVERY OGRAMME FOR BALANCE OF CEMENT ALREADY ORDERED X

PERMDEF

Global Communications
Global Communications
Global Communications
Global Communic

ADDENDUM TO AKUBA AFFIDAVIT - AFFIDAVIT OF DR. UCHE AKUBA SWORN TO JANUARY 5, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHENAX MAJESTY, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA

Defendants.

77 Civ. 3045 (MEF)

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DR. UCHE AKUBA, being duly sworn, deposes and says:

1. I am the president of Chenax Majesty, Inc., ("Chenax") plaintiff herein, and I make this affidavit in opposition to the motion of defendants to dismiss this action for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

2. Defendants' motion to dismiss relies primarily on two contentions. The first is that the transaction at issue had an insufficient nexus with the United States to warrant jurisdiction under the Foreign Sovereign Immunities Act of 1976, and the second is that the claims are non-justiciable by virtue of the Act of State doctrine. I am directing this affidavit primarily to defendants' contention that this transaction had an insufficient nexus with the United States.

3. Regardless of whether or not defendants engaged in substantial activities at Morgan Guaranty Trust Company (hereinafter called "Morgan") with regard to the cement acquisition program as a whole, the facts of Chenax's case

establish that there was a sufficient nexus vis-a-vis Chenax. Th also indicate the extent to which defendants, and not plaintiff, created the nexus with the United States. If the Court will examine the contract between plaintiff and defendant Nigeria (Exhibit "A" to my affidavit submitted on plaintiff's cross-motion for summary judgment); it will see that the Letter of Credit was to be paid at the Schroeder, Huenchmeyer, Hengst & Co. Bank in Munich, Germany. This was what I requested during my negotiations on behalf of plaintiff and what Nigeria agreed to do. (See my letter to defendant Nigeria of March 20, 1975, a copy of which is annexed as Exhibit "1"). Nevertheless, contrary to my request and the Agreement, and without Chenax's approval, defendants unilaterally had the Letter of Credit made payable at Morgan in New York. This disturbed me considerably. Because plaintiff had made all of its arrangements for the shipment of cement in connection with the contract in Europe, plaintiff wanted the Letter of Credit paid through a European bank. Consequently, when I discovered that the Letter of Credit was to be paid at Morgan, I wrote to defendant Central Bank of Nigeria expressing my concern. A copy of my letter of April 29, 1975, is annexed hereto as Exhibit "2". It has now become obvious why defendants made Morgan the paying bank. Morgan is their correspondent bank and apparently they control its activities. An independent bank would not have acceded to their request to revoke an irrevocable letter of credit, and would not have dishonored drafts against irrevocable letters of credit, as I understand Morgan did for Nigeria in the case of National American Corporation.

4. I also understand that in both cases commenced by Nikkei International, Inc. and East-Europe Import-Export, Inc.

with which Chenax's action has been consolidated, the contracts provided that the letters of credit be payable through the First National City Bank in New York City. However, the Nigerian defendants made the letters of credit in both of those cases payable through the Morgan. Accordingly, the Nigerian defendants should not be heard to claim that they did not take any independent action within this jurisdiction or that payment in New York was an accommodation to plaintiffs. Not only did they rely on the laws of New York to protect them vis-a-vis their banking activities in connection with the transaction at issue, they relied on their bank, Morgan, to follow their directives, even though these directives countermanded law and custom with regard to international commercial transactions.

5. The Nigerian defendants would have this Court believe that the breach of cement contracts and the revocation of the irrevocable letters of credit were solely for the sake of avoiding a national disaster. Though I would not question that a substantial motivation for stopping further shipment of cement was to relieve the congestion at the Lagos port, it was far from the only motivation. As explained in my accompanying affidavit on plaintiff's cross motion for summary judgment, before the Nigerian defendants would discuss rescheduling the shipments, they insisted that general releases in the form annexed to plaintiff's motion for summary judgment be signed. I have spoken to several persons who were foolish enough to sign such releases. After having signed them, if they were fortunate to even be granted an audience with National Supply Corporation, the government agency which replaced the Ministry of Defense as the agency with the responsibility of procuring the cement, they were offered a price of approximately $50 per ton, $10 below

the price on the contracts that had been breached and cancelled. In the case of plaintiff herein, the defendants have ignored every effort we have made to even discuss compensation or rescheduling of cement shipments.

6. Any implication in the affidavits submitted in support of defendants' motion to dismiss to the effect that there has been an effort to deal fairly with this situation is entirely specious. Over two years have passed since the contract was breached and the Letter of Credit revoked. During those two years I have personally made several trips to Nigeria during which I have tried to discuss the resolution of plaintiff's claims with appropriate officials. I and my counsel have also written to defendants. Despite all of these efforts, I have not even received the courtesy of a response. It is truly like dealing with a stone wall. Accordingly, as I am sure this Court must realize, if this country fails to assume jurisdiction over this action, plaintiff a New York corporation, will be forever foreclosed from receiving justice.

DR. UCHE AKUBA

Sworn to before me this
day of January, 1978

LEWIS S. SANDLER
Notary Public, State of New York
No. 31-4653111
Qualified in New York County
Term Expires March 30, 197

EXHIBIT 1 TO AKUBA AFFIDAVIT SWORN TO
JANUARY 5, 1978 - MARCH 20, 1975 LETTER
FROM AKUBA TO MINISTRY OF DEFENSE OF NIGERIA

March 20, 1975.

The Permanent Secretary,
Ministry of Defence,
Lagos, Nigeria.

Our ref: ABO/457-Y/34

For the attention of J. A. Ilori, Esq.

Dear Sir,
We refer to your letter Bg/101/S.8/999 of 4th February, 1975 and to the contract we signed with you today.

In order to avoid costly and time-consuming amendments to our pending Letter of Credit, we wish to suggest that the following items be included specifically. These items agree completely with the provisions of the agreement under reference. We are of the opinion that the inclusion of these items is important as their inclusion will enable us to deliver cement well within our requirements under the contract, and quite possibly, well ahead of the presently contemplated schedule.

Letter of Credit amount: In the amount of U.S.$1,200,000.00 plus or minus 10%, revolving.

Letter of Credit Description: Confirmed, irrevocable, divisible, transferable abroad, to revolve eleven times in the same amount, and drafts shall be payable at sight against documents specified below:-

(a) Commercial invoice, X original/s and Y copies.
(b) Clean on board Bills of Lading (Charter Bills of Lading acceptable).
(c) Insurance Certificate
(d) Certificate of Quality issued by an internationally recognised testing organization evidencing that cement shipped conforms to BSS.12/1958 or 1971 or Spanish Specification P.350.

Partial Shipments:
Partial shipments permitted.

Demurrage Payments: Demurrage in the amount of U.S.$4,100.00 per diem is payable via irrevocable Bank Guarantee confirmed by (any major German bank) at sight, against documentation by Ship's Master's Time Sheet.

Our Bank: Please specify:- All payments against Letter of Credit to be made through Schroeder, Muenchmeyer, Hengst & Co Bank of Hamburg, West Germany.

Bank Charges: All banking charges for account of buyer.

Thank you for your attention. We are looking forward to working with you.

Dr. [illegible], Authorized Representati

[illegible]
1 Union Square, New York 10073, U.S.A. Phone [illegible] Cables [illegible] Telex [illegible]
Industr[illegible] [illegible]al financing

Exhibit [illegible]

EXHIBIT 2 TO AKUBA AFFIDAVIT SWORN TO
JANUARY 5, 1978 - APRIL 29, 1975 LETTER
FROM AKUBA TO MINISTRY OF DEFENSE OF NIGERIA

100

April 29, 1975.

The Permanent Secretary,
Ministry of Defence,
Accounting Division,
P.M.B. 12500,
Lagos, N I G E R I A.

Our ref: ADA/457-Y/79
Your ref: MD/10/Vol.1/36.

Dear Sir,

For the attention of J. A. Ilori, Esq.

Re: Letter of Credit No. CBN/DC/75/79 by order of Ministry of Defence, Lagos for U.S.$14,400,000.00 covering 240,000 metric tons of cement.

We thank you for the above-mentioned letter of credit which has been opened in our favor by the Central Bank of Nigeria. We shall deliver cement on schedule as per our agreement with you.

In order to ensure proper payments to us under the credit, we have found it necessary to request a minor amendment to the letter of credit. We emphasize that though we request you to make this amendment as soon as possible, it is not essential that we have the amendment in order to begin deliveries.

Reason for amendment:
Our bank is in West Germany. Our cement manufacturer's bank is in Spain, and your bank (Morgan Guaranty) is in New York. This spread of banks means an inevitable delay (caused by the mail) in transmitting documents. In view of this, we may have difficulty collecting payments due to us on deliveries under the credit. In order that we may avoid such an unpleasant eventuality, we request that an additional instruction be made on the letter of credit, namely,

"Stale-dated bills of lading are acceptable".

We will draw your attention to the fact that the amendment we request is in full compliance with all the provisions of our contract with you.

Thank you very much for your prompt action in this matter.

I am,
Truly yours,

[redacted]
Authorized Signature.

EV/jy

Carbon copy: To
Schroeder, Muenchmeyer, Hengst & Co. Bank.

Exhibit "2"

OFFICE COPY

213a

AFFIDAVIT OF ROBERT ROSS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, SWORN TO NOVEMBER 11, 1977

rec'd
SERVED 11-11-77
FILED -
DOCKET 11-11
DIARY -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 2809 (GLG)

AFFIDAVIT OF ROBERT ROSS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT ROSS, being duly sworn, deposes and says:

1. I am President of EAST EUROPE IMPORT-EXPORT, INC. ("East Europe"), the plaintiff herein, and am personally familiar with all the matters hereinafter stated, since I have been in charge of the Nigerian cement contract and letter of credit negotiations and transactions from their beginning.

2. East Europe is a New York corporation, having been formed under the laws of New York in early 1971. It is headquartered at 440 Park Avenue South, New York, N.Y. 10016, where, together with affiliated corporations, it occupies the entire twelfth floor. The 440 Park Avenue South office is East Europe's headquarters, and its only office in the United States. As the corporate name indicates, East Europe is engaged in the business of importing and exporting commodities, including cement, and places special emphasis on trading with East European countries, although it likewise does business with countries in other parts of the world.

3. On January 28, 1975, East Europe signed a contract for the sale and delivery to Nigeria of 240,000 metric tons of

Portland cement to Nigeria (Exh. 1). The contract is a mimeographed, obviously standard form developed by Nigeria, with blanks (which on East Europe's contract were filled in by typewriter) for the name and address of the cement seller, the number of tons, price per ton, aggregate price, etc.

It provides, in ¶1.(v), for establishment by the buyer of

> "an Irrevocable, Transferable, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through the First National City Bank, 40th. Street and Broadway, New York, U.S.A."

It further provides, in ¶2:

> "The construction, validity and performance of this contract shall be governed by the Laws of U.S.A. . . .".

In light of these provisions, and the express admission by defendants that <u>at least</u> five other, apparently substantially identical contracts were entered into by defendants,* all likewise calling for payment in New York through CENTRAL BANK's ("CBN") establishment of a confirmed, irrevocable letter of credit through a prime New York City bank, and presumably all likewise providing that they are to be governed by "the Laws of U.S.A.," it is difficult for me to understand how

(a) defendants can now claim that these were not commercial transactions,

(b) defendants can now seek to assert sovereign immunity, which would make the choice-of-governing-law provision in their own standard form of contract utterly meaningless, and

---

* National American Corporation, J. L. M. International, Inc., Chenax Majesty, Inc., Nikkei International, Inc., and Kaisir Trading Corporation; see ¶6, below.

(c) defendants can now claim that this Court lacks subject matter jurisdiction, despite the fact that East Europe is a New York corporation headquartered in this District, the contract and letter of credit are by their specific terms (like the five others) to be performed by defendants in this District, and defendants' breaches occurred in New York,* where the credit which they unilaterally purported to modify and alter was situated and payable, and which was the stipulated place for defendants' performance.

4. After the execution of the cement contract in late January, 1975, there was considerable communication by letter, cablegram, telex, and otherwise between East Europe and CBN concerning several provisions of the contract, including possible amendments to the terms of the Performance Bond posted by East Europe, and the form of letter of credit for $14,200,000 to be established in East Europe's favor. With respect to the latter, I, on behalf of East Europe, had interpreted the contract as meaning that the phrase in ¶1.(v) "an Irrevocable, Transferable, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price" meant that the letter of credit would be confirmed by First National City Bank, Morgan Guaranty Trust Company or another prime New York bank; and I communicated this understanding to CBN. By letter from CBN to East Europe dated 14th July, 1975, copy of which is annexed hereto as Exhibit 2, CBN stated:

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* See my affidavit of November 3, 1977 in support of East Europe's motion for summary judgment, ¶¶7-10, and Exhibits F and G thereto.

> "It is not our practice to issue confirmed letters of credit. Our letters of credits are irrevocable credits and by virtue of our position no supplier should doubt our ability to settle our bills promptly."

Based on this assurance by CBN, and also my knowledge that Nigeria is the world's sixth-largest petroleum-producing and exporting country, and the largest nation in Africa with a population of some 80 million, and based on my belief that Nigeria and CBN would honor their written contracts, I accepted, on behalf of East Europe, the format proposed by CBN, i.e. CBN's confirmed, irrevocable letter of credit established in East Europe's favor, advised and payable through Morgan Guaranty Trust Company of New York. I so advised CBN by letter dated July 22, 1975, copy of which is annexed hereto as Exhibit 3. As this Court knows from my affidavit of November 3, 1977 in support of East Europe's motion for summary judgment, and the exhibits thereto (which are hereby respectfully incorporated by reference), Morgan Guaranty duly advised East Europe in August, 1975 that such documentary letter of credit had been established by CBN through Morgan Guaranty, payable through Morgan Guaranty; and with its advice, Morgan Guaranty enclosed a copy of the CBN documentary credit (Exh. 4). Upon receipt of the letter of credit, East Europe requested Morgan Guaranty to obtain from CBN an amendment thereof, relating to the ports from which cement under the contract could be shipped, and Morgan Guaranty advised East Europe in writing on or about September 8, 1975 that it had been instructed by CBN to advise East Europe that such amendment was agreeable and had been accepted by CBN (Exh. 5).

5. As above stated, the performance called for by East Europe under the cement contract is the delivery of 240,000 metric tons of Portland cement to Nigeria, and the performance called for by Nigeria is the payment to East Europe in U.S. dollars and in New York of $14,280,000, through a confirmed,

irrevocable letter of credit which Nigeria undertook to have its Central Bank establish, advise, and make payable to East Europe through and at a New York bank. East Europe would not have entered into the cement contract but for said payment terms: the very function of a letter of credit in international commerce is to assure the seller payment in its currency, and at the place where it is located, against documents showing its performance, i.e. shipment of the stipulated goods.

6. The defendants have annexed to their motion to dismiss, as Exhibit 9, an affidavit of Jacob Oladele Amao in the National American action, sworn to December 22, 1976, which acknowledges that letters of credit to a number of the cement suppliers, including East Europe, National American Corporation, J.L.M. International, Inc., Chenax Majesty, Inc., Nikkei International, Inc., and Kaisir Trading Corporation were made payable in New York, and states:

> "The place of payment of all such letters of credit was, in each case, chosen solely at the request of and as an accommodation to the cement seller."

That statement makes as much sense as to say that the delivery of the cement to Nigeria at a Nigerian port, rather than to and at Timbuktu, was "chosen solely at the request of and as an accommodation to" Nigeria.

7. Indeed, it seems clear to me that Morgan Guaranty, in acting as the advising and paying bank for all of these letters of credit, was acting as an agent for CBN; all of Morgan Guaranty's advices to us clearly conveyed the fact that Morgan Guaranty was acting for and upon the instructions of CBN, which is my understanding of what an agent normally does for its principal. My attorneys have advised me that they have noticed the deposition of Morgan Guaranty, and served a subpoena upon it, for November 10, 1977, and I believe that deposition will show

many activities by Morgan Guaranty in New York, on a paid basis, for CBN and perhaps also for Nigeria itself.

8. I am further advised by my attorneys that the plea of sovereign immunity has been rejected repeatedly by at least two judges of this Court, and by all other courts which have considered it, including the Court of Appeal in England and a West German court. I cannot help concluding that the defendants' insistence on once again relitigating an issue which has been repeatedly decided against them by every court which has considered it demonstrates a lack of good faith, and a determination to employ every possible delaying and stalling tactic.

9. Finally, Mr. Simms states in his affidavit of October 24, 1977 in support of defendants' motion to dismiss, in ¶11, pp. 8-9, that the defendants, through a Cement Contracts Negotiating Committee, have negotiated settlements of the claims of some of the 68 or so cement suppliers situated identically or similarly to East Europe. There appears to me to be an implication in Mr. Simms's affidavit that if only East Europe had been willing to negotiate with the defendants, its claim, too, could and would have been settled. If such an implication is intended, it is totally false. As shown by the annexed affidavit of Thomas Richard Spradlin, East Europe negotiated with the defendants, through a leading Washington law firm, for almost a year and a half; but despite the utmost good faith, patience, and forbearance on East Europe's part, no reasonable, bona fide proposal was ever received from the defendants. If there has been a lack of good faith, it has certainly not been on the part of East Europe.

Accordingly, I respectfully pray that defendants' motion to dismiss be in all respects denied.

However, if the Court should feel that additional facts must be adduced to dispose of this motion -- e.g., the relationship between CBN and Morgan Guaranty, whether Morgan Guaranty as the paying bank was more than a merely advising bank, whether First National City Bank (which, rather than Morgan Guaranty, is named in the contract) had anything to do with this credit -- then I respectfully request a continuance so that plaintiff may conduct discovery, including the deposition of Morgan Guaranty, as to these questions and any others raised by defendants' motion papers which this Court finds relevant. Obviously, these facts are not within plaintiff's knowledge, but within the sole knowledge of defendants, Morgan Guaranty, and possibly other witnesses, and therefore cannot be presented by plaintiff to this Court by way of affidavit.

ROBERT ROSS

Sworn and subscribed to before me
this 11th day of November, 1977.

Notary Public

BERTHOLD H. HOENIGER
Notary Public, State of New York
No. 31-0924950
Qualified in New York County
Commission Expires March 30, 1978

EXHIBIT 2 TO ROSS AFFIDAVIT - JULY 14, 1975 LETTER FROM CENTRAL BANK OF NIGERIA TO EAST EUROPE

EXHIBIT 2

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos
PRIVATE MAIL BAG 12194 : CABLES : CENBANK :
TELEPHONE

14th July, 1975.

Mr. Robert Ross,
East Europe Import Inc.,
440 Park Avenue South,
New York, N.Y. 10016,
(212) 686 - 7590,
U. S. A.

Dear Sir,

Letter of credit for US $14,280,000 in favour East Europe Import Export Inc. (U.S.A.).

I write with reference to your letter dated 2nd July, 1975, on the above-mentioned subject and to inform you that your proposed addition to your performance Bond will be acceptable to us except the portion of paragraph 1, sub-division 5 of the Contract Agreement of 28th January, 1975, which specified the following:-

CONFIRMED LETTER OF CREDIT.

It is not our practice to issue confirmed letters of credit. Our letters of credits are irrevocable credits and by virtue of our position no supplier should doubt our ability to settle our bills promptly. However, sceptical suppliers are free to initiate status enquiry about us. In this circumstance, you are advised to delete the word 'CONFIRMED' from your proposed addition to the performance bond.

I attach a copy of the specimen performance bond, which you said was not enclosed in our letter of 20th June, 1975.

Thank you for the copy of contract agreement forwarded to us for ease of reference. Sincere greetings to Mr. William H. Dalson.

Yours faithfully,

Bills Manager.

EXHIBIT 2

EXHIBIT 3 TO ROSS AFFIDAVIT - JULY 22, 1975 LETTER FROM EAST EUROPE TO CENTRAL BANK OF NIGERIA

EXHIBIT 3

July 22, 1975

Central Bank of Nigeria
Tinubu Square
Lagos, Nigeria

Attn: Bills Manager

Gentlemen:

In reference to your letter of July 14, 1975, regarding L/C for $14,284,000 ikmfavor of East Europe Import Export, Inc. thank you for responding to our letter of July 7, 1975, stating that the performance bond will be acceptable. We will accept your irrevocable Letter of Credit, and will delete the word "confirmed", and enclosed you will find a copy of the performance bond that was telexed by First National City Bank last week.

Since we have been awaiting this Letter of Credit since January 28, 1975, I would appreciate receiving the Letter of Credit immediately, so that shipment can start at once.

Thank you for your cooperation.

With kindest regards.

Yours faithfully,

EAST EUROPE IMPORT EXPORT INC.

Robert Ross

RR/sfv
cc: Mr. Obeyowale, Mr. Obiesie, Mr. Lavin Smith, Mrs. Feldman
Mr. Ilari, Mr. Schaeter, Mr. Duncan

EXHIBIT 3

ADDENDUM D TO EAST EUROPE MEMORANDUM OF LAW - DECISION IN NONRESIDENT PETITIONER v. CENTRAL BANK OF NIGERIA (DISTRICT COURT OF FRANKFURT, WEST GERMANY DATED DECEMBER 2, 1975)

Federal Republic of Germany: District Court Decision in Nonresident Petitioner v. Central Bank of Nigeria

23. GVG [Judicature Act] Section 20; ZPO [Code of Civil Procedure] Section 23 (Domestic jurisdiction over a foreign state in cases of non-sovereign activity)

Jurisdiction and Competence of German Court in Suit by a Nonresident Against a Foreign State Central Bank.

District Court, Frankfurt, Judgment of December 2, 1975 - Docket No. 3/8 O 186/75.

Facts of the Case: In February 1975, the petitioner entered into a written contract with the Ministry of Defense of the Republic of Nigeria for the delivery of 240,000 tons of cement to Nigeria. The contract called for an irrevocable, transferable, divisible and confirmed letter of credit to be opened in favor of the seller. In March 1975, the respondent, the Central Bank of Nigeria, opened an irrevocable letter of credit in favor of the abovementioned seller, payable in Austria at the petitioner's bank. The letter of credit referred at the end to the uniform provisions and uses for letters of credit, 1962 edition (Brochure 222 of the International Chamber of Commerce). An enclosure to this letter of credit stated that in addition to the agreed purchase price, demurrage "without any limit" would be paid upon presentation of specified documents. The Deutsche Bank in Frankfurt informed the respondent that it would charge the countervalue of the amount of money in the respective letter of credit to respondent's

Deutsche Mark account. The petitioner delivered almost 140,000 tons of cement, carried in 17 ships, which arrived in Lagos during the period 27 April to 1 September 1975. The purchase price for this partial delivery was paid on presentation of the documents. Because of heavy congestion which occurred in the meantime in the harbor of Lagos, the Nigerian Ministry of Transportation issued instructions on 9 August 1975 in accordance with which suppliers or carriers were to notify the Nigerian port authorities at least two months prior to the departure of ships to Nigeria and to provide them with extensive details; the port authorities were to authorize the shipments or to establish other dates. On 23 September 1975, the Deutsche Bank cabled the petitioner's bank that the respondent had discontinued demurrage payments against presentation of the prescribed documents and would make such payments only if the documents were first approved for payment by the respondent.

Petitioner submitted, among other things, that based on the letter of credit it has a claim against the defendant for the demurrage that had become due, and for future demurrage for the 10 ships that had not yet been unloaded. Its petition for an attachment of respondent's funds was granted. The respondent challenged the attachment order and, among other things, raised the defense of lack of jurisdiction and improper venue of the court. The District Court rejected these defenses.

Grounds for Decision: The German court has jurisdiction, and venue was properly laid for the attachment. Contrary to respondent's contention, the respondent is not immune from the jurisdiction of German courts. According to Section 20 of the GVG, German jurisdiction does not extend to persons who, in accordance with customary rules of international law or on the basis of treaties or other provisions of the law, are exempt from it. In the instant case, these prerequisites for an exemption are not present. We need not decide whether, based on the responsibilities assigned to it, the respondent discharges sovereign functions, and whether, under Nigerian law, the respondent acts as a juristic person and carries out in whole or in part the authority of the state in fulfillment of responsibilities under public law. The petitioner correctly points out that in accordance with general case law, legal publications, and writings on international law, separate legal entities of a foreign state enjoy no immunity (RGZ [Decision of the Supreme Court of the Reich in Civil Matters] 110, 315, 317; RGZ 157, 389, 395; BGHZ [Decision of the Supreme Court of the Federal Republic of Germany in Civil Matters] 18, 1 [9] = NJW [New Juristic Weekly Journal] 1955, 1435; Baumbach-Lauterbach, ZPO, 33rd edition [1975], Section 20 of the GVG, Note 1Aa; Stein-Jonas-Pohle, ZPO, 19th edition [1964], annotation to, Section 1, Note VBJ; Wieczorek, ZPO, 1957, Section 19 of the GVG, annotation B II; Rosenberg-Schwab, ZPO, 11th edition [1974], p. 84; Riezler, International Judicial Prodecure, 1949, p. 404; Dahm, VolkerR. [International Law], 1958, p. 228; compare further the supplementary comments in Habscheid, "Reports of the German Society for International Law," volume 8, p. 171, footnote 18, especially with reference to the decisions of foreign courts.) We need not decide whether the respondent, who according to Article 3 II of the Central Bank Law of 1958 was established as a juristic person, and according to a written statement of the Director of the Banking Division can sue and be sued in its own name and, in furtherance of its functions may acquire, hold and sell moveable and immoveable property, can partake of the Government's immunity because it is bound by instructions issued by the government and because it implements the financial policies of the government, and thus, it is in reality a "juristically dependent agency" of the government (see Dahm, p. 228; Habscheid, p. 169ff). Even if the respondent were an integral instru-

mentality of the Nigerian Government, it could not claim immunity from the jurisdiction of German courts under the facts of this case.

According to the decisions of the BVerfG [Federal Constitutional Court] of 1962 and 1963 (BVerfG Decision 15, 25ff = NJW, 1963, [p.] 435; BVerfG Decision 16, 27ff = NJW, 1963, [p.] 1732), a foreign state is exempt from the jurisdiction of German courts only in regard to its governmental activity (acta jure imperii), but not in regard to its non-governmental activity (acta jure gestionis), because there exists no recognized rule of international law which deprives municipal courts of jurisdiction in suits against a foreign state drawing into issue its non-governmental activity. This principle of law, which has prevailed in the Federal Republic of Germany since the issuance of the abovementioned decisions and which restricts the immunity of foreign states to their sovereign activities, is not limited to claims which have a connection with Germany, as was the case in the decision of the BVerfG of 30 April 1963. The BVerfG did not so limit its decision when it found that there existed no rule of international law which mandated a total immunity of foreign states. The earlier holdings of the Supreme Court of the Reich that immunity was to be denied to a foreign state only in cases of waiver or in cases of actions involving disputes in land located within the state (see RGZ 62, 165 [167]), are no longer valid according to the decisions of the BVerfG. In the absence of a contrary rule of international law, foreign states are, therefore, not exempted from the jurisdiction of municipal courts under Section 20 of the GVG in suits involving their non-governmental activities. Moreover, in the present case there exist contacts with Germany based on respondent's promise to make payment in Frankfurt under the letter of credit from assets on deposit here.

The restrictive immunity of the foreign state which applies to a suit on a debt in Germany applies also to the petition for a preliminary attachment which is sought by the petitioner (see Habscheid, p. 249ff and 264ff; Reizler, p. 402). If exercise of jurisdiction is permissible, attachment on the local assets of a foreign state is also admissible. Only those assets which are dedicated to the public service of the state are exempted from forcible attachment and execution. In the present case, petitioner's attachment seeks to reach respondent's cash and securities accounts, i.e., assets which are not "in the public service" of the respondent (see Riezler, p. 401; Habscheid, p. 266). A possible use of these assets in the future to finance state business cannot serve to establish their present immunity.

Petitioner's claims do not arise from sovereign activities of the respondent, but from the latter's private law transactions, viz., the establishment of letter of credit at a bank. The circumstance that the respondent did this on instruction from the Ministry of Defense of Nigeria in execution of the sales contract of 12 February 1975 is of no relevance to a characterization of the transaction as a non-governmental activity of the state, since the difference between governmental and non-governmental activity cannot be determined by a reference to the purpose of the activity or whether the activity is connected with a recognizable sovereign business. Since every activity conducted by a state, and also the respondent's activity here in implementation of its contract, serves largely sovereign purposes and has a direct connection with such purposes, the purpose test cannot be used in distinguishing between activities jure imperii and activities jure gestionis; rather the test is "the nature of the transaction or the ensuing jural relationship." What is of importance is "whether the foreign state in exercising its sovereign power has acted under public law or like a private person, that is, entered into a relationship governed by private law (see BVerfG Decision 16, 27 = NJW,

1963, [p.] 1732 for reference to identical or similar decisions rendered by the courts of Italy, Belgium, Switzerland, Austria and Egypt). The characterization of a state activity as governmental or non-governmental is to be made under domestic law, except where a rule of international law provides otherwise; the characterization of an activity of a foreign state as an act jure imperii is an intrinsic part of the exercise of the power of the state (BVerfG Decision 16, 27 = NJW, 1963, [p.] 1732).

The court concludes that the BVerfG intended that German law should be applicable; otherwise, there would have been no need to refer to international law exceptions if the domestic law of the defendant state were to govern the characterization. The court considers that the contrary opinion expressed by Canaris in an expert opinion submitted by the respondent is not justified under the present circumstances. Since German law determines the jurisdiction of German courts, the characterization of an act of a foreign state must therefore, in accordance with the cited decision of the BVerfG, and in the absence of limitations imposed by international law, be made under German law (to the same effect, see BGHZ 40, 197 [203] - NJW, 1964, [p.] 203; OLG [Court of Appeals, Munich, NJW, 1975, [p.] 2144. Assuming Nigerian law were to apply to the characterization of respondent's activity in opening a letter of credit, and assuming further that Nigerian law were to regard such activity as a governmental activity, such an attempted expansion of the concept of immunity to cover a private law activity carried out in Germany would run afoul of the legal principle of good faith dealings, which is fully recognized in international law (see expressly BVerfG Decisions 16, 27 = NJW, 1963, [p.] 1732). The principles of reciprocity and lack of a direct German interest cannot - contrary to the opinion expressed by Canaris - furnish a sufficient reason for the recognition of immunity here; this is especially so since in the present case there were payments under the letter of credit in Frankfurt, which are governed by German law, and because the domestic jurisdiction of a German court is invoked with respect to the attachment. Accordingly, pursuant to German law which governs the characterization, the execution of a sales contract and payment thereunder by the Nigerian Ministry of Defense by means of a letter of credit are not activities jure imperii in any sense of the term. The court rejects the contention that, in view of the different characterization of the activity under Nigerian law, as claimed by the respondent, international law requires that the court regard respondent's purchase of building materials for construction of military installations and its assumption of a payment obligation vis-a-vis the petitioner as an activity jure imperii. The respondent is, therefore, according to applicable German law, not exempt from the jurisdiction of German courts.

Since the accounts were maintained by the respondent at the Deutsche Bank in Frankfurt, venue is properly laid in the court according to Section 23 of the ZPO, and the court is competent to hear the case. Pursuant to these provisions, suits involving property claims brought against non-residents are to be brought in the district where the property is located. This provision also applies to attachments, because the same jurisdictional basis empowers the court to hear the merits of the case (see OLG Frankfurt, NJW, 1959, [p.] 1088 [1089]; OLG Stuttgart, NJW, 1952, [p.] 831; OLG Munich, MDR [Monthly Journal for German Law], 1960 [p.] 146). The bringing of a suit by the petitioner and a judgment on the merits are not foreclosed - contrary to respondent's contention - because international recognition would be denied to a judgment grounded on such jurisdictional basis. Such recognition would not be required, in any event, to the extent that the petitioner could satisfy any ensuing judgments from assets located in Germany. The manifest applicability of the unambiguous venue provisions of Section 23 of the ZPO cannot be limited through a restrictive inter-

pretation based on its legislative history, as urged by the respondent. According to the weight of authority, Section 23 of the ZPO fully applies to foreign juristic entities (see Rosenberg-Schwab, p. 158; Baumbach-Lauterbach, Section 23, note I; Wieczorek, Section 23, note A II) and to foreign states (see RGZ 62, p. 165ff; Wieczorek, Section 23, note II A; Habscheid, p. 165ff, 184ff). It is also generally held that Section 23 of the ZPO also applies to cases where the plaintiff is an alien (Stein-Jonas, Section 23, note I 2, with further comments in footnote 5). The petitioner, moreover, correctly points out that there are similar provisions in the procedural laws of a number of foreign countries, and that there is no reason not to apply Section 23 of the ZPO to the respondent here (see Habscheid, p. 165ff, 184ff). The court is not persuaded by the contrary arguments advanced by Canaris in his expert opinion.

(Reported by the Presiding Judge of the District Court, H.-W. Drueke, Frankfurt)

United States: District Court for the Southern District of New York Decisions in National American Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria*

NATIONAL AMERICAN CORPORATION, Plaintiff,

v.

FEDERAL REPUBLIC OF NIGERIA and Central Bank of Nigeria, Defendants.

No. 78 Civ. 2745.

United States District Court, S. D. New York.

Oct. 12, 1978.

Delaware corporation brought action against Republic of Nigeria and the Central Bank of Nigeria to recover sum in excess of $14,000,000, representing an unpaid balance for the purchase price of cement and unpaid demurrage charges claimed to be due under the terms of a written agreement. On the corporation's motion to prove an attachment and defendant's cross motion to vacate the attachment, the District Court, Edward Weinfeld, J., held that the corporation had presented a prima facie case upon its claim and was entitled to an attachment; that the fact of the agreement was signed by the Ministry of Defense on behalf of the Nigerian government did not automatically entitle the defendants to sovereign immunity; and that partial assignees of the corporation's claim were not indispensable parties.

Plaintiff's motion granted and defendant's cross motion denied.

OPINION

EDWARD WEINFELD, District Judge.

Plaintiff, a Delaware corporation having a principal place of business in this district, commenced this action against the Republic of Nigeria ("Nigeria"), a foreign government, and the Central Bank of Nigeria ("Central Bank"), a foreign banking institution having its principal place of business in Lagos, Nigeria. Plaintiff seeks to recover from the defendants a sum in excess of $14,000,000, representing an unpaid balance for the purchase price of cement and unpaid demurrage charges claimed to be due under the terms of a written agreement entered into with Nigeria. The complaint alleges that payment for the cement and demurrage charges was guaranteed by an irrevocable letter of credit established by Central Bank in favor of plaintiff under which payments were to be made by Morgan Guaranty Trust Company of New York ("Morgan Guaranty") upon presentation to it by plaintiff of sight drafts accompanied by

*[Reproduced from 420 Federal Supplement 934 (1976) and 425 Federal Supplement 1365 (1977).]

AFFIDAVIT OF CARL F. SALANS, ESQ., IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS, SWORN TO MAY 12, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

-against-

77 Civ. 2709 (L.W.P.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

CHENAX MAJESTY, INC.,

Plaintiff,

-against-

77 Civ. 3045 (L.W.P.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

DECOR BY NIKKEI INTERNATIONAL, INC.,

Plaintiff,

-against-

77 Civ. 2348 (L.W.P.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CARL F. SALANS, being duly sworn, deposes and says:

1. I am a partner in the Law Offices of Samuel Pisar, with offices at 68 Boulevard de Courcelles, Paris, 5/17 Clifton Street, London, 1300 Connecticut Avenue, N.W., Washington, D.C. and 645 Fifth Avenue, New York, N.Y. I am a member of the Illinois

and District of Columbia Bar, and received a J.D. degree from the University of Chicago Law School in 1957 and an LL.B. degree from Trinity College, Cambridge University, England, in 1958. From 1966 until 1972, I was Deputy Legal Adviser in the U.S. Department of State.

2. The Law Offices of Samuel Pisar have represented at least two holders of contracts issued by the Ministry of Defence of the Federal Republic of Nigeria, each for the supply of 240,000 metric tons of Portland cement to Nigeria at a total purchase price in excess of $14 million, and each payable through an "irrevocable" letter of credit issued by the Central Bank of Nigeria. After said contracts were breached by Nigeria in the fall of 1975, we instituted arbitration proceedings before the Court of Arbitration of the International Chamber of Commerce in Paris on behalf of one client, pursuant to the arbitration clause contained in said contract and expressly providing that disputes thereunder shall be arbitrated before that tribunal. The proceeding, entitled "Ipitrade International, S.A. against Federal Republic of Nigeria, its Federal Military Government, and its Ministry of Defence," Docket No. RT/DB No. 2949, went to hearing before the arbitrator, a Swiss lawyer appointed by the Court of Arbitration. (The Ipitrade contract provides that it shall be governed by the laws of Switzerland.) The Nigerian respondents, prior to the hearing, had presented to the tribunal their claim that they were not subject to its jurisdiction on grounds of sovereign immunity; thereafter, they did not participate further in the proceedings.

3. On April 25, 1978, the arbitrator appointed by the Court of Arbitration rendered his decision and award, expressly finding that the controversy arose out of a commercial transaction

and that the Nigerian respondents were not entitled to sovereign immunity, and that the arbitrator was competent to decide the controversy in accordance with the arbitration clause of the contract. The arbitrator awarded our client, Ipitrade International, $9 million in damages plus interest, legal costs, and costs of the arbitration.

CARL F. SALANS

Sworn and subscribed to before me
this 12th day of May, 1978.

Notary Public

DENIZE ZERO
Notary Public, State of New York
No. 31-4645006
Qualified in New York County
Commission Expires March 30, 19 79

OFFICE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF ANTONIO REALE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS, SWORN TO MAY 18, 1978

----------X

EAST EUROPE IMPORT-EXPORT, INC., :

Plaintiff, :

-against- : 77 Civ. 2809 (L.W.P.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, :

Defendants. :

----------X

----------X

CHENAX MAJESTY, INC., :

Plaintiff, :

-against- : 77 Civ. 3045 (L.W.P.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, :

Defendants. :

----------X

----------X

DECOR BY NIKKEI INTERNATIONAL, INC., :

Plaintiff, :

-against- : 77 Civ. 2348 (L.W.P.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, :

Defendants. :

----------X

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

STATE OF CONNECTICUT)
: SS.:
COUNTY OF HARTFORD)

ANTONIO REALE, being duly sworn, deposes and says:

1. I am the President of REALE INTERNATIONAL INC., a Connecticut corporation with its principal place of business at 508 Tolland Street, East Hartford, CT 06108. Companies and other

entities of which I am a principal are and have for a number of years been involved in real estate development, building construction, and international trade.

2. Prior to March 8, 1975, I, on behalf of Reale International, negotiated the terms of a contract with the Nigerian Ministry of Defence acting for and on behalf of the Federal Military Government of the Federal Republic of Nigeria. Said contract was executed on or about March 8, 1975. It calls for the sale and delivery by Reale International, and the purchase by Nigeria, of 240,000 metric tons of Portland cement at a price, CIF Lagos/Apapa, of $59.50 per ton, or a total of $14,280,000, plus demurrage.

I requested, on behalf of my company, that the Central Bank of Nigeria letter of credit to be established for payment under said contract be so established through Banco de Bilbao, Oviedo, Spain, and the contract (¶1.(v), p. 2) so provides, mentioning only Banco de Bilbao and making no mention whatever of Morgan Guaranty Trust Company of New York.

Copy of said contract is annexed as Exhibit 1.

3. Thereafter, Central Bank of Nigeria, acting unilaterally and not pursuant to any request from or discussion with Reale International, established said letter of credit through Morgan Guaranty Trust Company of New York, and instructed Morgan to advise Banco de Bilbao thereof. This is reflected in the letter from Morgan to Reale International dated May 8, 1975, copy of which is annexed as Exhibit 2. I reiterate that the choice and interposition of a New York bank in this transaction was solely the doing of Central Bank of Nigeria, since it was always Reale International's intention to obtain the required cement from Spanish or other non-U.S. sources and to ship the

same from Spanish or other non-U.S. ports, so that from Reale International's point of view the interposition of a New York bank, Morgan Guaranty, simply added one unnecessary layer.

ANTONIO REALE

Subscribed and sworn to before me
this 18 day of May, 1978.

NOTARY PUBLIC

My Commission Expires Mar. 31, 1982

EXHIBIT 1 TO REALE AFFIDAVIT -
REALE CEMENT CONTRACT

EXHIBIT 1

THIS AGREEMENT is made the 8th day of March, 1975,
BETWEEN IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria (hereinafter called "the buyer") of the one part

A N D

Heulo International Inc, of 508, Tolland Street, East Hartford, C.T. 06108, U.S.A.,

represented in Nigeria by

Chief ... M.... AKINOYE

whose registered place of business is

Nos. 8-10, Yakubu Gowon Street, Lagos, Nigeria

(hereinafter called "the seller")

of the other part.

WITNESSETH AS FOLLOWS:

1. The Buyer agrees to buy from the seller and the seller agrees to sell to the buyer cement on the terms and conditions hereinafter expressed.

(i) DESCRIPTION: The cement shall be Portland Cement conforming to B.S.S.12/1958 or B.S.S. 12/1971.

(ii) QUANTITY: 240,000 metric tons, plus or minus 10% at seller's option.

(iii) PRICE: The price shall be $ U.S. 59.50 per metric ton C.I.F. Lagos/Apapa Free Out (Incoterms 1953), making a total sum of $.U.S. 14,280,000.00, plus or minus 10%.

(iv) PACKING: In 6-Ply kraft paper bags each containing 50 kgs G/N. Also 3-Ply empty spare bags, to be supplied free of cost, equal to 3 per cent of total number of filled bags comprising each consignment.

...../2

(v) TERMS OF PAYMENT: By virtue of a revolving Performance Bond, in the sum of $ U.S. 35,700.00 (representing one-twelfth of 3% of the total purchase price) already deposited by the seller with the Central Bank of Nigeria, Lagos, the buyer undertakes to establish, within twenty-one (21) ~~fourteen (14)~~ days from the date hereinbefore mentioned, an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Banco de Bilbao of Oviedo, Spain.

Drafts drawn under the Letter of Credit shall be payable at sight, on presentation to the bank designated above of Invoices, Clean on Board Bills of Lading and Insurance Certificates.

(vi) SHIPMENT: Shipment to commence within 30 days after receipt of the Letter of Credit in Oviedo, Spain, by the seller. Delivery shall be at the rate of 20,000 metric tons per carrier, plus or minus 10% at seller's option.

(vii) INSURANCE: Insurance by the seller shall be from Gijon and/or Musel to the Lagos/Apapa Quays. The buyer shall insure the goods against all risks during discharge at the Lagos/Apapa Quays, and therefrom to his warehouse.

(viii) UNLOADING: The buyer shall arrange the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from Customs and complying with all necessary formalities, and shall pay all clearance charges, .../3

Customs duties, and harbour and anchorage dues.

(ix) DEMURRAGE: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbourmaster, whether the vessel is berthed or not), demurrage not exceeding $ U.S. 4,100.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the bank designated in sub-clause (v) above of time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's agents in Lagos.

2. The construction, validity and performance of this contract shall be governed by the Laws of Nigeria, and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient.

IN WITNESS WHEREOF IBRAHIM M. DANCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria has hereunto set his hand and seal, and ANTONIO REALE
for and on behalf of Reale International Inc.
has set his hand and seal the day and year first above appearing.

SIGNED SEALED AND DELIVERED by the said IBRAHIM M. DANCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria.

In the presence of C. G. LALIN-SMITH

SIGNED SEALED AND DELIVERED

by ANTONIO REALE

for and on behalf of Reale International Inc.

in the presence of Chief A. M. A. AKINLOYE

EXHIBIT 2 TO REALE AFFIDAVIT -
MAY 8, 1975 LETTER FROM MORGAN GUARANTY TO REALE

EXHIBIT 2

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

000030

CONFIDENTIAL

2

May 8, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A 08940

Reale International Inc.
508 Tolland Street
East Hartford, Ct. 06108

This refers to our advice of April 29,1975 and our Telex of today thru Banco de Bilbao, Oviedo, Spain

Dear Sirs:

We are instructed to advise you of the establishment by Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria of their IRREVOCABLE Credit CBN/BO/75/09 in your favor

For U.S.$14,280,000.00(FOURTEEN MILLION TWO HUNDRED EIGHTY THOUSAND U.S.DOLLARS)------

available upon presentation to us of your drafts at sight on us for 100% of the C.I.F. invoice value, accompanied by:

Commercial Invoice in quadruplicate - describing the merchandise as indicated below

Insurance Certificate in duplicate, covering ALL RISKS as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%. Insurance by the seller shall be from Gijon and/or Musel to the Lagos/Apapa Port. The buyer shall insure the goods against all risks during discharge at Lagos/Apapa Ports and therefro to his warehouse.

Full set (2/2) clean on board bills of lading, issued to order blank endorsed, marked notify The Permanent Secretary, Ministry of Defence, Lagos, marked Freight Prepaid, dated latest June 15, 1976.

Evidencing shipment C.I.F. value of 240,000 Metric Tons of Portland Cement plus or mi ten percent conforming to B.S.S.12/1958 or B.S.S.12/1971 at U.S.$59.50 per Met Ton, from United States of America to Apapa/Lagos Port. Packing shall be in 6- Kraft paper bags each containing 50 kgs G/W and also 3-Ply empty spare bags to supplied, free of cost, equal to 3% of total number of filled bags comprising each consignment.(and documents must so indicate). Shipment to commence within 30 days after receipt of the Letter of Credit in Oviedo, Spain, by the seller (and the credit is subject to amendment). Delivery shall be at the rate of 20 metric tons per month plus or minus 10% at seller's option.

Partial shipments and payments permitted — Transhipment prohibited

This credit is issued in your favor and/or transferees. This credit is transferable to second beneficiaries including abroad. Should you desire to transfer same, such transfer will be subject to the return to us of this advice together with your writte instructions on either of the enclosed forms and your assuming our usual transfer charge and a certificate of your bankers as indicated on the attached forms.

All documents to be made and addressed to The Permanent Secretary, Ministry of Defenc Lagos.

continued

OFFICE COPY - NOT NEGOTIABLE

SUPPLEMENTAL AFFIDAVIT OF BERTHOLD H. HOENIGER, ESQ., SWORN TO MAY 23, 1978 IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

-against- : 77 Civ. 2809 (L.W.P.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------X

----------X

CHENAX MAJESTY, INC.,

Plaintiff,

-against- : 77 Civ. 3045 (L.W.P.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------X

----------X

DECOR BY NIKKEI INTERNATIONAL, INC.,

Plaintiff,

-against- : 77 Civ. 2348 (L.W.P.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------X

SUPPLEMENTAL AFFIDAVIT ON BEHALF OF PLAINTIFFS (1) IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT, AND (2) IN SUPPORT OF PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BERTHOLD H. HOENIGER, being duly sworn, deposes and says:

1. I am a member of BAILEY MARSHALL HOENIGER & FREITAG, attorneys for plaintiff EAST EUROPE IMPORT-EXPORT, INC. ("East Europe") herein. I am personally familiar with the facts and circumstances of this action, having been in charge of the same since its inception. I make this affidavit in opposition to the motion of defendants FEDERAL REPUBLIC OF NIGERIA ("Nigeria") and CENTRAL BANK OF NIGERIA ("CBN") to dismiss the East Europe, Chenax, and Nikkei actions, and in support of the cross-motions by said plaintiffs for summary judgment for that portion of their claims which is liquidated, and partial summary judgment as to liability and a prompt assessment of damages with respect to that part of their claims which is unliquidated. Pursuant to agreement between LEWIS S. SANDLER, ESQ., attorney for plaintiffs Chenax and Nikkei, and myself, only one supplemental affidavit and one supplemental memorandum are being submitted on behalf of all three plaintiffs, so as to avoid duplication and unnecessary proliferation of papers and reading burdens on this Court.

SIGNIFICANT RECENT DEVELOPMENTS

2. Since defendants' original motion papers and plaintiff East Europe's cross-motion papers were served and filed in October and early November, 1977, there have been several significant developments involving other cases which arose out of substantially identical cement contracts -- a mimeographed form contract prepared by Nigeria's Ministry of Defence -- and substantially identical "irrevocable" letters of credit established by CBN and advised by MORGAN GUARANTY TRUST COMPANY OF NEW YORK ("Morgan") to the beneficiaries, the cement suppliers under said contracts. First, the National American case in this Court, 76 Civ. 2745, was tried before Judge Goettel in late December of last year and early January, 1978, and, by Opinion dated March 27, 1978, Judge Goettel held that this Court had subject matter

jurisdiction, that sovereign immunity did not apply, and that the act of state doctrine did not bar the prosecution of National American's claims. The significance and collateral estoppel effect of Judge Goettel's decision are discussed at length in plaintiffs' joint supplemental memorandum.

Second, in the Trendtex case, where the English Court of Appeal had unanimously rejected CBN's plea of sovereign immunity and CBN had lodged an appeal with the House of Lords, CBN elected to settle the action rather than permit the Lords to pass upon its appeal. (See Exhibit A, letter from Theodore Goddard & Co., solicitors for Trendtex, to me dated April 6, 1978, annexed hereto.)

Third, in West Germany, where the Frankfurt Landgericht (court of original jurisdiction) had entered a judgment on the merits in favor of Nada and against CBN for over $13 million and CBN had likewise filed an appeal, CBN likewise settled the action for more than $12 million, rather than risking a hearing and determination of its appeal. (See Exhibit B, annexed hereto, comprising correspondence between me and German attorneys relating to the foregoing.)

Fourth, in Paris, in the arbitration proceeding by Ipitrade International, S.A. against Nigeria, the Court of Arbitration of the International Chamber of Commerce, by decision dated April 25, 1978, rejected Nigeria's plea of sovereign immunity, determined that it was dealing with breach of a commercial contract which expressly provides for arbitration before that tribunal -- as is the case with the East Europe, Chenax, and Nikkei contracts -- and awarded Ipitrade International some $9 million in damages, plus interest, attorneys' fees, and the costs of the arbitration. (See Exhibit C, annexed hereto, letter from Carl F. Salans of the Law Offices of Samuel Pisar to

me dated April 28, 1978. I have requested a more detailed affidavit from Mr. Salans, and hope to be able to present the same to this Court with plaintiffs' final reply papers.)

3. Thus, every single tribunal (except the English trial judge in Trendtex who originally sustained CBN's claim of sovereign immunity, and who was unanimously reversed by England's Court of Appeal) has rejected the plea of sovereign immunity by the defendants, whether under that name or in the guise of the act of state doctrine; significantly, defendants have elected not to perfect their appeals from these decisions, but instead have settled the claims for breach of the cement contracts and letters of credit.

SUMMARY OF RELEVANT TESTIMONY IN THE NATIONAL AMERICAN TRIAL, AND OF OTHER RELEVANT EVIDENCE

4. The National American action was commenced prior to the passage of the FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 (the "Act"), by attachment of defendants' funds at the Federal Reserve Bank of New York. National American never made personal service on defendants in accordance with the provisions of the Act after the same entered into effect on January 19, 1977. Shortly prior to trial, defendants moved to dismiss and for summary judgment on grounds substantially identical to those urged in these actions, plus one additional ground (alleged failure to perfect the attachment) not relevant here. Judge Goettel reserved the motion for the trial. Thus, the National American trial involved the issues of sovereign immunity and the act of state doctrine, alleged failure to perfect the attachment and purported resulting loss of the Court's quasi-in-rem jurisdiction, and the merits of National American's claim. Further, in National American, there was some question whether the sovereign immunity - act of state defense should be determined under the criteria of the Act, or under pre-Act standards; see

28 U.S.C. §1602; Judge Goettel's opinion in National American, p. 40. Judge Goettel held (loc.cit.):

> "The issue of retroactivity [of the Act] need not be determined here, however, because whether defendants' conduct is evaluated with reference to prior or current standards, the result is the same -- sovereign immunity is no defense on the facts of this case."

4. Here, the Court need not look to pre-Act standards. All three of these actions were commenced after the effective date of the Act, all three specifically invoke the Act for Federal jurisdiction, and in all three, service upon defendants was made as specifically prescribed by the Act.

5. Since Judge Goettel has specifically held, after full trial, that, at least vis-a-vis a plaintiff which is a U.S. corporation headquartered here, and whose CBN letter was advised and made payable by and through Morgan -- which was the case in National American as it is with East Europe, Chenax, and Nikkei here -- there is no sovereign immunity for Nigeria and CBN for their breaches of the cement contract and CBN "irrevocable" letter of credit, that decision constitutes collateral estoppel of the defendants in these three actions under the Second Circuit's holding in Shore v. Parklane Hosiery. Even absent that collateral estoppel effect as a matter of law, Judge Goettel's decision would obviously constitute the strongest possible form of stare decisis. Interestingly enough, although National American is appealing from those aspects of Judge Goettel's decision dealing with the Discharge Agreement and damages, and his finding that National American and Intrafinsa (Arrau) perpetrated or attempted to perpetrate a fraud upon the defendants, I have been advised by James G. Simms, Esq. that the defendants are not cross-appealing from that decision. Thus,

even if Parklane were not the controlling law in this Circuit, there would still be the strongest reason to give conclusive effect to Judge Goettel's determination that neither sovereign immunity nor the act of state doctrine applies. These matters are fully discussed in plaintiffs' supplemental memorandum.

However, because each of the plaintiffs' claims here involves millions of dollars, and perhaps out of an excess of caution, we are herewith respectfully submitting to this Court, in addition to the original affidavits on behalf of plaintiffs, the following additional factual evidence that the defendants, as well as the transactions giving rise to these actions, have more than enough nexus with the United States -- if such nexus is required* -- to preclude any possibility of non-justiciability of these claims on grounds of sovereign immunity or act of state:

(a) testimony of Paul Winston Fitzpatrick, Morgan's Vice President in charge of the African territory, at the National American trial;

(b) testimony of Alfred Koebel, Assistant Vice President of Morgan in its Letter of Credit Department, at the National American trial;

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* The Act provides, 28 U.S.C. §1330(a) that the District Courts shall have subject matter jurisdiction "of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." The Act further provides, in §1330(b) that "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."

Defendants argue that under §§1605-1607, there must be a close nexus between the defendants and the transaction sued upon and the United States, and that such nexus is absent here; their arguments are based on certain language in the House Report.

(Continued on next page)

(c) testimony of Charles Juricek, recently retired from Morgan after 20 years in its employ, and formerly in charge of Morgan's letters of credit activities worldwide, at the National American trial;

(d) testimony of George W. Ryan, Manager in the Foreign Department of the Federal Reserve Bank of New York, at the National American trial;

(e) deposition of Morgan, by Arthur J. Brown, Assistant Treasurer, and Paul Winston Fitzpatrick, Vice President, taken by plaintiffs in these actions pursuant to Magistrate Schreiber's order on April 18, 1978; and

(f) documents produced by Morgan to plaintiffs herein pursuant to the orders of Magistrate Schreiber.

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* (Continued from previous page)

However, that argument lacks any basis in the plain text and meaning of §§1605-1607. Section 1605(a), which is relevant here, provides that a foreign state shall not be immune from judicial jurisdiction in the United States in any case where there has been (1) a waiver of immunity either explicitly or by implication or (2) "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States". The House Report shows that Congress considered either a provision in the underlying contract for arbitration, or a stipulation that the law of a state other than that of the foreign state shall govern the contract, to be a waiver; here, both of these factors are present in all three contracts, since all three have an identical arbitration clause, and since all three provide that they are to be governed by laws other than those of Nigeria -- the East Europe and Nikkei contracts, the laws of the United States, and the Chenax contract, the laws of Switzerland. Further, aside from waiver, it is obvious, as Judge Goettel indeed explicitly held, that at least the third, final clause of §1605(a)(2) -- an act outside the territory of the United States, in connection with a commercial activity outside the United States, which act causes a direct effect in the United States -- applies in these Nigerian cement contracts -CBN letter of credit cases.

6. The highlights of the aforementioned testimony are summarized below.

7. Paul Winston Fitzpatrick, Morgan's Vice President in charge of the African territory, testified as follows:

-- Morgan confirmed or advised approximately $400 million in letters of credit for cement purchases by Nigeria in 1975 (211-12);*

-- this was the largest letter of credit volume for any African country on Morgan's part in 1975 (214);

-- Nigeria was and is the largest revenue-producer for Morgan of any African country, and indeed is Morgan's fourth or fifth most lucrative foreign customer (214-15);

-- Morgan paid out about $200 million on the Nigerian cement contract letters of credit advised or confirmed by it, using for that purpose Nigeria's money at the Federal Reserve Bank of New York which Morgan drew upon and caused to be transferred to Morgan as needed (216-19);

-- Nigeria and/or CBN routinely request Morgan to make payments to different entities in the United States and abroad, to American and other companies, to Nigerian embassies, students, etc., and to otherwise pay obligations of Nigeria, including payments to U.S. corporations which supply commercial goods to Nigeria (219-23);

-- Morgan makes and made virtually daily drawings on Nigeria's funds at the Federal Reserve Bank of New

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* The references are to the page numbers of the transcript.

York in order to make these payments on behalf of Nigeria and CBN; originally, Morgan was authorized to draw $1 million per day, then $5 million per day, and since 1975, has had unlimited drawing rights (220-21);

-- Morgan is defendants' only correspondent bank in the United States (223);

-- Morgan maintains and maintained a custody account for CBN (226);

-- Morgan acted and acts as an agent for CBN, and CBN is Morgan's principal (231, 233);

-- at the present time, between $300 and $400 million of Nigerian money passes through Morgan annually (227);

-- the primary source of the Nigerian monies in the United States is sales by Nigeria of its products, and especially petroleum, to U.S. purchasers in the United States (253-55);

-- Morgan conducts two training seminars a year for officers and employees of foreign banks, and these are attended by various CBN officers (229-30);

-- Nigeria purchased various types of goods, including cameras, communications equipment, telephone equipment, trucks, locomotives, and pharmaceuticals in the United States from private American corporations, such as General Motors or General Electric (256, 260-61); Morgan made the payments -- in the case of the locomotives, some $20 or $30 million -- to the U.S. suppliers on Nigeria's

behalf (258), and these payments are made by Morgan in New York (261);

-- the Nigerian purchasing program in the United States is a pervasive and continuous one, which is carried on throughout the year (261), and these purchases run into "many, many millions of dollars" each year (262);

-- Nigeria is among the top 10 trading partners of the United States (263-66), and in connection therewith, other than making various types of payments on behalf of Nigeria and CBN, Morgan also renders other services, e.g. obtaining credit reports (267-68).

8. As further background to Mr. Fitzpatrick's testimony, it may be noted that Nigeria is the world's sixth largest oil producer, a member of OPEC, and a leading tin producer; that the United States is by far the leading customer for Nigeria's oil; and that Nigeria is the second largest oil supplier to the United States, after Saudi Arabia. (Source: Information Please Almanac, 1978.)

9. Alfred Koebel, a Morgan Assistant Vice President in the Letter of Credit Department, testified at the National American trial (1760) as follows:

> "Q This particular letter of credit was an advice letter of credit in which you were acting as an agent for Central Bank?
>
> A That's correct."

10. Charles Juricek, a former Morgan employee for 20 years until his retirement in June, 1976, and who at and prior to his retirement was in charge of Morgan's letters of credit

worldwide (360), testified in relevant part as follows:

-- when the Nigerians in September, 1975, unilaterally changed the terms of the CBN letters of credit and instructed Morgan to advise the beneficiaries, Morgan contacted its Legal Department and a wire was sent to CBN as to what this default on the letters of credit advised by Morgan meant (438);

-- Mr. Juricek had never experienced such a repudiation or dishonor of letters of credit in his entire life (439);

-- no commercial bank could afford a repudiation of irrevocable letters of credit such as CBN undertook, and caused Morgan to advise, or it would be out of business right away (440-41).

11. George W. Ryan, employed by the Federal Reserve Bank of New York for 15 years and a manager in its Foreign Department, testified at the National American trial in relevant part as follows:

-- the size of the deposits maintained by Nigeria or CBN at the Federal Reserve Bank of New York in 1975 may have run in excess of a billion dollars, and was certainly in excess of $100 million, and is in a nine to 10-figure range (313);

-- the source of those deposits is payments made by American oil companies, such as Exxon and Mobil (315-16);

-- the Nigerian/CBN funds on deposit at Federal Reserve Bank of New York are invested by it on behalf of Nigeria/CBN primarily in U.S. Government securities (320), pursuant to an automatic investment program (326);

-- in 1975, Nigeria/CBN was among the 20 or so largest holders of U.S. Government securities in the world, and in 1976, among the top 30 (324);

-- the Federal Reserve Bank of New York also maintains a custodial account for Nigeria or CBN in which it holds World Bank obligations and dollar-denominated obligations of foreign governments owned by Nigeria/CBN (327-28);

-- Federal Reserve Bank of New York has probably provided CBN with various kinds of technical advice and training programs for CBN staff people, and bought foreign exchange for CBN (328-29);

-- the account at the Federal Reserve Bank of New York was originally in the name of CBN, and in February, 1976, the name of the account was changed to that of the Federal Government of Nigeria; when Morgan made drawings, whether before or after February, 1976, it was on that account (330-31), whatever its name.

12. One other piece of evidence adduced at the National American trial is of interest, particularly with reference to plaintiffs' cross-motions for summary judgment. As the Court knows, Nigeria, in or about September, 1975, unilaterally

embargoed all further cement shipments to Nigeria unless prior written clearance for each proposed sailing had first been obtained from the Nigerian Ports Authority, and CBN unilaterally "amended" its "irrevocable" letters of credit to provide that all papers for drawings thereunder would henceforth have to be certified by CBN before they could be paid by Morgan. Some time thereafter, the required certification was changed from that of CBN to that of the Nigerian Ports Authority. At the National American trial, the defendants produced a Nigerian witness, O. B. Babah, Traffic Officer in the Nigerian Ports Authority, and who has been in its employ for 13-1/2 years (1486-87). Mr. Babah testified that after the task of certification had passed to the Nigerian Ports Authority sometime in the fall of 1975, the Ports Authority did not and would not certify any papers or claims for payment unless it had first received a certificate from the Cement Contracts Negotiating Committee certifying that the supplier had signed a discharge agreement (1547-52; 1619). In turn, the Cement Contracts Negotiating Committee demanded that all cement suppliers waive and discharge those portions of the contract and letter of credit which had not already been performed (or the entire contract if cement had not yet been shipped thereunder). In short, Nigeria and CBN insisted on a complete release of all (or in the case of those cement suppliers who had already shipped some cement, of all further) obligations under the commercial cement contracts and letters of credit; unless the cement supplier agreed to such release, he was not even paid for the cement already shipped or for the demurrage already due him. None of the plaintiffs here had as yet delivered cement as of the time of these anticipatory breaches and repudiations by Nigeria and CBN; none of the plaintiffs here signed such discharge agreements; and of course none of the plaintiffs here has been paid even one cent by Nigeria or CBN.

13. The repudiation by Nigeria of the cement contracts and by CBN of its "irrevocable" letters of credit issued pursuant thereto -- a repudiation of commercial obligations as flagrant as it was massive -- did not escape notice and comment by the Bar. Thus, the Committee on International Law of the City Bar Association, in its Committee Report entitled "The Sovereign Immunity Act of 1975," 31 The Record 471 at 477 and 478 (Vol. 31, No. 7, October, 1976), commenting upon a predecessor version of the bill which, with further revision, became the Foreign Sovereign Immunities Act of 1976, said:

> "Thus, the exemption of central bank property 'held for its own account' should be strictly construed to limit the scope of the quoted language to assets held by the central bank in the exercise of its public function as a monetary authority. Thus, a central bank which issues letters of credit in commercial transactions should not be granted immunity for its assets used for that purpose.12 The legislative history should make clear precisely what is intended."

The Committee's footnote 12 states:

> "12 The recent refusal of a central bank of an African country to honor its letters of credit issued for purely commercial purposes dramatically illustrates the problem."

For the Court's convenience, a copy of the entire Committee Report is annexed hereto as Exhibit D.

14. Promptly upon receipt of defendants' motion to dismiss for alleged lack of jurisdiction, plaintiff East Europe served a notice to take the deposition of Morgan and a subpoena duces tecum. After countless delaying tactics by the defendants, including motions for protective orders, etc., and a number of hearings before Magistrate Schreiber, that deposition (in which plaintiffs Nikkei and Chenax also participated) was finally held almost six months later, on April 18, 1978. Plaintiffs took the

deposition of Morgan by Arthur J. Brown, an Assistant Treasurer within Morgan's African territory, and by Paul Winston Fitzpatrick, the Morgan Vice President in charge of its activities in Africa.

15. Paul Winston Fitzpatrick was asked (88-89) whether, if he were asked the same questions that he had been asked on the stand during the National American trial, he would make the same answers; Mr. Fitzpatrick said "Yes."

16. Arthur J. Brown testified in relevant part as follows:

-- in 1975-76, prior to the institution of these actions, there were at least three visits by CBN officials to Morgan at which the cement situation was discussed (15-28); these visits included ones from CBN's Deputy Chief of Operations (16);

-- there were several meetings of Morgan officers upon the receipt of CBN's instructions in September, 1975 to unilaterally "amend" the 14 "irrevocable" letters of credit which Morgan had advised, some of which included Boris Berkovitch, Morgan's Senior Vice President and General Counsel (28-32);*

-- CBN's instructions caused concern to Morgan (56, 60-62), and led to a general feeling within Morgan that CBN would find itself in a difficult position through issuing "amendments" to irrevocable letters of credit without obtaining the agreement of the beneficiaries (62);

-- ultimately, these instructions by CBN led Morgan to consult outside counsel (63-65);

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* In fact, after CBN's unilateral amendments, various beneficiaries presented drafts and other documents to Morgan under their letters of credit which complied in all respects with the terms of those letters, and lacked only the certification which CBN had added ex parte as a requirement. Morgan, pursuant to CBN's instructions, refused payments of those presentments; an example is found in Exhibit N.

-- subsequently, Morgan advised CBN that Morgan thought litigation against CBN and Nigeria would likely result and that Morgan felt that CBN should retain competent New York counsel (21, 28); later, Morgan recommended one or more New York law firms to CBN, including Messrs. Kissam, Halpin & Genovese (21-23);

-- at CBN's request, Morgan agreed to act and did act as host, and sent out invitations for, a meeting at Morgan's premises, to be attended by members of the U.S. banking and international trade communities, at which Ambassador Sanu of Nigeria was to speak; and such meeting took place at Morgan's premises (34-39, 42-43);

-- Morgan officers also visited and visit CBN two or three times a year in Nigeria, and in the 1975-76 period, the cement situation was discussed on such visits (39-42);

-- Morgan advised 14 letters of credit and confirmed three letters of credit, in payment for Nigerian cement contracts in or about 1975 (44-47);

-- the total amount of the letters of credit advised or confirmed by Morgan in payment for Nigerian purchases of goods in the 1975-76 period was between several hundred million and one-half billion dollars (47-48); somewhat more than half of this total was for cement contracts;

-- Morgan also furnishes credit information to CBN (48), and makes various other payments within the United States on CBN's instructions (48-51);

-- Morgan furnishes training to CBN officers and employees on a regular basis, enrolling them in four- or six-week seminars and courses or giving them individualized exposure to particular Morgan people and activities (52-53).

17. At his deposition, Mr. Brown also identified 31 documents or groups of documents produced by Morgan, as records maintained in the regular course of business by Morgan. These documents, and further documents produced by Morgan's counsel pursuant to further orders of Magistrate Schreiber, are analyzed in the following paragraphs.

18. Certain key documents or groups of documents from the files of Morgan are annexed hereto as exhibits, and are briefly commented upon below.

Exhibit E -- Morgan memo dated August 2, 1976 from Arthur J. Brown stating in part:

> "The Central Bank of Nigeria is one of our most important clients and we are willing to go to great lengths in providing them with service. We are the only U.S. commercial bank to have an account from them. Our willingness and ability to provide training has been largely responsible for our enviable relationship."

Exhibit F -- Morgan memo dated October 4, 1976 from Arthur J. Brown which states in part:

> "The Central Bank of Nigeria is one of our most important clients. Their average balance for 1975 was $4,219,000. Their actual profit contribution for the first half of 1976 was $464,960."

Exhibit G -- Morgan memo dated 10/4/76 from Arthur J. Brown which states in part:

> "Atanda [CBN's Deputy Bills Manager] said that the CBN has ended its relationship with the Banque Nationale de Paris because BNP did not suspend payments under cement credits when asked to do so. Atanda said that Nigeria would remember those who helped them during their crisis.

"We understand that BNP continued to pay under unconfirmed cement credits [apparently CBN letters of credit advised by BNP to French suppliers, similar or identical to the letters of credit advised by Morgan to 14 cement suppliers, including the three plaintiffs here] when beneficiaries rejected Central Bank's amendments because the letters of credit were irrevocable on the part of the Central Bank.

"Atanda said that their letters of credit in favor of French beneficiaries would be sent through us. . . ." (Emphasis added.)

It is significant that the last-quoted sentence completely refutes the representations now made to this Court by defendants' counsel that Morgan was interposed into the Chenax and other situations* solely as an accommodation to said suppliers; the falsity of those representations is further demonstrated by the annexed affidavit of Antonio Reale. It should be further noted that the three foregoing exhibits -- E, F, and G -- also reflect visits by CBN officers to Morgan.

Exhibit H -- three Morgan memoranda dated October 6, 1975, June 30, 1976, and July 30, 1976, reflecting the payment by Morgan of limousines procured by it for visiting CBN officials.

Exhibit I -- 38 memoranda, letters, telexes, and other documents reflecting visits by CBN officials to Morgan and/or participation of CBN officers and other CBN employees in Morgan formal and informal training programs (in addition to visits reflected by Exhibits E, F, and G).

EXHIBIT J -- transmittal letter from Mr. Hoffman, attorney for Morgan, and five sets of documents as follows:

-- redacted memorandum by Ralph J. Bunche, Jr. of Morgan on his visit to CBN in Lagos in April, 1975, showing meetings by him with 14 CBN officials and discussions "of the huge amounts involved in recent letters of credit . . .".

-- Similar memorandum by Mr. Bunche to CBN in Lagos in October, 1975, reflecting meetings with 10 CBN officials, and specific discussions about the "cement problems" and "about potential problems which might arise because of the CBN's attempt to change wording in their letters of credit."

---

* where the beneficiary requested that the letter be established or advised through a Swiss, Spanish or other non-U.S. bank.

-- Similar memorandum covering visit by Mr. Bunche to CBN in Lagos in March, 1976, showing meetings with 12 CBN officials from CBN's Governor down, and stating in part:

> "The basic thrust of our conversation was an explanation of MGT and a review of the cement difficulty and our efforts."

-- Memorandum from Mr. Bunche and Arthur J. Brown covering their visit to CBN in Lagos in December, 1976, reflecting meetings with 20 CBN officials, and stating in part:

> "Apparently, this [lack of adequate direct liaison between CBN and the Nigerian Government] is one of the reasons that Government did not fully comprehend the letter of credit problems which arose because of the cement crisis."

The memo further states that the Banque Nationale de Paris ("BNP"), CBN's French correspondent, is now receiving "only small amount of business due to problems caused by cement crisis - we [Morgan] now receive most of the CBN French business . . .".

Further, the memorandum states:

> "The CBN has already paid over 170MM Naira in demurrage claims resulting from the cement crisis. [As of today, one Nigerian Naira equals U.S. $1.50-$1.60; thus, 170,000,000 Naira equals approximately U.S. $263,500,000.] * * * A cement shortage is again building. The government has recently increased the number of liscensed [sic] importers of cement from 11 to 47."

The exhibit also reflects several visits by CBN officials to the United States, and specifically to Morgan.

Exhibit K -- Morgan Credit Authorization dated May 2, 1975 showing establishment of a $5 million unsecured credit facility by Morgan for CBN "for forward foreign exchange contracts at NY Office."

Exhibit L -- Master form letter of invitation dated December 22, 1975 and sent out by Morgan to approximately 22 bankers, U.S. Government officials, and others, inviting them to attend a speech at Morgan's premises by Nigerian Ambassador Sanu; list of invitees; and text of Ambassador Sanu's speech.

Exhibit M -- Schedule of letters of credit confirmed or advised by Morgan under Nigerian cement contracts in the 1974-1975 period. A copy of all of these letters of credit is in plaintiffs' possession, and will be exhibited to the Court if it so desires.

Exhibit N -- Telex from Morgan (Juricek) to CBN dated 10/14/75 and reply telex from CBN dated 11/21/75.

CONCLUSION

19. In summary, five points appear crucial.

First, no court (other than the English trial judge in Trendtex, who was subsequently unanimously reversed by the Court of Appeal) has upheld the Nigeria-CBN claim of sovereign immunity and act of state; every court, whether American, English, German, or the ICC Court of Arbitration in Paris, has found that claims for breach by Nigeria of its cement contracts and by CBN of its "irrevocable" letters of credit present justiciable controversies which those tribunals are competent to decide on the merits.

Second, Judge Goettel, in his National American decision, expressly found that the minimum contacts for quasi-in-rem jurisdiction required by the Supreme Court's recent Shaffer v. Heitner decision were present on the facts adduced at the National American trial. If so, then they are a fortiori present here for purposes of 28 U.S.C. §1605(a)(2), since the House Report makes it amply clear that the Act, in taking away jurisdictional attachments and quasi-in-rem jurisdiction over foreign states and their agencies and instrumentalities, in turn gave a greatly enlarged subject matter and in personam jurisdiction to the courts with appropriate long-arm service provisions. Judge Goettel, at page 30 of his opinion, expressly recognized these "liberal standards for acquiring in personam jurisdiction" as the "quid pro quo * [for] the elimination of jurisdictional

attachments." Thus, in light of the clear intent of the Act, it would be ironic indeed if Nigeria and CBN, which prior to the effectiveness of the Act would have been subject to quasi-in-rem jurisdiction in this Court to the extent of hundreds of millions, and perhaps up to a billion dollars, were now to be held not subject to the jurisdiction of this Court. Such result would be bizarre; it would turn the Congressional intent in enacting the Act on its head.

Third, Judge Goettel expressly found that the facts adduced in National American "would appear to satisfy the last criteria of 28 U.S.C. §1605(a)(2) that jurisdiction exists over claims arising from an act committed outside the United States committed in the course of commercial activity having 'a direct effect in the United States.'"

Fourth, plaintiffs here, in resisting the defendants' motion to dismiss and for summary judgment, rely not only upon the collateral estoppel of the defendants by reason of Judge Goettel's National American decision; they rely not only upon the facts adduced at the National American trial in the form of the testimony of Messrs. Fitzpatrick, Ryan, and Juricek; they have additionally, in this affidavit, the affidavits of Dr. Uche Akuba and Mr. Reale, and the exhibits annexed to these three affidavits, presented numerous additional facts and documents further cumulatively enlarging the factual evidence of a very substantial nexus -- and not merely minimum contacts -- of these defendants and of the transactions sued upon with the United States and with this District.

Fifth, all three plaintiffs are American corporations having their sole American offices in this District. The courts of this country are the only forum available to them for a determination of their claims. It will hardly be argued that the

courts of the Federal Republic of Nigeria, which has been and is ruled by a government which frankly styles itself the "Federal Military Government," would be free to adjudicate these claims on the merits and to hold that Nigeria and its Central Bank breached the cement contracts and letters of credit and are liable to the plaintiffs for many millions of dollars. Thus, although defendants' motion is a jurisdictional one, granting the same would for all practical purposes be a resolution on the merits, since it would probably have the effect of foreclosing plaintiffs from any realistic possibility of redress.

Accordingly, I respectfully pray that defendants' motion to dismiss and for summary judgment be in all respects denied, with costs to plaintiffs.

BERTHOLD H. HOENIGER

Sworn and subscribed to before me
this 23rd day of May, 1978.

Notary Public

JANIS PALAZZOLO
Notary Public, State of New York
No. 41-8258945
Qual. in Queens County
Commission Expires March 30, 19[illegible]

EXHIBIT A TO HOENIGER AFFIDAVIT -
APRIL 6, 1978 LETTER FROM THEODORE GODDARD
& CO. TO B. H. HOENIGER

THEODORE GODDARD & CO.

16 ST. MARTIN'S-LE-GRAND
LONDON EC1A 4EJ

D. DUDLEY HORGAN
PETER A. J. HORLEY
J. N. FISHER
R. DEREK FOX
BLANCHE H. M. A. LUCAS
MARÉ N. STACEY
MICHAEL G. WALTERS
F. J. CALDERAN
R. K. SHUTE
M. J. W. TOD
EDWIN A. JONES
WILLIAM S. ROGERS
H. A. CROFT BAKER
H. J. HARRIS
ANTONY HEALD
CHRISTOPHER CLOGG
W. H. STUART MAY
ANDREW SINGHAM
MARTIN G. CHESTER
P. GRAFTON GREEN
DIANA GUY
DAVID S. WILKINSON
R. H. PRESTON
DEREK W. LEWIS
SIMON STUBBINGS

R. DEREK WISE, C.B.E. (RESIDENT IN PARIS)
EDWARD WILTSHIRE (RESIDENT IN MADRID)

CONSULTANTS
DEREK F. S. CLOGG
LASZLO GOMBOS

ASSOCIATES
E. A. CLARKE
MARTIN KRAMER
GUY I. F. LEIGH
A. R. W. CARRINGTON
WILLIAM BEVAN
C. J. J. MAPLES
PETER NELLIST
DIANA SHEEZUN

Telephone: 01-606 8855
Cables: Assumpsit London E.C.1
Telex: 884678
Telegrams: Assumpsit London Telex
Telecopier Extension 208
L.D.E. and C.D.E. Box Number 47
Stock Exchange Number STX 2346

Associate Offices:

187 RUE DE L'UNIVERSITE
PARIS 75007
Telephone (010 331) 705 89 45
Telex: 250681

LAGASCA 106
MADRID 6
Telephone (010 34 1) 275 03 24
Telegrams: Interlex

17 BOND STREET
ST. HELIER, JERSEY C.I.
Telephone (0534) 34676
Telex: 4188

HOSHAM LAW OFFICE
P.O. BOX 2628
AZIZIAH BUILDING
KING FAISAL STREET
RIYADH, SAUDI ARABIA
Telephone (010 966 1) 25458

Your Ref BHH:vk Our Ref 36/144/T 43220 NR 6th April 1978 AIR MAIL

B.H. Hoeniger, Esq.,
Bailey, Marshall, Hoeniger & Freitag,
345 Park Avenue,
New York,
N.Y. 10022

Dear Mr. Hoeniger,

Nigerian Cement Contracts Litigation

My thanks for your letters of 23rd February and 24th and 29th March. My apologies for not replying before but I have been rather busy and also I wanted to undertake some more extensive research before replying to your letters.

Dealing with the points raised in your letter of 23rd February, I have to inform you that Trendtex has now been settled and steps are being taken to withdraw the Appeal from the House of Lords. This is something of a disappointment as the matter is clearly one which the House of Lords themselves wanted to hear argued and, of course, it was an interesting point of law anyway. That being said, the clients clearly benefitted from an immediate settlement and the decision cannot be criticised. We have a case in the Court of Appeal under the name of Hispameza on almost identical facts and against the Central Bank but we do not appear to have instructions to proceed with that. All the other cases against the Central Bank have been postponed until now awaiting the final Trendtex decision. So it therefore seems that even if the House of Lords

come to consider the claims against the Central Bank, it will not be for some time and I doubt whether any Appeal would be heard by the Lords for 18 months, if ever. You may know that a State Immunity Bill has been introduced in the House of Lords and is presently being discussed. If you would like a copy of this, please let me know. It seems highly unlikely that the effect of the Bill will be retrospective and so, until the Bill becomes Law, the legal position remains as stated in the Court of Appeal in the Trendtex case.

As far as I am aware, the Central Bank did not pursue the Appeal against the German Court's decision in the Frankfurt Provincial Court. Certainly I have received no notice of any Judgment being given.

Yours sincerely,

A.R.W. Carrington

PORTIONS OF LETTER OMITTED

EXHIBIT D TO HOENIGER AFFIDAVIT -
COMMITTEE REPORT ON THE SOVEREIGN IMMUNITY ACT OF 1975,
BY THE COMMITTEE ON INTERNATIONAL LAW OF THE
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Committee Report

THE SOVEREIGN IMMUNITY ACT OF 1975

By THE COMMITTEE ON INTERNATIONAL LAW

The proposed Sovereign Immunity Act of 1975 (H.R. 11315) is a revised version of the 1973 bill (S. 566 and H.R. 3493) which had been returned to the Department of State for redrafting following committee hearings in the House. It incorporates many of the comments of bar associations and practitioners with respect to the predecessor bill.

This Committee strongly supported the initial bill and the current revision justifies like support. The proposed legislation accomplishes the highly salutary result of removing from the State Department, and placing with the judiciary, the responsibility of determining whether a claim of sovereign immunity should be sustained. By removing the question of sovereign immunity from the political sphere and placing it with the courts, where it belongs, the State Department is relieved of a burden it is ill equipped to bear and provides the private litigant with assurance that his claim will be determined under comprehensive rules and before a tribunal not subject to the daily exigencies of foreign policy.[1] Further, the bill also sets up a somewhat complicated scheme for service of process, including long arm service, for securing *in personam* jurisdiction over foreign states. Finally, it permits regulated execution to enforce a judgment against specified classes of assets of a foreign state.

Although excellent overall, the bill does contain imperfections and omissions, the correction of which would improve the resulting legislation. While the failure of Congress to adopt any or all of the suggestions which follow would not affect this Committee's strong support of the bill, the Committee nevertheless urges that they be adopted in the interest of producing more effective legislation.

I. *Highlights of the Bill*

The revised bill adopts the restrictive theory of sovereign immunity, i.e., the immunity of a foreign sovereign is recognized with regard to public acts, but not as to private or commercial activity. "Commercial activity" embraces both a regular course of commercial conduct or a particular commercial transaction or act which has a substantial contact with the United States.

The bill confers on the district courts original jurisdiction over nonjury civil actions against a foreign state "with respect to which the foreign state is not entitled to immunity" under the act. Actions may be commenced in the state courts, but subject to removal to the federal courts.

"Foreign state" is defined to include a political subdivision of a foreign state or an agency or instrumentality of such state. The latter includes entities a majority of whose shares are owned by a foreign state.

The bill bars a grant of sovereign immunity to a foreign state where: (1) the foreign state has waived immunity explicitly or implicitly, irrespective of

uses diplomatic channels to effect service, service cannot be made on the foreign state, except in the exceptional case arising out of an activity or act in the United States of a diplomat or representative for which sovereign immunity is not available. In these instances only, the legislation permits service through diplomatic channels. It is evident that the real possibility exists that many litigants could be out of court. An acceptable alternative would be the elimination of the mail receipt as a condition to the completion of service and the addition of a requirement that an informational copy be delivered to the ambassador or other diplomatic representative of the foreign state here. This procedure would not be inconsistent with Section 1 of Article 22 of the 1961 Vienna Convention[9] which has been construed to prohibit service on a diplomatic representative, since the copy delivered through diplomatic channels would not constitute service, but merely would be for informational purposes.[10]

(g) *Attachment and Execution.* The bill does away with prejudgment attachment.[11] First, according to the drafters, it is no longer necessary as a means of securing jurisdiction, given the broad *in personam* jurisdiction conferred. Second, attachment for security purposes has been eliminated as a troublesome and embarrassing friction causing factor in diplomatic relations. This conclusion is buttressed by the premise that most foreign states will pay their judgments in any event.

The rationale as regards the first point is only as valid as the premise on which it rests—the existence of broadly based *in personam* jurisdiction. Thus, it is particularly important that the legislation confer broad jurisdiction. To this end, limitations such as that discussed above should be eliminated.

The validity of the second basis will depend upon whether foreign states pay their judgments; and whether, if they do not, litigants are frustrated in enforcing their judgments as a consequence of the removal from the jurisdiction, while the litigation is pending, of property which would otherwise be subject to execution.

While the Committee is uncomfortable with the elimination of this traditional provisional remedy, it nevertheless is prepared to accept its elimination. However, it will urge reconsideration in the event that experience under the provision indicates the wisdom of restoring some form of prejudgment attachment.

Section 1610 breaks new ground in permitting attachment of certain foreign state assets in aid of execution, and execution against such assets. A broader right of execution is permitted against assets of agencies or instrumentalities.

Restrictions with respect to execution against assets of the state appear to be reasonable. Insofar as the Section permits execution against property which "is or was used for the commercial activity upon which the claim is based," the legislative history should make clear that the language does not delimit the class of property subject to execution to that identified with the particular commercial transaction or act which gave rise to the litigation, but that it extends to all property used in the course of commercial conduct which includes the transaction in litigation.

The mandate of subsection (c) that a reasonable period of time elapse following entry of judgment before attachment or execution may issue seems overly rigid for the accomplishment of its manifest purpose of affording the foreign state notice of the judgment and an opportunity to satisfy it. Cases may arise where the required hiatus is used by the state to remove assets from the jurisdiction. Hence, the court should be given discretion to waive the time proscription, at least with respect to attachment, whenever it has reason to believe that assets which could properly be subject to execution will be removed from the United States for the purpose of avoiding such execution.

Immunity for the property described in Section 1611 is appropriate if the section is reasonably construed. Thus, the exemption of central bank property "held for its own account" should be strictly construed to limit the scope of the quoted language to assets held by the central bank in the exercise of its public function as a monetary authority. Thus, a central bank which issues letters of credit in commercial transactions should not be granted immunity for its assets used for that purpose.[12] The legislative history should make clear precisely what is intended.

One also wonders why the military is not given the same right to waive immunity as is granted central banks, foreign states and agencies and instrumentalities.

III. *Conclusion*

It should be clear that notwithstanding the Committee's suggestions to improve the Sovereign Immunity Bill, the bill, as it presently stands, is a giant step in the right direction. The delineated shortcomings, whether considered singly or in the aggregate, do not over balance the great contribution which the bill makes by bringing order, reason and objectivity to the troublesome subject of sovereign immunity. Indeed, they are comments which raise technical problems which are readily remediable by simple drafting changes. The Committee therefore urges that the Sovereign Immunity Act of 1975 be enacted into law.

Respectfully submitted,

COMMITTEE ON INTERNATIONAL LAW

ROBERT B. von MEHREN, *Chairman*

HOWARD H. BACHRACH	RICHARD U. KOPPEL
BENJAMIN BUSCH	PHILIPPE S. E. SCHREIBER
WILLIAM G. CARTER	B. KO-YUNG TUNG
DAVID G. GILL	CARL R. ARON
WILLIAM F. KENNEDY	CHARLES N. BROWER
LILLIAN E. KRAEMER	SYDNEY M. CONE III
HENRY CLAY	E. ALLAN FARNSWORTH
JUDITH C. R. DAVIES	FRANK D. GORMAN
ANDREW FREEMAN	JEROME LIPPER
LARRY D. JOHNSON*	DAVID C. SEARLS

* Mr. Johnson abstained from voting on this report, since he is a member of the United Nations Secretariat.

269a

FOOTNOTES

[1] See, e.g., *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F. 2d 1198 (2d Cir. 1971).

[2] 348 U.S. 356 (1954).

[3] Restatement (Second), of Foreign Relations §69 (1965).

[4] *Id.*, §87. *But cf. Sullivan* v. *State of Sao Paulo*, 122 F. 2d 355 (2d Cir. 1941); *Johns-Manville Int'l Corp.* v. *Insul-Fil Co.*, 243 N.Y.S. 2d 14 (Sup. Ct. 1963).

[5] Dep't of State, Section-by-Section Analysis accompanying the Bill proposing Foreign Sovereign Immunities Act of 1973, H.R. 11315, 94th Cong., 1st Sess. (1975) at 6 (hereinafter Section-by-Section Analysis).

[6] See, e.g., *Holoubek* v. *United States*, translated in U.S. Dep't of State dispatch No. 1189, May 25, 1961 (Austrian Sup. Ct. 1961), in which the following expression of the distinction between *jure imperii* and *jure gestionis* is quoted: "To act as a sovereign state means to appear in the exercise of sovereign rights. To enter into private agreements means to take a position equal to that of a private person." The Austrian Supreme Court concluded: "Whether the act in question was an act under private law or an act of sovereignty can always be derived from the nature of the occurrence, that means from the intrinsic character of the act or the legal relation resulting therefrom."

[7] The State Department Report so states. Section-by-Section Analysis, *supra* note 5, at 10.

[8] *Sherman Inv. Co.* v. *United States*, 199 F. 2d 504, 507 (8th Cir. 1952); *Wood* v. *Schwartz*, 88 F. Supp. 385 (W.D., Pa. 1950).

[9] (1972) 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, see 71 Dep't of State Bull. 458–59 (1974), calling attention to the Convention provision in this regard.

[10] A similar problem could arise under §1608(e) which requires that a foreign state be sent notice of a default judgment "in the manner prescribed for service of process . . ." If the arrival of a return receipt is read in as a condition precedent to steps to enforce the judgment, the plaintiff could well be frustrated. See §1610(c).

[11] It is ironic that provisional attachment is being abandoned at a time when the Privy Council, in finally accepting the restrictive view of state immunity, has permitted an *in rem* attachment of a foreign governmental owned commercial vessel. *The Philippine Admiral* (Appeal No. 13–1974), The Privy Council, Nov. 5, 1975 (summarized in The London Times, Nov. 11, 1975, at 14).

[12] The recent refusal of a central bank of an African country to honor its letters of credit issued for purely commercial purposes dramatically illustrates the problem.

EXHIBIT E TO HOENIGER AFFIDAVIT -
AUGUST 2, 1976 OFFICE MEMORANDA OF MORGAN GUARANTY

MORGAN GUARANTY TRUST COMPANY OF NEW YORK
OFFICE MEMORANDUM

CONFIDENTIA

To: Mr. Robert Angarola, Bank Operators Date August 2, 1976

From: Arthur J. Brown

Subject: Visitors from Central Bank of Nigeria, Lagos

This confirms our telephone conversation of July 28, 1976.

Please arrange the following visits to our Commercial Credits Department:

Mr. O. O. Atanda from September 27, 1976 thru October 8, 1976

Mr. F. A. Egwakihide from January 17, 1977 thru January 28, 1977

The Central Bank of Nigeria is one of our most important clients and we are willing to go to great lengths in providing them with service. We are the only U.S. commercial bank to have an account from them. Our willingness and ability to provide training has been largely responsible for our enviable relationship.

A.J.B.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK
OFFICE MEMORANDUM

CONFIDENTIAL

To: Mr. Arthur Brown African Unit 3/15 Date Aug. 2, 1976

From: Robert J. Angarola

Subject: Bank Operation Tours (Icon Ltd. & Central Bank of Nigeria)

---

1. With reference to your memo dated July 26, 1976 in regard to Mr. Banjo's tour, the following schedule has been set up:

DATE	DEPARTMENT	INDIVIDUAL
August 17	Money Transfer	J. Quinn A.V.P.
" 18	Transit	R. Manza A.T.
" 19	Collection	C. McDonough A.T.
" 20	Bookkeeping	J. Kelly A.T.
Sept. 2	Commercial Credits	W. Anderson A.V.P.
" 3	Commercial Credits	W. Anderson A.V.P.

2. Also note that tours have been established for representatives of the Central Bank of Nigeria as follows:

Sept. 27th - Oct. 8th	Commercial Credits	W. Anderson A.V.P.
Jan. 17th - Jan. 28th	Commercial Credits	W. Anderson A.V.P.

3. If any problems or questions arise regarding these tours, please call me on ext. 4577.

R.J.A.

EXHIBIT F TO HOENIGER AFFIDAVIT -
OCTOBER 4, 1976 OFFICE MEMORANDUM OF MORGAN GUARANTY

Marion F. Cislaison, Foreign Exchange, 16/15 — October 4, 1976

Arthur J. Brown, African Unit, 3/15

CONFIDENTIAL

CENTRAL BANK OF NIGERIA, LAGOS, NIGERIA

80%

This confirms my telephone conversation of today with Robert Van Roten, VP. Mr. Van Roten has agreed that the foreign exchange traders will be able to have the visit of Mr. O. O. Atanda on Thursday, October 7th.

Mr. Atanda is the Deputy-Bills Manager at the Central Bank of Nigeria, Lagos. I will bring Mr. Atanda at your desk about 10:00 am on Thursday. We have arranged for him to have lunch with us and we will return him to you in the afternoon.

The Central Bank of Nigeria is one of our most important clients. Their average balance for 1975 was $4,219,000. Their annual profit contribution for the first half of 1976 was $464,960.

AJB

EXHIBIT G TO HOENIGER AFFIDAVIT -
OCTOBER 4, 1976 OFFICE MEMORANDUM OF MORGAN GUARANTY

Regarding CENTRAL BANK OF NIGERIA (CBN)

LAGOS, NIGERIA

CONFIDENTIAL

From Mr. Arthur J. Brown, African Unit, 3/15

10/4/76

Mr. O. O. Atanda
Deputy Bills Manager

We have made arrangements for Mr. O. O. "Tunji" Atanda to spend two weeks in our Commercial Credits Department. Mr. Atanda comes to us after having spent two weeks with Bankers Trust in their L/C Department. James Harrington, VP, at Bankers provided Atanda with many of the booklets which they publish on letters of credit and related subjects. Bankers has been soliciting the CBN's account and is anxious to confirm letters of credit for them. Atanda said that he told Harrington that they were very happy with their relationship with us and that they did not have any need for additional U. S. commercial banks. Furthermore, the CBN would continue with its policy of having one commercial bank in a country. Atanda said that the CBN has ended its relationship with the Banque Nationale de Paris because BNP did not suspend payments under cement credits when asked to do so. Atanda said that Nigeria would remember those who helped them during their crisis.

We understand that BNP continued to pay under unconfirmed cement credits when beneficiaries rejected Central Bank's amendments because the letters of credit were irrevocable on the part of the Central Bank.

Atanda said that their letters of credit in favor of French beneficiaries would be sent through us. (We have yet to see any.) We were able to elicit the following comments from Atanda:

1) Many more letters of credit will be sent through us. If the flow seems to have slowed, it is because of the Central Bank's problems of manpower versus workload.

2) Nigeria is now looking for imports of cement. There will probably be shipments under uncompleted contracts.

3) The Central Bank will continue to handle imports for the federal government and, in addition, we can expect to see credit opened on behalf of the states governments.

4) Nigerian Port Authority Clearance Certificates will not be required under Central Bank letters of credit but will be required under under those opened by Nigerian commercial or merchant banks.

5) CBN has so many visitors (bankers and businessmen) calling on them that they are "not available" to most callers. If we want to have clients of ours meet people whom we know at the Central Bank, we should telex Atanda to arrange it.

cont'd/...

Regarding CENTRAL BANK OF NIGERIA (CBN)

LAGOS, NIGERIA

CONFIDENTIAL

From Mr. Arthur J. Brown, African Unit, 3/15

At the end of four days in our Commercial Credits Department Atanda feels he has seen enough. This is because he is filled with information from Bankers Trust.

Next weeks schedule is as follows:

Monday, 10-4-76	Walter Anderson
Tuesday, 10-5-76	Charles McDonough, Domestic & Foreign Collection
Wednesday, 10-6-76	ABA Programed Text Sets
Thursday, 10-7-76	Frank Arisman, Foreign Exchange
Friday, 10-8-76	Departure

Atanda was met at the airport by Bankers Trust and Bankers Trust took care of his hotel bill during the few days before he moved in with his cousin.

AJB

EXHIBIT H TO HOENIGER AFFIDAVIT
OCTOBER 6, 1975, JUNE 30, 1976 AND JULY 30, 1976
OFFICE MEMORANDA OF MORGAN GUARANTY

CONFIDENTIAL

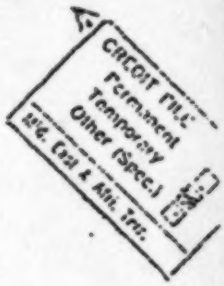
Ms. Joan P. Flannery, Comptroller's - 23/15 October 6, 1975

Arthur H. Rogers, Jr. - Vice President

Please pay the attached bill for $125.05 which covers part of the charge for the limousine used by Governor Isong of the Central Bank of Nigeria during his stay in New York.

LAGOS, NIGERIA

A.M.R.



CONFIDENTIAL

CREDIT DEPARTMENT FILE COPY

Ms. Joan P. Flannery - Comptroller's, 23/15 June 30, 1976

Ralph J. Bunche, Jr. - Assistant Vice President

Please pay the attached bill for $174.25 which covers the charge for the limousine used by Mr. O. O. Vincent, Deputy Governor of the Central Bank of Nigeria, during his stay in New York.

LAGOS, NIGERIA

CREDIT FILE
Permanent
Temporary
Other (Specify)
Mid. East & Afr. Ctry.

R.J.B.

APPROVED: _____

Paul W. Fitzpatrick
Vice President

Form 11-6-1790A

CREDIT DEPARTMENT FILE COPY

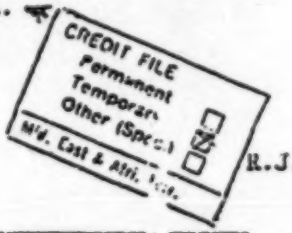
CONFIDENTIAL

Ms. Joan P. Flannery - Comptroller's, 23/15 July 30, 1976

Ralph J. Bunche, Jr. - Assistant Vice President

Please pay the attached bill for $29.00 which covers the charge for the limousine sent to meet Mr. O. Olashore, Chief Banking Examiner of the Central Bank of Nigeria.
LAGOS, NIGERIA

CREDIT FILE
Permanent
Temporary
Other (Spec.)
Mid. East & Afri. Ter.



R.J.B.

APPROVED: _____
Paul W. Fitzpatrick
Vice President

EXHIBIT I TO HOENIGER AFFIDAVIT -
1974 - 1976 CORRESPONDENCE BETWEEN
MORGAN GUARANTY AND CENTRAL BANK OF NIGERIA

CONFIDENTIAL

Lagos

TELEPHONE: 23306

20th August, 1974.

Mr. Edgar C. Felton,
(Vice-President),
Morgan Guaranty Trust Company
of New York,
23 Wall Street,
NEW YORK, N.Y. 10015.

Dear Mr. Felton,

Thank you for your letter of 7th August, 1974 regarding your proposed Central Banking Course which will take place from January 13 to 31st 1975. We are grateful for the invitation to participate in the Course which we believe will be useful to our staff. We are pleased to nominate two of our Managers, Messrs T.J. Ntekop, Manager, Public Debt Office and T.I. Bello, Manager, Accounts Office to participate in the Course. Their curricula vitae are attached to this letter.

We are also arranging for Messrs Ntekop and Bello to be attached to the Federal Reserve Bank of New York for a period of one week, following the course.

Yours sincerely,

GOVERNOR.

Encls.

CONFIDENTIAL

PRIVATE MAIL BAG [illegible]

July 7, 1976

Mr. Arthur J. Brown,
Morgan Guaranty Trust Company Limited,
23, Wall Street,
New York, N.Y. 10015,
U.S.A.

Credit File

Dear Mr. Brown,

I write to thank you for all that you did to make my attachment to your Bank well enjoyed. Please convey my thanks to Mr. R. Bunche and other members of your staff who contributed to the success of the attachment programme.

Yours faithfully,

I. A. OLADEINDE,
ASSISTANT CHIEF ACCOUNTANT.

CONFIDENTIAL

PRIVATE

216

30th

Mr Ralph J. Bunche, Jr.
Assistant Vice President,
Morgan Guaranty Trust Company,
23 Wall Street,
New York,
N.Y. 10015
U.S.A.

Dear Mr Bunche,

I am writing to express my appreciation to you and your colleagues for the kind courtesies extended to me during my recent visit to New York. Even though the visit was so short I found it very interesting and useful.

We highly value the cooperation subsisting between our two institutions and look forward to the prospects of strengthening this.

I do hope that we will have other opportunities in the future to exchange ideas.

With kindest personal regards,

Yours sincerely,

O. Ola Vincent
DEPUTY GOVERNOR

CONFIDENTIAL

CREDIT DEPARTMENT FILE COPY

VIA TELLX

USMAN KAGOGO
CHIEF PERSONNEL OFFICER
CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

CREDIT FILE
Permanent
Temporary
Other (Spec.)
Mid. East & Afr. Ter.

116 044

R.J. Bunche
5/18/76

Ter. 49

HAVE RESERVED DOUBLE ROOM AND SINGLE ROOM AT BARCLAY HOTEL, 111 EAST 48 ST (TELEPHONE 755-5900) FOR THREE NIGHTS STARTING JUNE 10. GUARANTEED RESERVATIO LOOK FORWARD TO SEEING YOU AGAIN. REGARDS.

RALPH BUNCHE

CONFIDENTIAL

OF NEW YORK

B00V009CTC925 LWB407 MA5016

UINY CO NGLG 078

LAGOS 78 17 1937

3/15

MR RALPH J BUNCHE JNR, MORGAN TRUST, COMPANY

NEW YORK

P. Please do Barclay Hotel

X

60 PLEASE BE ADVISED THAT I WILL BE ARRIVING IN NEWYORK ON THE 10TH OF JUNE 1976 FROM LONDON X MY WIFE MARAM AND MR ADETUNDI MANAGER RECRUITMENT OFFICE WILL ACCOMPANY ME I SHALL BE GRATEFUL IF YOU WILL BOOK ONE

~~COL 60 10TH 1976~~

~~MA5016 MR RALPH P2/28~~

OF NEW YORK

DOUBLE AND ONE SINGLE HOTEL ACCOMMODATION FOR US FOR THREE NIGHTS PLEASE EXTEND MY BEST REGARDS TO ALL OUR FRIENDS AT MORGAN GUARANTY

FROM : USMAN NAGOGO ~~CEBANK LAGOS~~

~~CB-NT~~ CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA 5/17/76 VS

620106A MGT UW

CONFIDENTIAL

WUI NYK

COM035 LNL752

LAGOS 52 13 2246

MORGAN GUARANTY TRUST

NEWYORK

3/15

53 ATTENTION MR RALPH BUNCH

RE YOURS OF MAY 11 I SHALL BE WITH YOUR ESTABLISHMENT ON 27TH

AND 28TH MAY 1976 AND NOT 1ST JUNE AS PREVIOUSLY ADVISED X

I SHALL CONTACT YOU ON ARRIVAL IN NEW YORK X REGARDS X

UNTESTED

I A OLADEINDE CEBANK LAGOS

FROM: CENTRAL BANK OF NIGERIA

620106A MGT UW

LAGOS NIGERIA 5/14/76 JS

WUI NYK

[redacted]

October 7, 1976

CONFIDENTIAL

Central Bank of Nigeria
Lagos, Nigeria

Dear Sirs:

We were very pleased to have had the visit of Mr. O. O. Atanda at our bank from September 24 to October 8, 1976.

During the time of his stay with us, Mr. Atanda was attached to our Commercial Credits Department and he also visited our Domestic and Foreign Collection Departments as well as our Foreign Exchange Trading Department.

We trust that the time Mr. Atanda spent with us will be useful to him in the future. We hope that programs of this type, which members of your staff may attend in the future, will serve to strengthen our relationship.

Sincerely yours,

CONFIDENTIAL

ZCZC 232194 RC025 PDC1917 RME9226 UWS639 LWA712 2363

URAU CO NGLG 066

LAGOS 66 7 2304

MORGAN GURANTY TRUST COMPANY OF

/MORGANBANK/ NEWYORK

C. Boache 3/15

43 ASSISTANT CHIEF ACCOUNTANT OLADEINDE WILL ATTEND SEMINAR AT MERRILL LYNCH IN NEW YORK MAY 17 TO 31 X WILL LIKE TO VISIT YOUR BANK ON TUESDAY 1ST JUNE TO DISCUSS MATTERS OF COMMON INTEREST X GRATEFUL ADVISE WHOM

COL 43 17 31 1ST

MA02363 MORGAN GURANTY TRUST PAGE2/16

TO CONTACT ON ARRIVAL IN NEW YORK

THROUGH MERRILL LYNCH UNTESTED

I A OLADEINDE ~~CEBANK LAGOS~~

CENTRAL BANK OF NIGERIA
LAGOS NIGERIA

FB 5/7

~~COL NIL~~

CREDIT FILE
Permanent
Temporary
Other (Spec.)
Mid. East & Afr. Ser.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

TELEGRAM

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

CONFIDENTIAL

ZCZC 232194 RC048 PDC1689 RMF7587 UWS181 LWA236 MA01769

URAU CO NGLG 025

LAGOS 25 6 1942

P put his names on cancel Done

MORGANBANK

NEWYORK

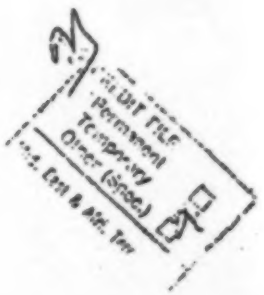
OUR I B ADEGBAYEMU ARRIVES NEW YORK SUNDAY 9TH MAY 1976 WE REGRET THE UNAVOIDABLE DELAY UNTESTED

PRINCIPAL LEGAL OFFICER ~~CEBANK LAGOS~~

FROM: CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA JW 5/6/76

~~COL I B 9TH 1976~~



Phone R. Bucke 11 15 AM 5/8

NNNN

Mr. Bucke 3/15

130407MAY6

OF NEW YORK

OF NEW YORK

CONFIDENTIAL

CREDIT DEPARTMENT FILE COPY

VIA TELEX

CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

ATTN: PRINCIPAL LEGAL OFFICE

116 [illegible]

[illegible] J. Bunche
3/3/76

Ter. #9

XXXXXX THANKS YOURS OF TODAY RE I. B. ADEGBAYEMI. WE LOOK FORWARD TO SEEI HIM NEXT WEEK. PLEASE TELEX PLANNED DAY OF ARRIVAL IN ORDER THAT WE CAN [illegible] HOTEL RESERVATION. REGARDS. RALPH BUNCHE

UINY CO NGLG 034 289a

LAGOS 34 26 2240

CONFIDENTIAL

MORGANBANK

NEWYORK

32 OUR R I B ADEGBAYEMU ARRIVES NEW YORK ON THUURSDAY 29TH AFRIL 1976 UX KINDLY ARRANGE ACIOMMODATION FOR HIM AT HOTEL MIDDLETON WNE X KIND REGARDS 148 E. 48 ST. PL5-3000

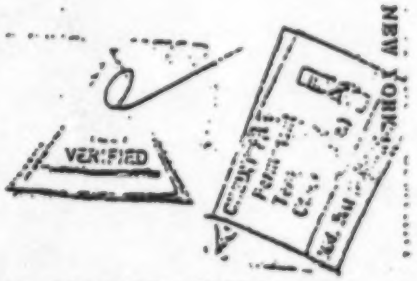
U32605 PRINIIPAL LEGAL OFFICER ~~TENDA X LAGOS~~

~~UCOL 32 29 TH 1976 32605~~

middletown (Mrs. Jaetta) will pass on message

Belmont Plaza
Lex. & 49 PL5-1300
held - late arrival
$5

VERIFIED



CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA
27 APR 76/RB

Mr Brown
5/15

NNNN

TELEGRAM

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

CONFIDENTIAL

VIA TELEX

CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

116 844

R. J. Bunche

4/27/76

Ter. #9

ATTN: ASSISTANT CHIEF PERSONNEL OFFICER

REFERENCE YOUR LETTER 20 APRIL. WE ARE PLEASED TO ACCEPT YOUR NOMINATION OF MR. FASASI AND REBUILE TO FORTHCOMING SEMINAR OF FINANCE AND BANKING. DATES OF SEMINAR HAVE BEEN SLIGHTLY ALTERED FROM MEMO I LEFT WITH YOU. THEY WILL NOW BE JUNE 7 THROUGH JULY 9. I HOPE THIS DOES NOT CAUSE YOU PROBLEMS. REGARDS.

RALPH BUNCHE

CONFIDENTIAL

Timubu Square
Lagos
PRIVATE MAIL BAG 12154: CABLES: CENBANK.
TELEPHONE.....

Our Ref: FERS/TRG

April 29, 1976

Mr. Ralph J. Bunche, Jnr.,
Morgan Guaranty Trust Company,
23, Wall Street,
New York, N.Y. 10015,
U.S.A.

Dear Sir,

Seminar on American Finance and Banking

I refer to our letter of 23rd March 1976 in which we requested you to reserve a place for us on the above seminar holding from June 16 - July 18, 1976 and wish to nominate Messrs. C. O. Fasani and C. O. Ezebuike to participate in the seminar.

We shall be pleased if you will reserve two places for us in the seminar. The curriculum vitae of our nominees are attached herewith for your consideration.

Thanks for your continued co-operation.

Yours faithfully,

ASSISTANT CHIEF PERSONNEL OFFICER.

Arthur J. Brown
Ralph J. Bunche, Jr.

CONFIDENTIAL

Tgn 8662 24 261 (T-T) Attached [illegible]
Tgn [illegible] Mo Cust 35127

806

Our Ref: PERS/TRG

April 15, 1976

NO ACCOUNT
APR 29 1976
Account Information

The Vice President,
Morgan Guaranty Trust Company,
23 Wall Street,
New York, N.Y. 10015

Dear Sir,

Mr. I. A. Oladeinde, our Assistant Chief Accountant, will be attending a seminar on Securities Money Management to be organised by Merril Lynch, New York from 17th - 29th May, 1976.

At the end of the seminar, we are proposing that Mr. Oladeinde should visit the Accounts Department of the Morgan Guaranty Trust Company on 2nd June, 1976.

We shall be pleased if you can arrange an attachment programme for him on the above date.

We look forward to an early reply from you.

Yours faithfully,

ASSISTANT CHIEF PERSONNEL OFFICER.

Central Bank of Nigeria
Lagos, Nigeria

CREDIT FILE
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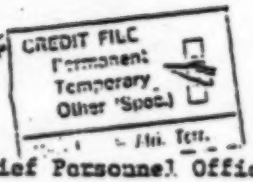
Temporary
Other (Spec.)
Mid. East & Afri. Terr.

OF NEW YORK

CONFIDENTIAL

April 1, 1976

Central Bank of Nigeria
Private Mail Bag 12194
Lagos, Nigeria



Attention: Assistant Chief Personnel Officer

Dear Sir:

Thank you for your letter of March 23. Mr. Bunche is presently on a business trip, and I am answering your letter in the interim.

We are reserving a place for a candidate from your institution for our Seminar in American Finance and Banking. During Mr. Bunche's recent trip to Nigeria, I believe he discussed this matter with Mr. Nagogo; and further details will be sent to you at a later date.

Regards.

Sincerely yours,

David D. Burrows
Middle East/Africa Territory

cc: Mr. Ralph J. Bunche, Jr.
Mrs. Christine S. Davin

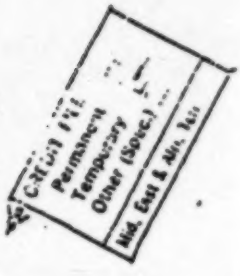
CONFIDENTIAL

Protection Dept. C/15

March 29, 1976

A.J. Brown 3/15

Visitors



T. O. Agbelusi
P. S. Anabor
S. A. Talabi
J.T. Imboede
M. B. Anagha

The above gentlemen, from the Central Bank of Nigeria, Lagos, Nigeria, will be visiting us from March 29 through April 2.

Please notify the appropriate individuals so that these visitors may enter the bank at either the 23 Wall Street, 15 Broad Street or 37 Wall Street entrances.

AJB

Approval: _____
P. W. Fitzpatrick, V.P.

CONFIDENTIAL

Our Ref: PERS/TRC

March 23, 1976

Morgan Guaranty Trust Co. of New York,
23 Wall Street,
New York, N.Y. 10015
U.S.A.

Attention: Mr. Ralph J. Bunche, Jnr.

Dear Sir,

Seminar on American Finance and Banking

We shall be pleased if you will reserve a place for us in your above seminar holding in June 1976. The name and other particulars of our nominee will be forwarded to you in due course.

Please let me have your confirmation that a place has been reserved for us.

Yours faithfully,

ASSISTANT CHIEF PERSONNEL OFFICER.

CONFIDENTIAL

VIA TELEX

CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

ATTN: ASSISTANT CHIEF PERSONNEL OFFICER

CREDIT FILE:
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Temporary
Other (Spec.) x
Mid. East & Af.

117/844

PW FITZPATRICK
FEB. 17, 1976
TERR. 9

REFERENCE YOUR LETTER OF FEBRUARY 4. WE WILL BE VERY GLAD TO RECEIVE 5 MEMBERS OF THE STAFF OF YOUR STAFF TRAINING SCHOOL FOR ABOUT A WEEK IN MARCH. WE LOOK FORWARD TO HEARING FROM YOU FURTHER IN THIS REGARD. MEANWHILE YOU MAY WISH TO DISCUSS THIS WITH MY COLLEAGUE RALPH BUNCHE JR., WHO WILL BE IN LAGOS FROM FEBRUARY 19 TO FEBRUARY 24 AND WILL BE VISITING THE CENTRAL BANK. YOU CAN CONTACT HIM THROUGH ICON LIMITED.

REGARDS, PAUL W. FITZPATRICK
VICE PRESIDENT

CONFIDENTIAL

To: Paul Fitzpatrick

Our Ref: PERS/TRG

February 4, 1976

Morgan Guaranty Trust Company,
23 Wall Street,
New York, N.Y. 10015

Dear Sirs,

The Central Bank is proposing to establish a Staff Training School and, in this connection, we have decided to send five members of our staff, who will be trainers in the School, on attachment visits to the training schools of reputable financial institutions in the United Kingdom and U.S.A., to acquire practical experience in the technique and method of staff training.

It is my pleasure to inform you that your institution is one of those we have selected for this attachment. I should therefore be pleased if you would indicate your willingness to receive these gentlemen for about a week in March, 1976.

As their tour will cover two continents, I will communicate to you in due course the exact period of their attachment to you after obtaining your formal approval to receive them.

I wish to take this opportunity to express my profound gratitude to you for your co-operation in the past.

Yours faithfully,

ASSISTANT CHIEF PERSONNEL OFFICER

CONFIDENTIAL

..., 1976.

Mr. Arthur M. Rogers Jnr.,
Morgan Guaranty Trust Company,
23 Wall Street,
New York, N.Y. 10015,
U.S.A.

Dear Mr. Rogers,

Thanks for your letter of December 24, 1975. I was particularly delighted to go through the Directory of your course participants for the period 1970-75 which you attached to your letter. It is pleasing to note that your alumni are so widely spread over the world.

On the economic scene, our experience in 1975 was almost akin to yours except that, thanks to our oil resources, we did not experience recession as most oil consuming nations. Our major pre-occupation in the year was how to contain the excess liquidity of the commercial banks, decongest our ports and minimize the effects of inflation.

The mention of your colleagues, Tina, Sidney and others quickly recalls in me the memory of our happy association at Morgan Guaranty in 1973. I am looking forward to re-uniting with you again in Mid-June when I will be in the United States on staff recruitment tour. Until then, please convey my warm regards to all my friends at Morgan Guaranty.

Thanks for your continued co-operation.

Yours sincerely,

U. Nagogo
Chief Personnel Officer.

020005 75 NOV 26 A 4:49

B420230 MGT UI

21350CEBANK NG 26. 26.11.75

CONFIDENTIAL

90 WE NOMINATE MR.J.O. AMAO TO ATTEND THE 1976 SEMINARS FOR

CENTRAL BANKERS.

A FORMAL LETTER FOLLOWS.

ASSISTANT CHIEF ~~OFFE~~ PERSONNEL OFFICER I

CENTRAL BANK OF NIGERIA.

UNTESTED++

LAGOS, NIGERIA 11/26/75 GMC

TIME 09:80

B420230 MGT UI

21350CEBANK NG

Mr LANCER

25/37

~~WELL RECD PLS70~~

~~B420230 MGT UI~~

~~21350CEBANK NGM~~

COMPANY

NN

132194A MGT UR

CONFIDENTIAL

CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

X

117-714

BUNCHE

11/13/75

TESTED TELEX

TERR. 69

RE YOURS 13/11/75. PLEASED TO LEARN OF SCHEDULED ARRIVAL 16/11/75 OF TWO OF YOUR REPRESENTATIVES. WE WILL BE PLEASED TO ASSIST YOU IN MAKING ARRANGEMENTS. IN ORDER TO MAKE BOOKINGS AT MIDDLETOWNE PLEASE TELEX IMMEDIATELY BOTH NAMES OF YOUR REPRESENTATIVES. LOOK FORWARD TO MEETING WITH THEM. REGARDS.

RALPH BUNCHE

SW

RB

COMPANY

CONFIDENTIAL

o

232194D MGT UR

21350CEBANK NG 13.11.75 011639 75 NOV 13 A 9:41

1536

73 YOUR CABLE OF SEVENTH NOVEMBER 1975 REFERS. TWO REPRESENTATIVES OF THE CENTRAL BANK OF NIGERIA WILL BE ARRIVING NEW YORK SUNDAY 16/11/75 TO MAKE ARRANGEMENTS TO RETAIN A FIRST RATE NEW YORK LEGAL COUNSEL. PLEASE ARRANGE TO BOOK HOTEL ACCOMMODATION AT HOTEL MIDDLETOWNE, 148 ~~EMC 22E~~ 148 EAST 48TH STREET, NEW YORK N.Y.10017.

TEST 73774 =

CENTRAL BANK OF NIGERIA+

COL 73774 ++

TIME 15380

232194D MGT UR

21350CEBANK NG

Lagos 9:rt.

o

232194D MGT UR

21350CEBANK NG 13.1

3/15

COMPANY

CONFIDENTIAL

CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

ATTN: A. A. LAWAL
CHIEF ACCOUNTANT

11/7/73

Telex. #9

VERY PLEASED TO LEARN THAT YOU WILL BE COMING TO UNITED STATES IN LATE NOVEMBER. WE WERE INFORMED OF YOUR VISIT IN THE CENTRAL BANK OF NIGERIA TELEX OF 11/3/73 AND WE LOOK FORWARD TO SEEING YOU ON TUESDAY DECEMBER 2. WE HAVE ARRANGED FOR YOU TO SEE VARIOUS PEOPLE TO DISCUSS MATTERS OF MUTUAL INTEREST. WE HOPE YOU WILL BE ABLE TO JOIN US FOR LUNCH, DINNER AND A BASKETBALL GAME ON DECEMBER 2. PLEASE GIVE ME A CALL ON ARRIVAL. MY NUMBER IS 483-2457. CAN WE BE OF ANY ASSISTANCE IN MAKING HOTEL OR ANY OTHER ARRANGEMENTS FOR YOU DURING YOUR STAY? LOOK FORWARD TO SEEING YOU AGAIN. BEST REGARDS.

RALPH DUNCHE

COMPANY

32194A NGT UR

NNNN55@057CTB229 LWA065 MA0758 001102 [illegible]

UINY CO NGLS 052

LAGOS 52 3 2234

806

CONFIDENTIAL

TELEGRAM

MORGANBANK

NEWYORK

3/K

ATTENTION RALPH BUNCHE JR

68 CHIEF ACCOUNTANT LAWAL WOULD ATTEND SEMINAR IN NEW YORK NOVEMBER 25 AND 26 X WOULD LIKE TO VISIT YOUR BANK ON TUESDAY SECOND DECEMBER TO DISCUSS MATTERS OF COMMON INTEREST X GRATEFUL ADVISE WHOM TO CONTACT ON ARRIVAL IN NEW YORK X

68677 CEBANK LAGOS

FROM: CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA 11/3/75 GMC

COL 68 25 26 68677

TEST VERIFIED

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

COMPANY

RB

NNNN

CONFIDENTIAL

TEST SECTION EXTENSION 2371

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

9790

RECEIVED 6/12/75

6/10/75

DELIVER TO

REF YOURS 6TH & 9TH WE REPEAT MSG NO. 61 OF 5/6/75 NO. 61 QUOTE ATTN RALPH BUNCHE JR. I WILL ARRIVE NEW YORK 14TH JUNE I LEARNED FROM BELLO AND NTEKOP THAT HOTEL MIDDLETOWN WHERE THEY STAYED IS GOOD PLEASE RESERVE ACCOMMODATION FOR ME THERE I WILL INFORM YOU OF THE FLIGHT NUMBER LATER THANKS AND SEE YOU SOON TESTED 61724 UNQUOTE

This message has been sub-divided. A copy of the complete message is attached. Do not act on this part until complete message has been read.

CAUTION:

This may be a duplicate message. If another copy is delivered to you take no action.

GMC 755A Section CC

CONFIDENTIAL

ZCZC 232194 RC039 PDM0651 RME0582 JYS257 OMZ718X LWB814 MA1415

URAZ CO NGLS 045
LAGOS 45 5 0159 SR

MORGAN GUARANTY TRUST COMPANY (DELF MORGANBANK)
NEWYORK

3/15

ATTENTION RALPH J BUNCHE

RE YOUR CABLE OF 27TH MAY FERERS S A OKPOWOBI DEPUTY CHIEF OF BANKING OPERATIONS HAS BEEN NOMINATED FOR THE SEMINAR HE WILL LEAVE NIGERIA ON 13TH JUNE THANKS 55664

ASSIST CHIEF PERSONNEL OFFICER CENBANK LAGOS

COL 55 27TH 13 TH IRPT 13TH 55664

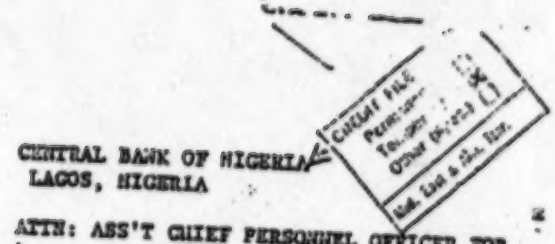
FROM CENTRAL BANK OF NIGERIA
LAGOS NIGERIA 6/5 1000 AM RI

1005

RNHH

023106JUNO

232194A MGT UR



CONFIDENTIAL

CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

ATTN: ASS'T CHIEF PERSONNEL OFFICER FOR
USMAN NAGOGO

117/244

MAY 27, 1975

TERR. 9

THE SEMINAR IN AMERICAN FINANCE AND BANKING WILL PROVIDE A COMPREHENSIVE UNDERSTANDING OF AMERICAN CAPITAL MARKETS AND INSTITUTIONS INCLUDING THEIR ECONOMIC AND POLITICAL ENVIRONMENTS AS WELL AS CURRENT DEVELOPMENTS, TRENDS AND ISSUES WITH EMPHASIS ON ORGANIZATION, OPERATIONS AND MANAGEMENT OF COMMERCIAL BANKS. THE PROGRAM WILL INCLUDE DAILY LECTURES AND CASE DISCUSSIONS BY UNIVERSITY X PROFESSORS AND OFFICERS OF MORGAN GUARANTY TRUST COMPANY. THE PROGRAM WILL ALSO INCLUDE FIELD TRIPS TO FINANCIAL AND [illegible] INSTITUTIONS AND WILL BE SUPPLEMENTED BY A BROAD RANGE OF READINGS REMX RELEVANT TO EACH TOPIC TO BE COVERED. THE BROAD CATEGORIES OF THE TOPICS TO BE COVERED ARE AS FOLLOWS: 1) THE AMERICAN ECONOMY; 2) THE AMERICAN CAPITAL MARKETS AND FINANCIAL INSTITUTIONS; 3) THE COMMERCIAL BANKING SYSTEM; 4) COMMERCIAL BANK ORGANIZATION AND ACTIVITIES; 5) COMMERCIAL LENDING FUNCTION; 6) MANAGEMENT OF OTHER BANKING FUNCTIONS; 7) COMMERCIAL BANKING IN THE INTERNATIONAL ENVIRONMENT; 8) BANK MANAGEMENT - POLICY AND STRATEGY FORMULATIONS. WE LOOK FORWARD

CONFIDENTIAL

CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

ATTN: ASS'T CHIEF PERSONNEL OFFICER FOR USMAN NAGOGO

XX 117/844

AJ BROWN
MAY 27, 1975
TERR. 9

PAGE -2-

RECEIVING THE NAME OF YOUR REPRESENTATIVE AS SOON AS POSSIBLE SO THAT WE MIGHT FORWARD ADDITIONAL COURSE MATERIAL.

REGARDS, AJ BROWN

CONFIDENTIAL

75 MY 24 A 7:37

99Ø011CTC507 OMX247X C LWB944 MA8532
UINY CO NGLS 057
LAGOS 57 23 2303

MORGAN GUARANTY TRUST COMPANY
NEWYORK

3/15

ATTENTION RALPH J BUNCHE

44 YOUR CABLE FOR ATTENTION USMAN NAGOGO RECEIVED X THE CENBANK IS INTERESTED IN SENDING A REPRESENTATIVE FOR SEMINAR IN FINANCE AND BANKING X PLEASE SEND US COMPREHENSIVE DETAILS OF COURSE CONTENT TO ENABLE US CONFIRM NAME OF OUR REPRESENTATIVE X

44710

ASST CHIEF PERSONNEL OFFICER ~~CEBANK LAGOS~~

Am. Central Bank of Nigeria

COL ~~44 44710~~

Lagos. Nigeria 5/23/75

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

CONFIDENTIAL

CENTRAL BANK OF NIGERIA
LAGOS, ~~XXXXX~~ NIGERIA

ATTN: USMAN MAGOCO
CHIEF PERSONNEL OFFICER

CREDIT FILE
Permanent ☐
Temporary ☒
Other (Spec.) ☐
Mid. East & Afri. Terr.

117 844

R. J. Bunche

Tor x 09

DURING MY VISIT YOU MENTIONED CENTRAL BANK MIGHT WANT TO SEND ~~XXXXXXXXX~~ REPRESENTATIVE TO OUR SEMINAR IN FINANCE AND BANKING JUNE 16 THROUGH JULY 18. THIS IS THE SAME SEMINAR YOU ATTENDED TWO YEARS AGO. YOU ALSO MENTIONED THAT MR. OKPONOBI MAY WISH TO ATTEND AND I CONCUR THIS WOULD BE AN EXCELLENT CHOICE. AS THE SEMINAR WILL BEGIN SOON, I WONDER IF YOU MIGHT LET ME KNOW BY THE END OF THE WEEK WHETHER THE CENTRAL BANK WOULD BE INTERESTED IN SENDING A REPRESENTATIVE. BEST REGARDS TO YOU AND YOUR ~~XXXX~~ FAMILY.

RALPH BUNCHE
ASSISTANT TREASURER

CENTRAL BANK OF NIGERIA, TINUBU SQUARE, LAGOS NIGERIA
PRIVATE MAIL BAG 12194: CABLES: CENBANK LAGOS

CONFIDENTIAL

Our Ref: PERS/TRG

November 27, 1975

Personal - Treasury Program

Morgan Guaranty Trust Company,
23 Wall Street,
New York, N. Y. 10015

Ralph Bench

Dear Sir,

1976 Seminar for Central Bankers
January 12 to 30, 1976

Further to our cablegram of 26th November 1975 regarding the above seminar, we write to confirm that we have nominated Mr. J. O. Amao, Deputy Chief Accountant, to participate in it.

We wish to seize this opportunity to thank you for the invitation to participate in the seminar.

Yours faithfully,

CHIEF PERSONNEL OFFICER.

Central Bank Seminar

CONFIDENTIAL

NIGERIA

Tiamiyu Adedokun Osola Bello (75)
Manager
Accounts Office
CENTRAL BANK OF NIGERIA

Thaddeus Joseph Ntekop (75)
Manager
Public Debt Office
CENTRAL BANK OF NIGERIA

Jacob Oladele Amao (76)
Deputy Chief Accountant
CENTRAL BANK OF NIGERIA

Simon Oladotun Fatokun (77)
Assistant Chief
Banking Operations
CENTRAL BANK OF NIGERIA

James Olabode Koleosho (77)
Bank Examiner
CENTRAL BANK OF NIGERIA

Isaac B. Ogodogu (78)
Principal Bank Examiner
Bank Examination Department
CENTRAL BANK OF NIGERIA

OMAN (SULTANATE OF OMAN)

Tariq A. Al-Jamali (76)
Director of Accounts Department
CENTRAL BANK OF OMAN

Abdullah Suleiman Al-Mahrouqy (77)
Accountant
International Relations Department
CENTRAL BANK OF OMAN

PERU

Federico Jarque (76)
BANCO CENTRAL DE RESERVA DEL PERU

PHILIPPINES

J. Roberto Abling (75)
Director
Development Management Staff
OFFICE OF THE PRESIDENT OF THE PHILIPPINES

EXHIBIT J TO HOENIGER AFFIDAVIT -
MAY 17, 1978 LETTER FROM WARSHAVSKY & HOFFMAN TO ATTORNEYS IN EAST EUROPE, NIKKEI AND CHENAX ACTIONS ENCLOSING OFFICE MEMORANDA OF MORGAN GUARANTY

WARSHAVSKY & HOFFMAN
380 MADISON AVENUE
NEW YORK, N. Y. 10017

STEPHEN D. HOFFMAN
SUZANNE M. WARSHAVSKY

TELEPHONE (212) 682-8020

May 17, 1978

HAND DELIVERY

James G. Simms, Esq.
Kissam Halpin & Genovese
120 Broadway
New York, New York

Berthold H. Hoeniger
Bailey, Marshall, Hoeniger
& Freitag
345 Park Avenue
New York, New York 10022

Lewis S. Sandler, Esq.
620 Fifth Avenue
New York, New York 10036

Re: Central Bank of Nigeria

Gentlemen:

Enclosed are Trip Memoranda relating to visits by Morgan Guaranty personnel to the Central Bank of Nigeria. Pursuant to Magistrate Schreiber's rulings and our various discussions, these Trip Memoranda have been redacted so as to black-out all material other than material referring to Central Bank of Nigeria cement letters of credit. Please note that among the material blacked out in the March 1976 and December 1976 memoranda is material referring to litigation concerning cement letters of credit.

The enclosed Trip Memoranda are produced upon the condition that they will be kept confidential and will not be shown to anyone without either the consent of Morgan Guaranty or an Order of the Court.

Sincerely,

Stephen D. Hoffman

SDH:K
Enclosures

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Assistant Treasurer

April 1975

C. Isong	Governor
O. O. Vincent	Deputy Governor
S. A. Okponobi	Deputy Chief Banking Operations
R. A. Lawal	Chief Accountant
Dr. J. O. Adekunle	Director of Research
T. I. Bello	Manager, Accounts Office
O. Olashore	Chief Bank Examiner
Usman Nagogo	Chief Personnel Officer
T. Ntekop	Banking Manager
Mr. Ojemoran	Manager, Bills Office
J. Ogedegbe	Chief of Administration
S. I. Abe	Deputy Chief Bank Examiner
F. K. Banjo	Assistant Chief Internal Auditor (now with ICON)
O. Adesina	Assistant Chief Bank Examiner

	1975 to Date	1974
Deposits:		
Facilities:	Sight Credits - $69.5MM	
	Line for Foreign Exchange Contracts -	

CENTRAL BANK OF NIGERIA CONFIDENTIAL

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Assistant Treasurer

Because of the huge amounts involved in recent letters of credit, either the Governor or the Deputy Governor supervises all letter of credit transactions. Isong says the Bank has been very cautious and conservative thus far, particularly because of the many "bucket shops" the ministries have had a tendency to deal with. The Central Bank has become adamant that letters of credit not be confirmed by their correspondents. Apparently, this dogmatic policy has caused severe difficulties only in Germany. I advised the various parties concerned with letters of credit that in certain instances where the commodity is vital to development they might have to be somewhat flexible on the confirmation question. However, it appears that they will consistently refuse to have credits confirmed.

A Bills Department has now been established and is run by a Mr. Ojemoran. The Department was created because of the increasing volume of letter of credit work the Bank has been asked to undertake. As Nigeria's imports continue to grow this year, the volume of Central Bank letters of credit should also increase. The Bank now has a new letter of credit form which incorporates all the changes which our Letter of Credit Department suggested (form attached). As one can see, the form specifically requests that we not add our confirmation

CENTRAL BANK OF NIGERIA

CONFIDENTIAL

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Assistant Treasurer

- 3 -

(1)

T. Ntekop, who attended last year's seminar, is now the Bank Manager.

They seemed to be pleased with our new payment system worked out by Fitzpatrick and Brown. Bello did question the amount of "idle" funds which was accumulating He referred to a letter he had sent to Brown concerning the build up of these funds. I told him I would check with Brown and revert upon my return.

Laval, who is Bello's boss, is concerned that overdrafts be avoided at all costs and thus is recommending that our drawing rights at the Federal Reserve be increased from the present $1,000,000 maximum per day.

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Assistant Treasurer

- 4 -

R.J.B.

Attachment

cc: Messrs. Arthur M. Rogers, Jr.
John A. Mayer, Jr.
Arthur J. Mohan
George H. Chittenden

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

. 1973

O. O. Vincent	Deputy Governor
F. A. Ijewere	Chief of Banking Operations
S. A. Okponobi	Deputy Chief of Banking Operations
Jacob Amao	Assistant Chief Accountant
A. Bello	Manager of Accounts Office
T. Ntekop	Banking Manager
O. Olashore	Chief Bank Examiner
R. A. Lawal	Chief Accountant
Usman Nagogo	Chief Personnel Officer
S. B. Falegan	Deputy Director of Research

1. has officially been retired.

I suspect that the cement problems caused him some difficulty as well because it was the Central Bank which permitted the Ministry of Defense to issue letters of credit which were well in excess of Defense's budget. However, as Ministry of Defense was really controlled by Gowon, it would have been hard for to refuse the Ministry's request.

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CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

- 2 -

4. Wagner and I talked at length to Ijewere and Okponobi about potential problems which might arise because of the CBN's attempt to change wording in their lette of credit. I also talked to Deputy Governor Vincent about this problem. We went over the demurrage language in their existing credits and attempted to sho them why the new clause must be considered an amendment. We pointed out that, if they did not treat the new wording as an amendment, they could do serious damage to their future international credit standing. They were not at all impressed by this argument. Their position is that the Government has told them to stop all payments for cement until they can determine which payments are legitimate. Furthermore, they will not allow the cement situation to ruin their economy. Ijewere did like Rod's suggestion that one way to get around the demurrage problem was to pass a local ordinance which would prohibit shipping agents from verifying the number of days a ship was in the harbor if they did not have the approval of the Harbor Master.

The Nigerian Government has decided to take a hard line on the cement problem i the hope of scaring away future cement shipments. They are willing to do this regardless of any effect on their reputation. Their position is that no respon sible person would ship cement to Nigeria in view of the port congestion; and, therefore, NGT should not pay any cement credit, whether confirmed or unconfirm We told them that, if documents were presented in order under confirmed credit, we had to pay. Vincent responded that the Government was willing to go to cour if we did pay. In a subsequent discussion, Louis Michel of UBA said the BNP wa told the same thing by the Central Bank, but BNP is convinced that the Central Bank will not refuse to reimburse them for payments they have to make under letters of credit.

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

ch 1976

Mallam Adamu Ciroma	Governor
O. O. Vincent	Deputy Governor
A. O. G. Otiti	Chief of Banking Operations
R. A. Lawal	Chief Accountant
J. Amao	Deputy Chief Accountant
Sule A. Okponobi	Deputy Chief Exchange Controller
T. I. Bello	Assistant Exchange Controller
O. Olashore	Chief Banking Examiner
Mr. Ojemeran	Manager, Bills Office
T. Ntekop	Assistant Personnel Manager
Usman Nagogo	Chief Personnel Officer
S. B. Falegan	Chief of Research

As usual, this was a three-day call.

1. With a great deal of hard work, Okponobi was able to secure an appointment with Governor Ciroma.

The basic thrust of our conversation was an explanation of NGT and a review of the cement difficulty and our efforts. He seemed well informed and thanked us for our efforts and patience.

2. Otiti has replaced Ijewere. In 1967-1969, he was Deputy Chief of Banking: thus, most of his responsibilities are familiar.

He received me very warmly and also thanked us for our efforts on the cement problem.

CONFIDENTIAL

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

(3)

4. Settlement with 44 contracts has been reached. $73MM has been paid. Bello says all dollar settlements have gone through us, regardless of where the credit was opened. Apparently some of the other banks are encountering difficulty in making these payments. Only one or two Greek shippers are still causing problems. In general, the settlements call for a series of demurrage and cargo payments with the letters of credit to be tendered after 14 days. Only one credit relinquished thus far. At Brown's suggestion, I pointed out that payments have been made in certain cases through our Money Transfer Department, which have not reduced or cancelled the underlying credits. Most of the payments thus far are for demurrage and are outside of the credit. The Nigerian settlements call for good faith money 14 days in advance of the hand over of the credit, but it is not clear whether this is 14 days from first or last payment. Nevertheless, Otiti and Ojemoran were very appreciative of this caution. will look into the matter further and asked that we continue to advise them of any problems we saw.

5. Kukoyi is now one of the Deputy Chiefs of Banking Operations. Sanusi is the other. As I pointed out, they should start a club of MGT/CBN personnel as they all tend to get promoted after our training: Nazomo - Deputy to Chief Personnel Officer; Kukoyi - now Deputy Chief of Banking Operations; Bello - now Assistant Chief Accountant; Akamiokhor - Governor, Kaduna; Nteko: Assistant Chief Personnel.

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

- 4 -

14. Balio says custody account will return after the cement problem is resolve I don't feel too confident however.

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS. NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice.President

- 5 -

—

R.J.B.

cc: Mr. Paul W. Fitzpatrick

Lagos, Nigeria

CONFIDENTIAL

Ralph J. Bunche, Jr., A.V.P. and Arthur J. Brown, A.T.

CONFIDENTIAL

Between 6 December and 17 December, Arthur Brown and the undersigned made numerous calls on the above. In addition, the nine Heads of Department arranged a luncheon on our behalf, and the junior staff entertained us on various occasions. As usual, Sule Okponobi coordinated all appointments.

(4)

Structure of Organization

McKinsey & Co. has finished its report. The report has been passed by the CBN's Board of Directors and has been submitted to government for approval. One of the main change recommended by McKinsey is that the two Governors become less involved in daily operati and more involved with policy matters and liason with government. Up until very recently, the views of the Central Bank have been represented to Government by the Ministry of Finance. Apparently, this is one of the reasons that Government did not fully comprehend the letter of credit problems which arose because of the cement crisis McKinsey has recommended that three Executive Director positions be set up to handle the daily bank operations. Each Executive Director would be in charge of 3 Departments thus freeing the Governors for policy matters.

R.A. Laval is definitely leaving in March to become Managing Director of CTB Stock-brokers, one of the 3 local stockbrokers. CTB's major foreign shareholder is the British insurance broker C.T. Bowring. Apparently, CTB intends to widen its scope of business into merchant banking. J. Amao who attended the 1976 Central Bank Seminar should take over although no appointment has yet been made.

CONFIDENTIAL

Letters of Credit

The CBN has now taken a firm position on confirmation of letters of credit. It has instructed all the Ministries not to include confirmed letters of credit in any contract regardless of whether or not the beneficiary is willing to bear the charges. In addition, the CBN has asked all its correspondents to tell their clients that the CBN 1) will not request confirmation; 2) is good for its obligations. Apparently, the CBN realized that when it was requesting confirmation with the charges for account of beneficiaries, these charges were being built back into the original contract price.

Accounts

The CBN still holds to its stated policy of one commercial account per country. Their network of commercial bank accounts is MGT, Midland, Deutsche Bank, BNP (only small amount of business due to problems caused by cement crisis - we now receive most of the CBN French business), Bank of Tokyo, Royal Bank of Canada, Credito Italiano, Swiss Banking Corporation, Algemene Bank, Societe Generale de Banque.

CONFIDENTIAL

Miscellaneous

The CBN has already paid over 170MM Naira in demurrage claims resulting from the cement crisis.

A cement shortage is again building. The government has recently increased the number of liscensed importers of cement from 11 to 47.

CONFIDENTIAL

R.J.B.

Distribution:

Messrs. Rodney B. Wagner, S.V.P., 2/23
Rolf G. Sellge, V.P., 10/15
Paul W. Fitzpatrick, V.P., 3/15

EXHIBIT K TO HOENIGER AFFIDAVIT -
MAY 2, 1975 CREDIT AUTHORIZATION OF MORGAN GUARANTY

CREDIT AUTHORIZATION P. EE (Morgan) Eff. 1
4.18.78 MAY 7 1975

☐ GENERAL BANKING DIVISION
☒ INTERNATIONAL BANKING DIVISION

E.W.
CRED. & FIN. ANAL. DEPT.

DATE May 2, 1975

NAME CENTRAL BANK OF NIGERIA
DATE A/C OPENED March 6, 1974

ADDRESS Lagos, Nigeria
DISTRICT TERRITORY Middle East/Africa

BUSINESS Central Bank

INDICATE NAME OF PARENT COMPANY, IF ANY
DATE A/C OPENED

OR OTHER CROSS REFERENCE

AMOUNT $5,000,000
RATE

☒ NEW ☐ RENEWED ☐ AMENDED ☐ CANCELLED ☐ BANK ☐ BOND ☐ 365 DAYS ☐ 366 DAYS

PREVIOUS AMOUNT

☐ LINE OF CREDIT ☐ ADVISED ☐ NOT ADVISED REVIEW DATE November 15, 1975
☐ COMMITMENT ☐ REVOLVING ☐ NOT REVOLVING COMMITMENT FEE
☐ CONVERTIBLE ☐ NOT CONVERTIBLE HOW PAYABLE
☐ SHORT TERM ☐ LONG TERM

☐ IMMEDIATE BORROWING EXPIRATION OF COMMITMENT
☒ OTHER CREDIT FACILITY MATURITY OF LOAN
☐ SECURED ☒ UNSECURED

FACILITY DESCRIPTION, INCLUDING ANY AMORTIZATION:

Internal guidance line for forward foreign exchange contracts at NYOffice
(For authorization purposes 10% considered as risk)

PURPOSE: ☐ SEASONAL WORKING CAPITAL ☐ OTHER (DESCRIBE)

See above

COLLATERAL OR GUARANTEE: None

BALANCE UNDERSTANDING: No formal balance understanding

TOTAL LINES AND MAJOR BANKS: We believe that we are the only U.S. commercial bank with account

TOTAL PEAK AND MINIMUM SHORT TERM DEBT: N.A.

REMARKS, INCLUDING SOURCE OF REPAYMENT: Cancelled

NOT IN EFFECT
CREDIT DEPT.

Best Copy Available

ACCOUNT PROFITABILITY:

APPROVED: GENERAL A. BRUCE BRACKENRIDGE, SVP SENIOR D. WEATHERSTONE, SVP

REGULAR PW FITZPATRICK, VP LIMITED

CREDIT DEPARTMENT COPY

EXHIBIT L TO HOENIGER AFFIDAVIT
DECEMBER 1975 LETTERS FROM MORGAN GUARANTY

Central Bank of Nigeria
Lagos, Nigeria

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 Wall Street, New York, N.Y. 10015

December 22, 1975

Dear :

As the Department of Commerce has previously informed you, the new Nigerian Ambassador to the U.S., The Honorable Edward C. Sanu, has requested a meeting with selected members of the financial community with the principal purpose of explaining the Government of Nigeria's attitude to the problems which have recently arisen as a result of cement orders contracted for by the previous government.

Morgan Guaranty will be hosting this meeting, which is now scheduled for January 8, 1976, at 11:00 a.m. The meeting is to be held at our Main Office, 15 Broad Street, 28th floor, in Morgan Guaranty Hall.

We hope you will be able to attend both the conference and the luncheon which will directly follow the meeting. If you plan to attend, please telephone Ms. Diana Schauer (212) 483-2454 prior to January 2nd.

We look forward to seeing you.

Sincerely,

P.E.E (Morgan) Exh #2
4.18.78
II
TM

Hon. Edward O Sanu - Ambassador
Embassy of Nigeria
2201 M Street, N.W.
Washington, D.C. 20036

Mr. Olufemi Ani
Consular for Economic Affairs
2201 M Street N.W.
Washington, D.C. 20036

Hon. V. Adebayo Taylor
Consul General
Consulate General of Nigeria
575 Lexington Ave.
New York, N.Y. 10022

Mr. Titus T. Makanjuola
Consul (Commercial)
575 Lexington Ave.
New York, N.Y. 10022

Mr. A. Afhkuai
Information Officer
575 Lexington Ave.
New York, N.Y. 10022

Mr. Hamilton W Meserve, V.P.
First National City Bank of New York
International Banking Group
399 Park Ave.
New York, N.Y. 10022

Mr. Dennis D DeMunnick
Assistant Vice President
First National City Bank
International Banking Group
399 Park Ave
New York, New York 10022

Mrs. Evelyn S Lord - A.V.P.
Bankers Trust Company
280 Park Ave.
New York, N.Y. 10017

Mr. Robert S. Hilliard
Assistant Vice President
Bankers Trust Company - Letter of Credit Marketing
~~280 Park Avenue~~ 1 Bankers Trust Plaza
New York, New York ~~10017~~ 10006

Mr. Thomas Saliba - A.V.P.
First Chicago International
Banking Corp.
737 5th Ave.
New York, N.Y. 10022

Mr. J.R. Sanchez, V.P.
Bank of America International
41 Broad Street
New York, N.Y. 10005

Mr. Gabriel H. Chalhoub - A.V.P.
Bank of America International
41 Broad Street
New York, N.Y. 10005

Mr. Peter J. E. Nice, V.P.
The Chase Manhattan Bank
N.A.
International Department
1 Chase Manhattan Plaza
New York, N.Y. 10015

Mr. Robert M. Hoen, V.P.
The Chase Manhattan Bank
N.A.
International Department
1 Chase Manhattan Plaza
New York, N.Y. 10015

Mr. Bruce C Nicholas, V.P.
Foreign Credit Insurance Assn.
1 World Trade Center, 9th Flr.
New York, N.Y. 10048

Mr. Ben A. Parnell - ~~Investment~~
OPIC ~~Financial Analyst~~ Officer - Africa
1129 20th Street, N.W.
Washington, D.C. 20527

Ms. Bonny Henderson
Financial Supervisor
OPIC
1129 20th Street, N.W.
Washington, D.C. 20527

Mr. Clay Norris, V.P.
Export-Import Bank of
the United States
811 Vermont Avenue, N.W.
Washington, D.C. 20571

Mr. Jack Bierman, Deputy, V.P.
Export-Import Bank of
the United States
811 Vermont Avenue, N.W.
Washington, D.C. 20571

Mr. Edward W. Lollis III
~~Country Officer for~~ - Nigeria
U.S. Department of State
Washington, D.C. 20520

Mr. Gilbert Weinstein, Exec. V.P.
Nigerian American Chamber of Commerce
65 Liberty Street
New York, N.Y. 10005

Mr. Arthur C. Rutzen, Director - N.Y. District Office
Mr. Abner Fein, Deputy Director
U.S. Department of Commerce
26 Federal Plaza
New York, N.Y. 10007

Ms. Wynola Robison
Information Officer
U.S. Department of Commerce
26 Federal Plaza
New York, N.Y. 10007

Mr. Gilbert L. Hachadoorian
Trade Specialist
U.S. Department of Commerce
26 Federal Plaza
New York, N.Y. 10007

Mr. Theodore F. Fiedler
Country Marketing Manager
West and Central Africa Div.
Office of International Marketing
(MD 4016)
U.S. Department of Commerce
Washington, D.C. 20230

Mr. Rodney P. Rydlum
County Specialist
West and Central Africa Div.
Office of International Mktg.
(MD 4016)
U.S. Department of Commerce
Washington, D.C. 20230

Ford ML

Mr. John W. Ford III
Merrill Lynch, Pierce,
Fenner & Smith, Inc.
One Liberty Plaza
New York, New York 10006

MORGAN GUARANTY PERSONNEL ATTENDING

Alfred H. Von Klemperer
Senior Vice President

Arthur M. Rogers, Jr.
Vice President

Ralph J. Bunche, Jr.
Assistant Vice President

J. Alexander Caldwell, IV
Associate Economist

Arthur J. Brown
Middle East & Africa Territory

Christine S. Davin
International Banking Administration

John A. Payne
Managing Director
ICON Limited

John H. Barnes III
Vice President

George D. Cashman
Vice President

December 23, 1975

The Honorable Edward O. Sanu
Ambassador
Embassy of Nigeria
2201 M Street, N.W.
Washington, D.C. 20036

Dear Ambassador Sanu:

The meeting which you have requested with members of the financial community is now set for 11:00 a.m. on January 6, 1976. As you are aware, the Morgan Guaranty Trust Company of New York will host the meeting which is to be held at our Main Office, 15 Broad Street, 28th Floor, in Morgan Guaranty Hall. Luncheon will follow immediately.

In order that the meeting commence promptly, I suggest that you come to our offices around 10:30 a.m. In this way, we will be able to give you a short orientation. Please ask for Ralph Bunche, Middle East & Africa Territory.

Enclosed for your perusal is a list of invited guests. We look forward to meeting with you and your colleagues.

Sincerely,

Ralph J. Bunche, Jr.
Assistant Vice President

Enclosure

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 WALL STREET, NEW YORK, N.Y. 10015

RALPH [illegible]
Assistant Vice President

December 23, 1975

Mr. Olufemi Ani
Consular for Economic Affairs
2201 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Ani:

As you know, the meeting which Ambassador Sanu and you have requested with members of the financial community is now set for 11:00 a.m. on January 6, 1976. The meeting, which is to be followed immediately by luncheon, is to be held at Morgan Guaranty's Main Office, 15 Broad Street, 23th Floor, Morgan Guaranty Hall.

In order to be able to allow time for a brief orientation, I have suggested that the Ambassador arrive at approximately 10:30 a.m.

Enclosed for your perusal is a list of invited guests. We look forward to meeting with you.

Sincerely,

Enclosure

December 23, 1975

The Honorable V. Adebayo Taylor
Consul General
Consulate General of Nigeria
575 Lexington Avenue
New York, New York 10022

Dear Mr. Taylor:

As you know, Ambassador Sanu has requested a meeting with members of the financial community. This meeting is now scheduled for 11:00 a.m. on January 6, 1976 at the Head Office of Morgan Guaranty Trust Company of New York, 15 Broad Street, 28th Floor, Morgan Guaranty Hall. Luncheon will follow immediately.

In order to be able to allow time for a brief orientation, I have suggested that the Ambassador arrive at 10:30 a.m.

Enclosed for your perusal is a list of invited guests. We look forward to meeting with you.

Sincerely,

Ralph J. Bunche, Jr.
Assistant Vice President

Enclosure

December 23, 1975

Mr. Titus T. Makanjuola
Consul (Commercial)
575 Lexington Avenue
New York, New York 10022

Dear Mr. Makanjuola:

As you know, Ambassador Sanu has requested a meeting with members of the financial community. This meeting is now scheduled for 11:00 a.m. on January 6, 1976 at the Head Office of Morgan Guaranty Trust Company of New York, 15 Broad Street, 28th Floor, Morgan Guaranty Hall. Luncheon will follow immediately.

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Sincerely,

Ralph J. Bunche, Jr.
Assistant Vice President

Enclosure

December 23, 1975

Mr. A. Afhkami
Information Officer
575 Lexington Avenue
New York, New York 10022

Dear Mr. Afhkami:

As you know, Ambassador Sanu has requested a meeting with members of the financial community. This meeting is now scheduled for 11:00 a.m. on January 6, 1976 at the Head Office of Morgan Guaranty Trust Company of New York, 15 Broad Street, 28th Floor, Morgan Guaranty Hall. Luncheon will follow immediately.

In order to be able to allow time for a brief orientation, I have suggested that the Ambassador arrive at 10:30 a.m.

Enclosed for your perusal is a list of invited guests. We look forward to meeting with you.

Sincerely,

Ralph J. Bunche, Jr.
Assistant Vice President

Enclosure

EXHIBIT M TO HOENIGER AFFIDAVIT -
SCHEDULE OF LETTERS OF CREDIT CONFIRMED OR ADVISED
BY MORGAN GUARANTY IN PAYMENT FOR NIGERIAN CEMENT CONTRACTS

LETTERS OF CREDIT CONFIRMED OR ADVISED BY MORGAN IN PAYMENT FOR NIGERIAN CEMENT CONTRACTS

	BENEFICIARY	TONNAGE	FACE AMOUNT (EXCLUSIVE OF DEMURRAGE)
A.	CONFIRMED (1974)		
1.	Nix International 673 Shepherd Avenue Brooklyn, N.Y.	500,000 tons	$26,250,000
2.	Chikafis International 140-20 211th Street Jamaica, N.Y. 11429	280,000 tons	13,440,000
3.	Tri-Ex Enterprises, Inc. Two World Trade Center New York, N.Y. 10048	500,000 tons	24,750,000
B.	ADVISED (1975)		
4.	East Europe Import-Export, Inc. 440 Park Avenue South New York, N.Y. 10016	240,000 tons	14,280,000
5.	Chenax Majesty Inc. One Union Square West New York, N.Y. 10003	240,000 tons	14,400,000
6.	Decor by Nikkei International Inc. 110 East 23rd Street New York, N.Y. 10010	240,000 tons	14,400,000
7.	Reale International Inc. 508 Tolland Street East Hartford, CT 06108	240,000 tons	14,280,000
8.	Verlinden B.V. Lomanstraat 1 Amsterdam Netherlands	240,000 tons	14,400,000
9.	National American Corporation One East 57th Street New York, N.Y. 10022	240,000 tons	14,400,000
10.	Nigerian American Corporation/ Kaiser Trading Company 2211 Woodward Avenue Detroit, MI 48201	240,000 tons	14,400,000
11.	JLM International Inc. 243 Vassar Street Cambridge, MA 02138	240,000 tons	14,400,000
12.	Fadoul B. Rebeizof P. O. Box 1713 Beirut Lebanon	240,000 tons	14,400,000

T Ex. PJ-12 4,100

T Ex. PJ-9 "at the International Rate"

T Ex. P-J 7 4,000

T Ex. PJ-13 4,100

T Ex. PJ-8 4,000

	BENEFICIARY	TONNAGE	FACE AMOUNT (EXCLUSIVE OF DEMURRAGE)
13.	Sure Petroleum Limited Hamilton Bermuda	240,000 tons	$ 14,400,000
14.	Afric International Associates c/o Toltec International Trade Limited 111 Front Street Freeport, N.Y. 11520	240,000 tons	14,280,000
15.	Texas Trading and Milling Corporation 11 Greenwich Street New York, N.Y. 10004	240,000 tons	14,400,000
16.	First Columbia Company Inc. Suite 829 1800 K Street, N.W. Washington, D.C. 20006	240,000 tons	14,304,000
17.	Ying International Corporation 400 Park Avenue New York, N.Y. 10022	240,000 tons	14,280,000
TOTALS		4,640,000 tons	$265,464,000 (plus an open-ended amount for demurrage)

EXHIBIT N TO HOENIGER AFFIDAVIT -
OCTOBER 14, 1975 TELEX FROM MORGAN GUARANTY TO CENTRAL BANK OF NIGERIA AND NOVEMBER 21, 1975 TELEX FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY

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CENTRAL BANK OF NIGERIA
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AT THE REQUEST OF EAST EUROPE IMPORT EXPORT INC., BENEFICIA
YOUR IRREVOCABLE CONFIRMED CREDIT CBN/BO/75/201 OUR REFERENCE A 12122 WE
INFORM YOU THEY PRESENTED TO US 10/14/75 SHIPPING DOCUMENTS COMPLYING WI
THE TERMS OF YOUR CREDIT EXCEPT YOUR CABLE 9/30/75 COVERING 10,500 METRI
TONS CEMENT CIF VALUE $624,750. STEAMER TORENIA, PORT LOADING BILBAO
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MORGAN GUARANTY TRUST COMPANY OF NEW YORK

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85 YOUR CABLE DATED 14/10/75 SENT ON BEHALF OF EAST EUROPE IMPORT EXPORT REFERS STOP AUTHORITY TO DEBIT OUR ACCOUNT CANNOT BE GIVEN EXCEPT SUPPLIERS COMPLY IN FULL WITH FED GOVERNMENT INSTRUCTIONS OF

19TH AND 29TH SEPTEMBER 1974 WHICH STIPULATE THAT PAYMENT OF DEMURRAGE

CLAIMS CANNOT BE EFFECTED

~~COL 85 14/10/75 19TH 29TH 1974~~

~~IMA9280 MORGANBANK PAGE 2/08~~

UNLESS CERTIFIED FOR PAYMENT BY NIGERIAN PORTS
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CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA 11/12/75

TESTIMONY OF PAUL WINSTON FITZPATRICK, OFFICER OF MORGAN GUARANTY TRUST COMPANY AT TRIAL OF NATIONAL AMERICAN ACTION

can get him finished.

MR. GRUTMAN: I shall try, Judge. Mr. Fitzpatrick.

P A U L W I N S T O N F I T Z P A T R I C K,

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Fitzpatrick, what is your occupation.

A I am a banker.

Q With what bank are you connected?

A Morgan Guaranty Trust Comapny.

Q Keep your voice up, please, Mr. Fitzpatrick.

A Morgan Guaranty Trust Company.

Q For how many years have you been in the service of the Morgan Guaranty Trust Company?

A Twenty seven.

Q And at the present time, whatis the job status which you occupy?

A I am a vice president in charge of our activities in Africa.

Q Does that vice presidency title have a prefix to it; are you just a vice president or a senior vice president?

A A vice president.

J-7

J nsmch Fitzpatrick - direct

A I worked in the African territory, but I didn't have the same responsibilities that I have now.

Q Would it be fair to say, Mr. Fitzpatrick, that at or about the time that your job became upgraded there was a substantial increase in the volume of business done by Morgan Guaranty Trust Company with Africa?

A Not at that particular time, no.

Q At or around that time?

A It had been growing for some years.

Q When did Nigeria first become a customer of the Morgan Guaranty Trust Company?

MR. KISSAM: I object to this testimony on the ground that, one, this will be an effort to go into an area which we believe is completely improper. If this testimony is to go in per your Honor's ruling because I think your Honor mentioned this morning that the business custom of the relationship between a bank and its client is confidential, but I think there are two exceptions. If the bank is directed by judicial order, that is something else, or if the client accepts.

Neither of those situations have occurred yet. I would move for a protective order if you are going to take the testimony, and I would also move for the exclusion of certain individuals who are in this courtroom on other

THE COURT: Your witness is excused for the rest of the day.

MR. RINGSMUTH: Will the examination be conducted in the same order?

THE COURT: I don't know. He is from the Federal Reserve Bank.

(Discussion off the record)

(Spectators leave courtroom.)

MR. GRUTMAN: Now that the courtroom is cleared, I want to restate for the record that I don't believe that was required.

Am I under any secrecy instructions from the Court?

THE COURT: Yes. The information imparted by this witness at this time will be used only in this case.

MR. GRUTMAN: All right.

BY MR. GRUTMAN:

Q Mr. Fitzpatrick, when did Nigeria become a customer of Morgan?

A 1974.

Q At that time when they first became a customer you had responsibility for African affairs, did you not?

A Yes.

Q Between 1974 and 1975, was there an increase in

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the volume of business which was transacted by Morgan for Nigeria?

MR. KISSAM: I object to this. It's irrelevant.

THE COURT: I will allow it.

Q You may answer, sir.

A Yes.

Q Were you in charge of the African Affairs Department before the cement contracts were issued?

A Yes.

Q In the year preceding that in which the cement contracts were issued, what was the volume of business that Nigeria did with Morgan, sir?

MR. KISSAM: Objection, your Honor. What relevancy?

THE COURT: If you know.

Do you have that figure in mind?

THE WITNESS: No, your Honor.

Q Mr. Fitzpatrick, I have deferred asking you to bring documents at the request of your counsel. While you may not have the figures here, as the vice president in charge, I would be happy to take from you an approximate

A Very little; very slight.

Q In 1975, when the cement contracts were let, did Morgan handle letters of credit for Nigeria for those

cement contracts?

A Yes.

Q Would you tell his Honor what was the gross amount of the cement contract letters of credit handled by Morgan in 1975 for Nigeria?

MR. KISSAM: Objection, your Honor. We are concerned with one case.

THE COURT: Yes. While I have great doubts about this doing business, particularly if it is limited to banking transactions, I will let him make his record and rule on it at the end of the trial.

Overruled.

A I would say 400 million.

Q Of the 400 million, how many of them were confirmed letters of credit?

A About 60.

(Continued on next page)

Q Could you give us an approximation, Mr. Fitzpatri of what the gross dollar volume was of the sixty confirmed letters of credit?

THE COURT: Only sixty letters?

THE WITNESS: Sixty million were confirmed.

Q When Morgan issues a confirmed letter of credit, does Morgan charge its customer a fee or commission for confirming rather than advising on a letter of credit?

A Absolutely.

Q Let's say on a $14 million letter of credit, what would be the commission or charge that Morgan would make to its customer Nigeria for confirming such a letter of credit?

A 1/20th per cent per quarter.

THE COURT: By quarter, you mean that if the letter of credit is outstanding for more than three months an additional 1/20th per cent is charged for each successive three months?

THE WITNESS: If the credit is open and has a validity date one year from the date it was opened, you charge for four quarters. If the credit expires within two years, you charge for eight quarters.

THE COURT: I follow you. What you are saying in effect is you are charging a fifth of a per cent a year.

If it is a shorter period of time, it can be as little as 1/20th of a per cent if payable within three months?

THE WITNESS: That is right.

Q Of the $400 million in confirmed letters of credit --

A They were not confirmed.

Q Of the $4 million of letters of credit handled by Morgan for Nigeria in 1975, how many of them were involved with cement contracts?

A All of those. There were others.

Q I understand that. There were $400 million of cement contracts on letters of credit for Nigeria passing through Morgan in 1975, of which you say 60 million were confirmed; right?

A Yes.

Q In addition to the letters of credit in 1975 which Morgan serviced for Nigeria for the cement contracts aggregating around $400 million, were there other areas of credit which Morgan furnished on behalf of its customer Nigeria for 1975?

MR. KISSAM: I object.

A Very few.

THE COURT: I will take it subject to connection.

Q Of the customers which Morgan had in 1975

nsm3 Fitzpatrick - direct

originating out of Africa, did you have a more important client than Nigeria?

MR. KISSAM: Objection.

THE COURT: I do not like the phrase more important.

Did you have another African country that produced a larger volume?

THE WITNESS: Not for letters of credit.

Q Of Morgan's foreign customers out of Africa, what is the largest income-producing customer that the bank has?

MR. KISSAM: I object to that.

A Right now?

MR. KISSAM: What does that have to do with this litigation?

THE COURT: He is showing that Nigeria is important to Morgan. That does not mean Morgan is important to Nigeria.

MR. GUTMAN: We will come to that.

THE COURT: It is a fact that Nigeria is your greatest revenue-producing African country?

THE WITNESS: Now it is; yes.

THE COURT: When did it become the biggest?

THE WITNESS: Maybe in 1975, 1976, not necessari

nsm4 Fitzpatrick - direct

with the cement.

Q Of all your foreign customers, European, African, Asiatic or Arctic, does the Morgan Guaranty Trust Company have a more lucrative customer than Nigeria?

A I am sure.

MR. KISSAM: I object.

THE COURT: I overrule the objection. You will probably like the answer.

A France, Britain, Saudi Arabia, probably Kwait.

Q How much money did Morgan make from Nigeria in 1975?

MR. KISSAM: I do not know whether the witness is qualified to say.

MR. GRUTMAN: He is in charge.

THE COURT: I will let him give his best estimate.

A That's about $600,000.

Q I beg your pardon?

A $600,000.

Q That is the total amount of money that Morgan made from Nigeria?

A Yes. That is a lot of money, $600,000.

Q How much did you make from France is that year?

A I don't know.

nsm5 Fitzpatrick - direct

MR. KISSAM: I object. Why doesn't he ask for salaries of executives?

THE COURT: I will sustain it.

Q Did Nigeria have in 1975 concerning these letters of credit a line of credit with Morgan?

A No.

Q So that on the letters of credit on which you advised $400 million were in cement contracts, that money was all Nigeria's own money, wasn't it?

A The $400 million were advised letters of credit.

THE COURT: Only the 60 million is confirmed that they hold the assets on.

Q The 60 million confirmed, that was Morgan's money that they had to pay out on those, is that correct?

A If Nigeria didn't have the money we would have had to pay.

Q Of the 400 million that were merely advised and not confirmed, the money used to pay out that $400 million through your bank was Nigeria's own money, wasn't it?

THE COURT: There you have an objection, Mr. Kissam, because there has been no evidence that the 400 million was paid out.

MR. KISSAM: I assumed your Honor had looked at that rule which says you do not have to make an objection

any more.

THE COURT: You have to make objections. You do not have to note exceptions. They are quite different things.

Let me put it to the witness. Of the $400 million in letters of credit, do you have any idea as to approximately what percentage was in fact paid through your bank?

THE WITNESS: No.

THE COURT: Would it be more than 100 million or less than 100 million?

THE WITNESS: More.

THE COURT: More than 200 million or less?

THE WITNESS: About 200 million. I really don't know.

THE COURT: Somewhere in the middle figure?

THE WITNESS: Yes.

THE COURT: Since you were only the advising bank, was it necessary for Nigeria to keep funds in its account with you in order to pay those or could it simply make a transfer of funds at the time the payment became due?

THE WITNESS: That is right. We would pay the beneficiary and we would get the money that was needed from the Federal Reserve Bank. They did not have to keep the money with us.

Q How much money did Nigeria of its own keep with you on the average in 1975?

A Two and a half million dollars.

Q When you needed more money to pay the obligations of Nigeria than was actually on deposit in Morgan's own coffers, did you have an arrangement whereby you could call on the Federal Reserve and use funds of Nigeria from the Federal Reserve to meet Nigeria's commercial obligations?

MR. KISSAM: Is this addressed to 1975?

MR. GRUTMAN: 1975.

A Yes, we did.

Q Was there, Mr. Fitzpatrick, an agreement in writing between Morgan, Nigeria and the Federal Reserve concerning this practice?

A Yes. When the account opened we had no business. We had a $1,000 deposit in nothing. Then when one credit came in it was confirmed and then another. Then we got up to 60 million and nothing else happened. At the beginning they said you may draw one million dollars.

Q From the Federal Reserve?

A Per day.

Q Right.

A But then they started asking us to make payments

to different entities, companies and so forth, whatever they needed for their own transaction.

Q Did you use the word transaction?

A Payments to their embassies, for example. We made payments to all their embassies, to students. A million dollars was not enough because more than that was being paid. They upped it to two million and then five million. Now it is unlimited.

THE COURT: Let's stop a second. What is the nature of the holdings of Nigeria in the Federal Reserve System? Are they Treasury notes or what sort of obligations?

THE WITNESS: I don't really know. I would imagine that is what they are.

Q Do not imagine.

A I don't know.

THE COURT: In any event, they have --

THE WITNESS: Very liquid.

THE COURT: -- certain business transactions with our Federal Reserve Bank of which they are a creditor and have substantial reserves there which they can pledge to you to cover their commercial obligations which are honored by you by letters of credit?

THE WITNESS: They do not pledge them. They let us draw.

MR. KISSAM: Did your Honor use the word pledge?

THE COURT: I did and he corrected me. They can be drawn against.

Q When you started out with a very modest deposit and no money and in short order you reached a point where you had to have a capability of meeting the obligations and so this system was set up with the Federal Reserve, right?

A Yes.

Q Was the Federal Reserve put on notice of your right to withdraw the use of five million or whatever the sum was?

A Yes.

Q In 1975 was there a writing which established a ceiling on the amount per day that you could draw down from Nigeria funds in the Federal Reserve?

A Yes. It started when the account opened it with a million. Then it went to two and a letter was written to us saying you may now draw two. I suppose they must have sent a similar letter to the Federal Reserve saying we could draw two. When it got to five-- and I do not remember the dates -- it said we may draw five and then one, that you may draw as much as you wish.

Q Was it the practice of Morgan in 1975 to make

these daily drawings from the Federal Reserve to meet Nigeria's obligations?

A Yes.

Q Do you recollect in 1975 that there were ever occasions when on a daily basis Morgan was drawing down from the Federal Reserve out of Nigeria's reserve more than five million dollars?

A There may have been.

Q Earlier in your testimony when you talked about requests or services performed by Morgan, you said that you were asked to pay for various transactions. You said the Embassy and students. Do you remember telling Judge Goettel that?

A Yes.

Q If I use a phrase called "money transfers," does that phrase mean anything to you?

A Money transfers is what they are.

Q When I use the term "money transfers," does that mean to you that on behalf of your customer Nigeria you paid their obligations?

A Some of them.

Q Do you besides paying embassies and students ever pay American corporations with Nigerian money?

A Yes.

nsm11 Fitzpatrick - direct

Q Are these as a result of various commercial transactions in which Nigeria is involved?

A Some of them are benefiaries of letters of credit. We pay that.

Q Whether it is a letter of credit or whatever, I am speaking of the underlying nature of the commercial activity. For example, do you know whether Nigeria is a substantial petroleum producing country?

A Yes.

Q Of the petroleum producers of the world, do you know how large it is?

A Fifth or sixth.

Q Do you know the total amount of revenue generated annually by Nigeria as a result of this petroleum revenue?

MR. KISSAM: Where are we going?

THE COURT: I do not know.

This sort of service that you were rendering to Nigeria, is it a unique sort of service or do you do this for other foreign countries?

THE WITNESS: Other foreign countries. This is routine for them.

THE COURT: This is a routine service to a foreign country?

THE WITNESS: Routine banking service.

nsml2 Fitzpatrick - direct

THE COURT: How many countries do they do it for?

THE WITNESS: For their central banks, twelve in Africa, the Bank of England, the Bank of France, the Russians, the Belgians, the Italians, the Swedes.

THE COURT: You just confirmed what I thought was the case.

Q Do you ever pay money to American corporations like Exxon, Texaco, RCA, Mosler's Safe, and the like?

A For the French.

Q For the Nigerians.

A I don't know. We do make payments, yes, to corporations.

Q For what we could call commercial transactions?

MR. KISSAM: I object to that.

THE COURT: What you believe to be commercial transactions?

THE WITNESS: Yes. Whatever the transactions may be, we make the payment; yes.

Q Are you the only bank in the United States that performs that service for Nigeria?

A We are the only correspondent in the United States.

Q The answer is yes?

A Yes.

Q So that if you did not do that service for Nigeria of paying those obligations, which you do pay, Nigeria would have to pay it itself, correct?

MR. KISSAM: I object to it.

Q Or they could go to another bank?

A They could open another account or have the Federal Reserve do it.

(Continued on next page.)

Q But if a bank like you didn't do it, Nigeria would have to do it itself or get somebody else to replace you?

A They'd have to get -- they could do it through the Federal Reserve, as they did before we became their correspondent.

Q Beside the letters of credit that you told me about and the money transfers in meeting commericial obligations of Nigeria which are paid to American corporations in the United States, would you tell us whether or not in 1975 Morgan made investments in the United States through its trust department for Nigeria?

A No.

MR.KISSAM: That is objected to, if your Honor please.

A No, we didn't.

THE COURT: His answer is no, so I don't think it causes any problem.

Q Do you know whether or not Morgan gave Nigeria any investment advice?

A No, we didn't.

MR.KISSAM: Same objection.

Q I beg your pardon?

A No, we didn't.

Q You say flatly it did not?

A Absolutely.

Q And does Morgan have a trust department?

A Yes.

Q Does it have an investment advisory service?

A Yes.

Q And do you say that in 1975 or '76 it gave no advice and performed no services for Nigeria?

A Performed services, but gave no advice.

Q What services did those departments perform?

A We had the -- Central Bank had a custody account.

Q Of what?

A Of bonds, stocks.

Q Coupons on those bonds?

A Yes.

Q Who clipped them?

A We did probably.

Q And in doing that, did you act as an agent for Nigeria?

A We were just --

MR.KISSAM: I renew my objection.

Q Beg your pardon?

THE COURT: Overruled.

Q Did you, sir?

A Yes, we were acting the way we do for anybody else

that has a custody account. We were acting as their bank.

Q As a banker, which you say is your occupation, do you have any idea of how much money of Nigeria's passes through your bank annually?

A Annually?

Q Yes.

MR. KISSAM: That is objected to, if your Honor please.

THE COURT: I will allow it for purposes of making a record, but I do want to talk to both of you when court adjourns.

A Well, I'd say probably 3 or 4 hundred million dollars a year. I mean that's -- but really,I mean,I don't know.

Q Besides the 3 or 4 hundred million dollars a years that passes through the Morgan Guaranty Trust Company, do you know whether or not Nigera maintains deposits in the United States in bills?

MR. KISSAM: Just a minute. He said he didn't know whether it was 3 or 4 hundred million, and you incorporated it in your question as if he had stated that, which I think is entirely improper.

MR. GRUTMAN: You may be right.

THE COURT: In any event, do you know how much

A. Yes.

Q Beside the various things which you told us about so far, from time to time were there every employees of the Central Bank of Nigeria who worked here in New York City at the Morgan Guaranty Trust Company and received training here?

MR.KISSAM: Same objection, your Honor.

THE COURT: I will allow it.

MR. KISSAM: Wherever they buy their clothes --

THE COURT: I will allow it nevertheless.

A We had representatives of the Central Bank trained in New York. We have two seminars a year. There were representatives from the Central Bank, but they were from thirty other banks.

Q Forget the others. Central Bank of Nigeria is my only interest.

A That's right. It was special --

Q Were there officers that came here to receive training and education?

A They were officers, yes, at various levels.

Q When they came and performed the services for however long they were here --

A They didn't perform any services.

Q When they did what they did on behalf of the

mb 6 Fitzpatrick - direct

Central Bank of Nigeria in acquiring education on your premises in New York City, were they paid by Central Bank or by Morgan?

A By Central Bank.

Q And for what length of time did any of these people stay on the premises of Morgan Guaranty Trust Company receiving training or indoctrination or education?

A Well, the Central Bank seminar lasts three weeks. The ones that came to that stayed three weeks. There is one for -- on American banking practices that lasts, I think, a month; so those stayed a month. The first guy that ever came stayed a month on his own, and after that some of them would stay two or three days, some would stay one day. It depended what they wanted to learn.

Q I have just a few more questions this afternoon, Mr. Fitzpatrick, and I shall not detain you long, I hope, tomorrow morning. I hope that is encouraging to you.

A Very.

Q May I ask you, as a banker, sir, do you from time to time act as an agent on behalf of various customers?

A Not in my department, no.

Q In letters of credit, do you act as an agent

as an agent on behalf of customers?

A We act as a correspondent bank.

Q I asked you whether you act as an agent.

A I don't know what an agent is.

Q Is the language principal and agent a series of terms with which you have become professionally familiar in the years that you have been a working banker in New York City?

A An agent -- we act on their behalf, yes.

Q So that agent and principal are terms known to you in banking?

A Sure. We are not the principal.

Q Are they also terms which are known to you in the handling of letters of credit?

A I suppose,yes, yes.

MR. GRUTMAN: Could this document be marked for identification, please?

MR. KISSAM: Your Honor, could I have that last answer? I couldn't hear it.

THE WITNESS: I said yes, I suppose.

*** (Plaintiff's Exhibit 3 marked for identification.)

Q I show you a document, Mr. Fitzpatrick, which

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2a THE COURT: We have a witness on the stand?

MR. GRUTMAN: Yes. Mr. Fitzpatrick, would you be good enough to resume the witness stand?

P A UL W IN S T O N F I T Z P A T R I C K, resumed.

MR. KISSAM: Your Honor, may I attract attention that we still have spectators.

THE COURT: Yes, I will have to ask all spectators to leave until this witness is concluded.

MR. GRUTMAN: I guess that is going to be called the I-spy strangers motion if we keep clearing courtrooms.

THE COURT: I must say I haven't heard much confidential. I keep hoping to hear the secrets of Morgan Guaranty Trust.

MR. GRUTMAN: I am going to try and get to them promptly as soon as we resume.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q Mr. Fitzpatrick, in addition to the officers of the officers of the Central Bank of Nigeria who periodically receive training or indoctrination on the premises of Morgan in New York, could you tell us whether or not in 1975 from time to time Morgan was visited by Central Bank officials looking into its

mbp2 Fitzpatrick-direct

business with Morgan?

MR. KISSAM: I object to that, if your Honor please. What do you mean by the business of Morgan, general business, particular business?

THE COURT: You mean studying Morgan's business or their own accounts?

Q Their own accounts and their own affairs as they were handled by Morgan.

A In '75?

Q Yes.

A No, not really.

Q Did they communicate with you about that?

A About their affairs?

Q Yes.

A Not in any specific way, no.

Q All right. As the chief officer at Morgan responsible for the Nigerians' accounts, did you have some familiarity in 1975 and in 1976 with various activities of Nigeria of a commercial nature which were carried on here in New York?

MR. KISSAM: I object to that, if your Honor please. It calls for a conclusion.

THE COURT: I will allow it.

MR. KISSAM: It is a loaded question,

mbp3 Fitzpatrick-direct

"commercial nature."

THE COURT: Overruled.

Q May we have your answer?

A Could you recite the question?

MR. GRUTMAN: Would the reporter be good enough to read back the question which your Honor has allowed?

MR. KISSAM: Your Honor, would you ask Mr. Fitzpatrick to keep his voice up?

THE COURT: Yes, you have to speak louder.

THE WITNESS: Yes.

(Question read.)

A Yes, I was aware of their activities.

Q Would you tell us what those activities were of which you were aware?

A Well, they asked us to advise letters of credit, they made payments. As I say, they sent people for training. I don't really know anything else.

Q Did you know that Nigeria sold substantial quantities of oil to the United States?

A Yes.

Q Where were those payments for the oil which was purchased and delivered to the United States made?

A I don't know.

Q Was any of that money ever deposited at Morgan?

A No.

Q Was any of it --

A I don't think so. I mean, I don't know.

Q Was any of it, to your knowledge, deposited at the Federal Reserve Bank?

A It may have eventually got there, yes.

Q When you say it may have eventually got there --

MR. KISSAM: I move to strike that, your Honor, speculation.

THE COURT: Yes. Do you really know or are you just speculating?

THE WITNESS: I don't know really, but if they were dollar payments, they would presumably get to the Federal Reserve.

MR. KISSAM: May the answer be stricken?

THE COURT: I think all he is saying is that if somebody pays Nigeria in dollars, that the manner in which they carry on their business would of necessity have funneled it through the Federal Reserve System. Is that correct?

THE WITNESS: That's correct.

THE COURT: But that's just his assumption about their business.

Q To the extent that you know, Mr. Fitzpatrick,

mbp5 Fitzpatrick-direct

let us know. If it's something that is completely outside of your knowledge, why of course we would not want you to conjecture or surmise, but you knew, did you not, that the United States purchased one-half of Nigeria's oil production? Did you know that?

MR. KISSAM: I object to that, if your Honor please. I am not at all certain it's a fact.

THE COURT: Let the witness tell us. He should know better than us. Was half of Nigeria's oil output purchased by the United States in '75 and '76, to your knowledge?

THE WITNESS: No, I don't know that it was a half.

Q How much was it?

A A lot.

Q How much does a lot translate to in barrels or dollars?

MR. KISSAM: Your Honor, I object to this on the ground that the witness is not qualified.

THE COURT: If he doesn't know the answer, he will say he doesn't know the answer.

Do you know the answer?

THE WITNESS: No, I don't, your Honor.

Q If I suggest to you that the quantities of

mbp6 Fitzpatrick-direct

oil purchased by American companies from Nigeria in '75 and '76 was in the millions of dollars, would that square with your understanding?

A Oh, yes.

Q And if I suggested to you that it was in the centi-million category on that, meaning hundreds of millions, would that likewise square with your understanding?

A Yes.

Q Among the purchasers who paid for that oil to Nigeria, were there not among them the major American oil companies such as Exxon and Mobil?

A I don't know.

Q Do you know whether Mobil maintains its headquarters here in New York?

A Yes.

Q Do you know that the Exxon Corporation is likewise based here in New York?

A Yes.

THE COURT: I thought Mobil moved to Houston a couple of years ago?

MR. GRUTMAN: They maintain a headquarters, to my knowledge, your Honor, right here in New York particularly for the purchases of petroleum from Nigeria.

MR. KISSAM: Texaco moved. I think Mobil

mbp7 Fitzpatrick-direct

may still have a building on 42nd Street. I am not sure.

MR. GRUTMAN: Yes, it sure does.

THE COURT: All right, it's not really important.

Q All right. Well, oil which is purchased by Mobil or Exxon is paid for, to your knowledge, if you have it, Mr. Fitzpatrick, are those payments made in New York?

A I don't know.

Q Do you know approximately how much money Nigeria maintains at the Federal Reserve or did maintain in 1975 and 1976?

A No.

MR. KISSAM: That is objected to, if your Honor please.

THE COURT: On what grounds?

MR. KISSAM: It has no relevancy to this case, if they maintain money in a bank account. That bank account is not the subject matter of this action.

THE COURT: Directly it has no bearing, but it could have some indirect bearing. I will overrule the objection. If you know.

THE WITNESS: I don't know.

Q If I suggest to you, Mr. Fitzpatrick, that Nigeria had billions of dollars standing to its credit at

the Federal Reserve in New York, would that square with your general understanding of what their position was there?

MR. KISSAM: I object to that, if your Honor please. The witness has testified he doesn't know. Now, is he supposed to sit here and guess?

THE COURT: If he knows that it's an amount in excess of a billion dollars, I will allow him to say so. I would assume the next witness from the Federal Reserve can be a little more definite, so we are sort of wasting time, but to your knowledge did the Nigerians maintain financial reserves at the Federal Reserve in excess of a billion dollars in 1975?

THE WITNESS: Not to my knowledge.

Q To your belief?

MR. KISSAM: I object to that.

THE COURT: No, I will sustain that objection.

MR. GRUTMAN: All right.

Q However much money the Nigerians maintained at the Federal Reserve, did you know what the source of those American dollars was?

A Primarily oil.

Q The payments made to Nigeria in New York?

A Maybe not in New York.

Q But some in New York?

A I really don't know. I honestly don't.

Q And were the purchases made by private American oil companies?

A I don't know. I mean, I am not an expert on oil. I don't know.

Q But you are an expert on Nigeria, Mr. Fitzpatrick.

A Yes, but I don't know how they -- who buys the oil and who pays who were. I mean, I just don't know these things.

Q Could you account for why Nigeria was able to accumulate such a large deposit at the Federal Reserve other than from transactions in the United States of a commercial nature?

MR. KISSAM: Thatis objected to, if your Honor pleases.

THE COURT: Yes, I don't like the question is phrased. I think an appropriate aspect of it is, are the moneys that Nigeria maintains with the Federal Reserve derived from the sales of its products in the United States or merely from the transfer of their funds to the United States?

mbp10 Fitzpatrick-direct

THE WITNESS: I would say both, your Honor.

THE COURT: Both.

THE WITNESS: It's just a supposition. I don't know.

Q Would you assume that a substantial part of those deposits are derived from dollars generated from commercial transactions in the United States?

MR. KISSAM: I object to the assumption. It's even in his question, "Would you assume."

THE COURT: Yes. Do you know?

Q Do you know?

A I don't know.

Q Have you made a study economically of Nigeria?

A A study has been made. I didn't make it.

Q Are you familiar with it?

A Yes.

Q Would you agree, Mr. Fitzpatrick, that the bulk of Nigeria's revenues do not come from income tax payments on its population?

A Its external revenues?

Q Its revenues, its total revenues.

A No, they don't.

Q Pardon?

A No, they don't.

Q Would you likewise agree, sir, that the bulk of that country's wealth derives from the sales of its natural resources to countries abroad?

A True.

Q And the principal country with which it does business is which country, sir?

A The United States.

Q And that was true in 1975, was it not?

A I think so.

Q And it was likewise true in 1976?

MR. KISSAM: I move to strike his answer.

THE COURT: On what grounds?

MR. KISSAM: He says he thinks so. That is an assumption.

THE COURT: You can develop that on cross-examination. Overruled.

Q In addition to the revenues which it derived from the sales of its products in international commercial activity with the United States, do you know from your familiarity with studies done on Nigeria whether or not Nigeria made purchases in the United States?

A Yes.

Q And are you familiar with the kinds of things besides cement which Nigeria purchased through the United

States?

A In general, yes.

Q Would you tell us about that, sir?

A Well, they purchased camera communications equipment, telephone equipment, trucks, locomotives, pharmaceuticals. I can't really think of anything else.

Q That is a pretty good list. Were those purchases made in the United States from private American corporations?

A Yes.

THE COURT: Would you happen to know whether there was a positive or negative net trade balance between the United States and Nigeria in 1975 and '76?

THE WITNESS: My belief is that it was negative for the United States.

THE COURT: Negative for the United States, which is to say positive for Nigeria; they were selling us more than they were buying here?

THE WITNESS: Right.

Q The bulk of things which we purchased was of course the oil, wasn't it?

A Of course.

Q When Nigeria bought these things, what was the name of the entity that made the purchases for Nigeria?

A Usually the government.

Q What is the name of the governmental entity? Does it have one like the Nigerian Purchasing Corp.?

A No, there's various, but there is a Nigerian National Purchasing Company, something like that is very often the case.

Q All right.

And could you give us some idea of the magnitude? For example, you mentioned locomotives. Did the Morgan Guaranty Trust Company act as the paying agent for Nigeria

for the locomotives that you referred to as a product purchased in the United States for the government of Nigeria in 1975 and 1976?

A Yes, we advised credits and payments.

Q What was the amount of the volume of that transaction?

A I don't remember.

Q Was it in the many millions?

A Yes.

Q Approximately. Give us a ball park estimate of the size of that transaction.

A 20 or 30.

Q Remember the name of the company from whom it was purchased?

A It was either General Motors or General Electric. I am not sure.

Q Did Morgan pay on Nigeria's behalf?

A Yes.

Q And did you pay dollars?

A Yes.

Q Where did you get the dollars from to make the 20 or 30 million dollar payment for the locomotives the government of Nigeria purchased in the United States from private companies in '75 or '76?

A From the Federal Reserve.

Q With respect to the telephone --

THE COURT: Let me ask you a question about that.

Why is it necessary for you to do this? Can they not direct Federal Reserve to simply pay these corporations directly?

THE WITNESS: Well, no, your Honor, it's because there was an advise letter of credit.

THE COURT: I see.

THE WITNESS: And they draw on the letter of credit, we pay, and we get the money.

THE COURT: Because there was a letter of credit, it was necessary for you to handle it?

THE WITNESS: That's right.

Q I am interested in expanding that as far as what you just answered.

Morgan is a commercial bank chartered by the State of New York, isn't it?

A Yes.

Q That means you are a New York State bank and not a federal bank?

A That's right.

Q The Federal Reserve is neither a State bank nor a national bank; am I right?

A No, it's an entity of its own.

Q And as a State bank, the Morgan Guaranty Trust Company is authorized and empowered, among other things, to issue letters of credit; am I right?

A Yes.

Q To your knowledge as a banker, the Federal Reserve cannot do that, can it?

A I don't believe so.

Q And therefore, was it not necessary when Nigeria decided to do substantial amounts of business through the device of letters of credit to find some bank other than the Federal Reserve who could perform those services for it?

A It would seem so.

Q And the bank that they chose was the Morgan Guaranty Trust Company?

A Yes.

Q What was the year in which that decision was made and when you were designated as their foreign bank?

A 1974.

Q Now you mentioned telephones, telecommunications, trucks and pharmaceuticals. I won't parse each of those, but I would like to ask you as to those four categories, were the purchases by Nigeria of those materials made from

private companies?

A In the United States.

Q In the United States?

A Yes.

Q And was the payment for those goods made by Morgan Guaranty Trust Company on behalf of Nigeria?

A Yes.

Q Was the payment made in New York?

A Yes.

Q Could you tell us, sir, over what period of time were these various transactions running into the many, many millions of dollars for the purchases of the kinds of commodities that you just referred to transacted?

A Not precisely.

Q Well, was Nigeria's purchasing program a pervasive activity, one that it carried on throughout the year?

A Yes. Yes, it goes on all the time.

Q All the time, so that it is not only pervasive, it is continuous?

A Yes.

Q And the magnitude of the transactions is in the many, many millions of dollars?

A Not all the transactions. I mean,you have some small ones.

Q Some small ones, but the aggregate of the pervasive, continuous financial activities conducted by Nigeria in New York in the nature of international commerce and which are transactions by you for Nigeria is in the many, many millions of dollars; correct?

A Correct.

Q And in 1973, the amount of the business was --

A '73?

Q '74.

-- the amount of the business was less than it has become in the succeeding years; is that also true?

A That's true.

THE COURT: In hopes of bringing this to an end, could we summarize it by saying that Nigeria sells a large amount of its natural resources, particularly oil, to private companies in the United States, and that these sales went into the hundreds of millions in each of 1975 and '76, and in turn it purchases a number of manufactured goods from private American corporations in a somewhat lesse sum but still in the many millions of dollars?

THE WITNESS: Correct, your Honor.

THE COURT: Is this pattern of transaction markedly different from that of other countries whose primary industries are natural resources?

THE WITNESS: Well, the payments are bigger.

THE COURT: The amounts are bigger. Are they bigger than Saudi Arabia?

THE WITNESS: No, no, certainly not.

THE COURT: But for an African nation, they are big?

THE WITNESS: Big.

THE COURT: Not as big as a major oil producer and probably not as big as a major manufacturing nation such as Japan or France?

THE WITNESS: Correct, sir; that's right.

THE COURT: But still quite substantial?

THE WITNESS: Quite substantial.

THE COURT: And the manner in which they do their business, namely, having a New York commercial bank handle letters of credit and having their income funds paid through the Federal Reserve, is that unique to Nigeria or a fairly common way for a foreign nation to do business in the United States?

THE WITNESS: Fairly common way.

MR. GRUTMAN: Your Honor, could I say, in response to the inquiries which you are using to abbreviate this, that there is a case in this circuit called Victory Transport, of which I trust your Honor has some familiarity.

THE COURT: I think my law clerk does.

Q Now, a few more grace notes on what you just said.

In terms of Nigeria's production, do you know where they rank as a petroleum producer of all petroleum-producing countries in the world?

THE COURT: I think it was said they were fifth.

THE WITNESS: Fifth or sixth.

THE COURT: I believe that was said twice.

MR. GRUTMAN: All right. Then it won't be said again.

Q Do you know where they rank in terms of primacy or order as a customer of the United States?

A No.

Q Do you know whether or not they are among the five or six leading customers of the United States in international commerce?

A No, I don't.

Q Have you any idea at all?

MR. KISSAM: I object to that.

A I could think of some countries that are bigger and some that are smaller.

Q I agree, but I believe they are among the top six.

THE COURT: Would they be among the top ten or twenty?

THE WITNESS: Certainly the twenty.

THE COURT: Possibly ten?

THE WITNESS: Ten. You have the Saudis and the Kuwaitis and the Japanese and the French.

THE COURT: All right. You put them somewhere around ten to twenty rank?

THE WITNESS: Maybe around ten. Maybe before a little. I really don't know. Substantially.

THE COURT: I really can't believe that it makes any difference whether they are sixth or sixteenth.

MR. GRUTMAN: Judge, I read the cases, they talk about magnitude, pervasiveness and continuousness; and I am as energetically as possible trying to develop that proof.

THE COURT: As contrasted to virtually any foreign corporation, single foreign corporation, they are very large.

As compared to other foreign corporations, they are large, but not among the very largest, and what more do you need to say about that?

MR. GRUTMAN: Fine. Fine. I only say, your Honor, that foreign corporations like foreign governments

can be sued. Victory Transport.

I move on.

Q Are you familiar with whether or not Nigeria maintains in New York any entities which it owns or controls that consistently do business in New York City, such as the Nigerian National Airline?

MR. KISSAM: I object to that, if your Honor please; the question incorporates a presumption, consistently does business in New York City.

THE COURT: Simplify your question.

Q Are you familiar with an entity called the Nigerian National Airways?

A Yes.

Q Do you know whether they conduct business in New York City?

A No.

Q Do you know whether they have an office in New York City?

A No.

Q Do you ever pass Rockefeller Center, number 30?

A Virtually never.

Q Have you ever passed 545 Fifth Avenue?

A I may have.

Q Does the Morgan Guaranty Trust Company prepare

payrolls for the Nigerian National Airways?

A I don't know.

Q Does the Morgan Guaranty Trust Company act as a depositary for the wages that have to be deducted and paid in taxes for any employees of the Nigerian National Airways?

A I don't know.

Q When you say you don't know, you are neither assenting or denying that Morgan does?

A No.

MR. KISSAM: He says he doesn't know. I object to that.

The reporter will record what he is saying.

Q Yesterday you told us some of the services which the Morgan Guaranty Trust Company performed on behalf of the government of Nigeria.

They included the letters of credit, and you said that it paid bills for Nigeria.

When you referred to those bills yesterday, my recollection is you talked about paying embassy expenses.

A That's what I was told. We do that.

Q In addition to paying for such things as telephones telecommunications, trucks, locomotives, pharmaceuticals and the bills incurred by the embassy, are there

any other services carried on or performed for Nigeria by the Morgan Guaranty Trust Company or any of its affiliates or subsidiaries, agents, servants or employees which you haven't yet told us about?

A Well, I told you about making the credit checkings. I told you that yesterday.

Q About the which?

A Making credit checkings.

Q What does that mean?

A It means that they say to us, "Give us a credit report on the standing of such-and-such a company."

THE COURT: Do you do that independently or obtain it from a service for them?

THE WITNESS: We get most of it from the service. We have files of our own, and we use Dun & Bradstreet.

Q And after you check the raw data supplied you from outside sources, you make an evaluation which is Morgan's evaluation, which you report to Nigeria; right?

A We don't make an evaluation.

Q What do you do?

A We send them the facts.

Q All right.

You organize the facts as you have collected them?

A Yes.

Q Now, in addition to the credit services, is there anything else that you could think of in answer to my preceding question which you haven't yet told Judge Goettel?

A No, really not.

Q When you told me yesterday that the profit derived by the Morgan Guaranty Trust Company from its dealings with Nigeria in 1975 and 1976 was in the vicinity of $600,000, was that answer restricted solely to the fees earned by the bank for banking services which it performed for Nigeria and for which it submitted a direct charge?

A No.

Q Did that answer include the revenues generated by Morgan from using the funds deposited with it by Nigeria as demand deposits and that served as footings for loans that the bank could make?

A Footings for loans?

Q Yes. Footings.

A What does that mean?

Q Do you know what a footing is?

A Not in that sense.

Q When a bank makes loans, does it not sometimes

use, in making those loans, funds which have been deposited with it by its customers?

A You mean to other clients?

Q That's right.

A The -- some of the revenue, some of the earnings that we get are from commissions and the other is from interest on the deposits.

Q Correct. And that interest is earned by lending the deposits of one customer to another?

A Right.

Q That is what I mean by footings.

A All right.

(Continued on next page)

Q Is he a vice-president and resident counsel?

A Right.

MR. GRUTMAN: I will say that I have served the bank and he accepted service for the bank. I would hope to dispense with the necessity of bringing Mr. Schweitzer.

THE COURT: It is a matter of bank records which could be done in a single page of bank transcript agreed upon by both sides. Unless you see some advantage of wasting the witness's time or the Court's time --

MR. GRUTMAN: I am trying to button down some highly technical objections.

Q Finally, Mr. Fitzpatrick, in connection with paying out on any of these letters of credit with which we began your direct examination yesterday, and I am talking about letters of credit which have to do with the purchases of cement by Nigeria, if the letters of credit for either the consignment of cement or for demurrage payments were made to the bank and called for sums of money which the bank did not have on its account at that time sufficient to make payment, would the bank have drawn on the Federal Reserve to get the funds to make the payments?

A Yes.

MR. GRUTMAN: No further questions.

and there are additional amounts.

THE COURT: Will you let me have your original letter? I will hold it until such time as they wish to make some use of it. However for the present time you indicated that this amounts to a garnishee statement as of the original garnishment.

MR. HOFFMAN: Right.

THE COURT: All right. Can we proceed now?

MR. SIMMS: Defendants call as their next witness Mr. Koebel.

A L F R E D K O E B E L , called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIMMS:

Q Mr. Koebel, what is your residence address?

A 43 Northwood Avenue, Demarest, New Jersey.

Q Would you state your occupation?

MR. GRUTMAN: Your Honor, since this witness' name does not specifically appear in the pretrial order, may I ask for an offer or proof as for what purpose Mr. Koebel is offered.

MR. SIMMS: Why don't you wait until he states his occupation?

J-8

THE COURT: I am sure he is going to be with the bank. Is he being substituted for somebody mentioned?

MR. GRUTMAN: Mr. Thiele is the only person mentioned of Morgan.

MR. SIMMS: At Page 77 of the pretrial order we indicated Mr. Thiele or an officer of Morgan Guaranty Trust Company of New York. Mr. Koebel is an officer of the Morgan Guaranty Trust Company of New York.

THE COURT: I take it Mr. Thiele will not be testifying.

MR. SIMMS: That is correct, your Honor.

Q Mr. Koebel, will you state your occupation, please?

A I am an assistant vice president in the letter of credit department.

Q For what company?

A Morgan Guaranty.

Q How long have you been with Morgan Guaranty Bank, Mr. Koebel?

A Since 1942.

Q Could you briefly describe your duties in your present position in the letter of credit department?

A I am a technical officer dealing with problems in letters of credit as opposed to perhaps administration.

MR. SIMMS: The witness has also testified that the only documents with respect to demurrage in the records of Morgan Guaranty shown as having been submitted after October 27 were the ones, four sets of documents submitted by Manufacturers Hanover Trust which were returned by Morgan for the reasons noted.

THE COURT: So what is the point?

MR. SIMMS: I don't know what Mr. Grutman's point is.

MR. GRUTMAN: The point is that no demurrage payment was ever made or ever authorized or ever directed by Nigeria to Morgan.

MR. SIMMS: Your Honor, the witness has testified that no demurrage was ever paid. I am not adopting Mr. Grutman's reasons why the demurrage wasn't paid. The witness has already identified documents which were received from Central Bank, messages that were reveived by Morgan from Central Bank which they --

MR. GRUTMAN: Do I have to listen to this drizzle?

THE COURT: No, I am not going to listen to any more from either of you. Put the next question.

Q Isn't it a fact that before February 7 or after February 7 you advised the Central Bank of Nigeria to pay

any demurrage on any NAC vessel, is that correct?

A That's correct we did not.

Q You have told us, sir, that you are familiar with Uniform Customs & Practice for Documentary Credits, 1962 Revision under which this particular letter of credit was handled, isn't that true?

A That's correct.

Q How seriously is that Uniform Customs & Pracitce for Documentary Credits followed by Morgan?

A That is our bible.

Q I thought so. Now, let me read you something from the scripture. Article III. It reads as follows, speaking about credits and the like:

"Such undertakings can neither be modified nor cancelled without the agreement of all concerned."

Are you familiar with that language, sir?

A Yes, sir.

Q You are familiar with the original letter of credit, are you not?

A Yes, sir.

Q Now, I ask you, sir, do you have any document whereby the original beneficiary of the letter of credit agreed to any modification or cancellation of any of the undertakings prescribed in the specific language of the

letter of credit?

A No.

Q In your direct testimony, sir, you said that these were unusual letters of credit.

Do you remember using that phrase?

A Yes.

Q Wasn't it extraordinary for Morgan to have adhered to the advice when Central Bank gave it when it unilaterally changed the documents required for payment under this letter of credit?

MR. SIMMS: Objection to the question, your Honor.

THE COURT: You have a problem with your syntax there. You have used a pronoun that makes it seem like Morgan unilaterally changed the terms.

MR. GRUTMAN: Your Honor is correct, fine.

Q Mr. Koebel, wasn't it extraordinary for Morgan to have followed the advice given to it by Central Bank when Central Bank unilaterally changed the terms and provisions of its irrevocable letter of credit?

A No.

Q You mean Morgan as a regular practice will permit one of the parties to a letter of credit to alter or modify it contrary to what is provided for in Uniform Customs

& Practice for Documentary Credits, 1962?

A It is an advised letter of credit.

Q I didn't ask you --

MR. SIMMS: I object to the question as being an improper question.

THE COURT: He has answered the question. Since it was an advised letter of credit. Consequently Morgan was merely advising of the changes that had been inserted.

Q Are you familiar with what happened when Nigeria did what it did?

MR. SIMMS: I beg your pardon. I object to the question.

THE COURT: Sustained. Hold it just a second. Were you aware that at least one bank had confirmed the letter of credit?

THE WITNESS: Yes.

THE COURT: Do you know what bank it was that did confirm the letter of credit?

THE WITNESS: Confirmed a Central Bank of Nigeria credit?

THE COURT: Yes, on this particular letter of credit, I believe. A Spanish bank confirmed it?

THE WITNESS: I know.

MR. GRUTMAN: They only guaranteed it, your Honor. Only guaranteed the charterers. It did not confirm the letter of credit. It was the Banco de Comercio and that is why Intrafinsa was able to do the deal.

THE COURT: All right.

Q We understand, Mr. Koebel, that this was not a confirmed letter of credit, it was an advised letter of credit in which you were acting as the agent of Central Bank, isn't that true?

MR. SIMMS: Objection again. Calls for a legal conclusion.

THE COURT: No, I will allow that. Overruled.

Q Isn't that so?

A Would you repeat the question, please?

THE COURT: Read it back to him.

Q This particular letter of credit was an advice letter of credit in which you were acting as an agent for Central Bank?

A That's correct.

Q If a payment under that letter of credit and in accordance with the terms that had been bilaterally agreed upon had been called for by the presentation of the documents required under the letter of credit, and you had funds on hand, would Morgan have paid it?

A If all the requirements for the letter of credit were met would we have paid it?

Q Correct.

A Yes.

Q Isn't the difference between an advised letter of credit and a confirmed letter of credit, in the latter case Morgan pays out of its own funds, and in an advised case, Morgan pays only out of the originating bank's funds?

A What you have stated is not correct.

Q What is the difference between a confirmed letter of credit by Morgan and an advised letter of credit?

MR. SIMMS: Objection, your Honor, no relevance.

THE COURT: Overruled.

A You have the irrevocable obligation of Morgan on the confirmed credit to pay.

Q Out of whose funds?

A For the most part, to the debit of the opening bank's account.

Q That is a confirmed letter of credit?

A Yes.

Q Whether Morgan pays on a confirmed letter of credit, if the originating bank does not have funds at Morgan, what funds does Morgan use to pay a confirmed letter of credit?

A If the funds aren't there, Morgan is responsible to pay.

Q On a firmed?

A On a confirmed credit.

Q On a so-called advised letter of credit?

A Yes.

Q Such as was the case with NAC?

A Yes.

Q An irrevocable confirmed advised letter of credit by Morgan?

A It can't be --

MR. SIMMS: Wait a minute. I object to the question, so-called advised.

THE COURT: I haven't heard a question so far.

MR. SIMMS: Then don't answer, Mr. Koebel.

THE COURT: Could we simplify it a bit if I asked in general nonbanking terms, if the difference between a confirmed letter of credit and an advised letter of credit is that the bank is in effect a guarantor of payment on a confirmed letter of credit?

THE WITNESS: That's correct.

Q The letter of credit in this instance was not confirmed by Morgan, true?

A Correct.

Q But it was an irrevocable letter of credit originated by Central Bank?

A That's correct.

Q If the papers and documents necessary under the letter of credit to effect payment had been presented on this irrevocable letter of credit and Morgan had funds of the Central Bank either in its coffers or available to it, I understand that you say Morgan would have paid, correct?

MR. SIMMS: Objection. Already asked and answered.

THE COURT: Yes. Go on from there.

Q In this case, Nigeria unilaterally changed the documents required under the letter of credit to effect payment, isn't that so?

A That's correct.

Q When that happened, were you informed about it at Morgan?

A Oh, yes.

Q Did it create a stir at Morgan?

MR. SIMMS: Objection, your Honor. What is the relevance of that?

THE COURT: I don't like the word stir but I will ask you whether Morgan protested the unilateral change.

THE WITNESS: I don't know that we protested it, no.

THE COURT: I am not using it in the banking terms of protest.

THE WITNESS: I realize that.

THE COURT: Did you say to CNB "Hey, fellows, this isn't the way we do it in the banking business"?

THE WITNESS: I am not aware of any protest that we made.

Q Mr. Koebel, you are an assistant vice president, aren't you?

A That's correct.

Q You were working under Mr. Thiele?

A That's correct.

Q Is he still in the bank?

A No, he is retired.

Q When his Honor suggested to you in sort of substance a communication from Morgan to Central Bank to the effect of "Fellows, you have issued an irrevocable letter of credit,a creditworthy bank doesn't unilaterally modify" --

MR. SIMMS: Objection, your Honor.

THE COURT: Let me finish the question.

Q --"such a document," weren't you aware that in

fact in substance that is precisely what Morgan said to Centra Bank?

MR. SIMMS: Objection. The witness has already testified he is not aware of any communication.

THE COURT: I know, but we will try it one more time.

A I am not aware of that communication.

Q Do you know who the regular lawyers for the Morgan Guaranty Trust Company are?

A Yes.

MR. SIMMS: Objection, no relevance.

THE COURT: Overruled.

Q It is the law firm of Davis, Polk, is it not?

A Correct.

Q Are you aware of whether in addition to Davis, Polk concerning the propriety of the instruction Central Bank had given Morgan, Morgan went to another law firm to get another opinion?

MR. SIMMS: Objection. The witness has no basis for this question. The witness has already testified he doesn't know of any such communication.

THE COURT: I will sustain that objection but on somewhat different reasons.

Q Were you aware of whether or not the bank

hbnc 15 Koebel - cross

consulted several law firms concerning what it should do about this action taken by Central Bank?

MR. SIMMS: Objection. No foundation for the question.

THE COURT: He is asking him is he aware.

Were you familiar with these sort of things?

THE WITNESS: No.

THE COURT: Good, let's move on to something else.

Q In your experience how many times had a bank done what Central Bank did in these letters of credit?

MR. SIMMS: Objection. No relevance.

THE COURT: It probably isn't relevant, but I am going to allow it and see what it might lead to eventually.

You may answer it.

A We get a few a year.

Q And when that happens, don't you stop dealing with the banks that do that?

A No.

MR. SIMMS: Objection, no relevance, Judge.

THE COURT: That I will sustain.

Q Insofar as this letter of credit is concerned it was for $14,400,000, correct?

original beneficiary?

THE WITNESS: If we had their invoices.

THE COURT: Yes. All right. I follow that.

Q Isn't it a fact that your former superior, Mr. Thiele, had corresponded with National American concerning its rights to receive demurrage payments in excess of the contract price for 240,000 tons of cement?

MR. SIMMS: Objection, there is no foundation that the witness is competent to answer that.

THE COURT: Show him the document.

Q Here is Exhibit 11-A in evidence.

Doesn't this refresh your recollection that Morgan Guaranty corresponded directly with National American concerning its rights to demurrage payments which were not specifically spelled out in the original letter of credit?

THE COURT: What is the date of that, incidentally?

MR. SIMMS: Objection to that characterization.

THE COURT: Overruled. What is the date of the letter?

MR. GRUTMAN: June 23, 1973, your Honor.

THE COURT: But for the purposes you are using it you have to keep in mind that that date precedes any transfer of the letter of credit to Intrafinsa.

MR. GRUTMAN: Okay.

THE WITNESS: What was your question, please?

Q Does this reflect or does it refresh your recollection that Morgan was dealing specifically with National American about its right to receive demurrage payments in addition to the contract price under the letter of credit?

MR. SIMMS: I object to the question, your Honor.

THE COURT: Overruled.

A That is correct.

Q Do you have any knowledge of what private arrangements were made between NAC, Intrafinsa and Natbank concerning whether the demurrage payments were ever intended to be transferred away from NAC?

A No.

Q And you could see from the installment transfer which Intrafinsa got in the latter part of July and early in August, that NAC did not divest itself of all its rights, isn't that true?

MR. SIMMS: Objection, your Honor.

THE COURT: All its rights to the cement payments.

MR. GRUTMAN: To the cement payments, correct.

THE COURT: I will allow it, but the answer is obvious. Can't we move on to something new?

Q Did you read the press conference enclosure which was admitted into evidence along with the letters that covered them, the transmittal letters from Morgan? Did you read that?

A When we received it, yes, I did.

Q Good. Now, do you remember that at the time that you received that Nigeria was telling the world that it was concerned about reducing its obligations to pay demurrage?

MR. SIMMS: Objection, your Honor.

THE COURT: Sustained.

Q What do you remember about Nigeria's position concerning demurrage on cement contracts?

MR. SIMMS: Objection, no relevance.

THE COURT: Wait a minute, Mr. Grutman. If you want to get into the merits and statements in that press release for the truth of them, which is what you are now about to do, then we will have to admit the document for all purposes.

MR. GRUTMAN: No, what I am trying to do is to assist a recollection that seems to be in need of some help on the subject matter of what Nigeria's objectives were

concerning all of these cement contracts.

THE COURT: What does his knowledge, partial though it would have to be, and faulty though his recollection may be, of Nigeria's attitudes have to do with this case?

MR. GRUTMAN: It may be of some assistance to your Honor when you consider the proposition of coercion, duress and the real motives of the Nigerians in suspending the payments which they refused to permit even though the documents presented were in all respects in order.

THE COURT: You are not going to be able to prove it through this witness.

MR. GRUTMAN: Can I have Exhibit WWW, please.

Q I show you the document which came out of Morgan's files and which is in evidence as Exhibit WWW.

Do you recollect that this is a Morgan document which quotes a communication to it from Central Bank of Nigeria, Lagos?

A That's correct.

Q You notice from that that the communication from Central Bank is applicable to all cement contracts and not merely those under advisory letters of credit, isn't that true?

MR. SIMMS: Objection, your Honor. The document

speaks for itself.

THE COURT: Let's have a look at it. I wasn't aware that it pertained to letters of credit as such at all.

MR. GRUTMAN: It relates to documents required for payment under all cement contracts.

THE COURT: The last part of it refers to "Beneficiaries of our letters of credit which cover demurrage terms," and it makes no distinction between advisory and confirmed letters of credit.

Q Do you agree with what his Honor says?

A Yes.

Q That is the fair intendment of that letter?

A Yes.

Q You notice, do you not, that there are additions to the documents to be submitted to procure payment?

A Yes.

Q Does it also refresh your recollection it lay within the power of Nigeria to either grant or withhold those additional documents without which payment could not be obtained?

A Yes.

MR. GRUTMAN: No further questions. Thank you.

THE COURT: Redirect.

Tk 1A PM

nsb-1 AFTERNOON SESSION 360
1:50 P.M.

(In open court.)

THE COURT: Call your next witness.

C H A R L E S J U R I C E K, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q You gave your occupation as being retired. With what bank were you previously connected before your retirement?

A I was working for twenty years with Morgan Guaranty Trust Company.

Q At the time of your retirement with Morgan what was your official title at the Morgan Bank?

A I was in charge of the company for Letters of Credit.

Q Worldwide?

A That's right, sir.

Q Before going to Morgan when you began your career with them, had you had an experience in your native country?

A Yes. I was working here for five years with som. export-import company. In Europe, in Czechoslovakia, where I was born, I was associated with the largest

J-9

nsb-2 Juricek-direct

transporter, International Transporter Company Schenker, for about ten years, and during the past two years as a president of the company.

Q When were you retired from the Morgan Guaranty Trust Company?

A I retired I guess as of June 1976.

Q In 1973, were you in charge of Letters of Credit for the Morgan Guaranty Trust Company?

MR.KISSAM: I object, if your Honor please. This witness has been known to the plaintiff I would say for several years and not for several months. He is not listed on the pretrial order. The only information we have is that on December 16, Mr. Grutman wrote and I think he has referred to the letter already. I know no reason why this witness is called at this late date without notification.

THE COURT: I assume it is because Mr. Grutman did not think the motion for summary judgment based upon the attachment issue was to be tried during the case.

MR. GRUTMAN: That is one reason, your Honor. As I earlier indicated this morning in chambers, in addition to the jurisdictional questions and the attachment questions raised by the November 1977 motion by the defend-

THE COURT: Yes. Proceed.

Q In 1973 you were in charge of Letters of Credit for Morgan and did you have a familiarity in such a position with volume of business transactions with the Government of Nigeria and Morgan?

A Every Letter of Credit would have to go through my hands. I would have to approve it to be responsible for every Letter of Credit, which means I knew about every Letter of Credit which was issued by Morgan Guaranty Trust Company.

THE COURT: Try to speak slowly and distinctly so the young lady in front of you can get it down correctly.

THE WITNESS: I'm sorry .

Q Were you aware some time in the year 1975 of a large wave of Letters of Credit issued by Nigeria payable through the Morgan Guaranty Trust Company having to do with an acquisition program by Nigeria of large quantities of cement?

A Yes, I was.

Q I show you a document which has been previously marked as Plaintiff's Exhibit 9 for identification. This is a photocopy, Mr. Juricek. These have been premarked exhibits.

MR. KISSAM: May we see it, please?

MR. GRUTMAN: It's the Letter of Credit.

THE COURT: Gentlemen, you look at documents when they are offered in evidence and not when the witness is identifying them.

A Yes. I remember this Letter of Credit very well.

Q Is the document which I have shown you marked Exhibit 9 for identification a photocopy of the Letter of Credit issued by the Central Bank of Nigeria of Tinubu Square in favor of National American Corporation?

A Yes. It's an irrevocable Letter of Credit issued by Central Bank of Nigeria in favor of National American Corporation.

MR. GRUTMAN: I offer the document in evidence.

THE COURT: While they are looking at that, Mr.Grutman, have you supplied the copies of those two documents?

MR. GRUTMAN: Yes, I have, your Honor.

THE COURT: May I see them?

MR. GRUTMAN: Surely. We have marked them, your Honor.

THE COURT: Good. Exhibit 4 was supposed to be in evidence. They agreed if you put the whole letter in

term means, and what the word "confirmed" means in the phrase as you uttered it?

A The definition --

MR. KISSAM: Your Honor, I understood your ruling to be that this would be restricted to jurisdictional questions. This has nothing to do with any jurisdictional question.

THE COURT: I said he could identify documents. He has identified one as being an irrevocable confirmed letter of credit. I will allow him to be asked what that means.

MR. KISSAM: Could I hear that question?

Q What is an irrevocable confirmed letter of credit?

A Irrevocable confirmed letter of credit is an obligation of the issuing bank to make certain payment or payments to the beneficiary provided that the beneficiary complies with the terms of the letter of credit.

Q Are all of the terms of the letter of credit set forth on the letter of credit?

A Letter of credit --

MR. KISSAM: I move to strike this. It is subject to the uniform practice.

THE COURT: More important than that, at the

bottom of the letter of credit it speaks for the possible need for amendment because of certain information not being available and the fact that the sailing date was within 45 days.

Can a letter of credit that is subject to amendment nevertheless be irrevocable?

THE WITNESS: Provided the beneficiary agrees to such an amendment. An irrevocable letter of credit cannot be amended without the beneficiary's agreement.

THE COURT: Show him Exhibits 9 and 10-A.

As I read it, it implies that the bank's principal, in this case the Central Bank of Nigeria, had the right to make amendments to the letter of credit without the consent --

THE WITNESS: No, sir.

THE COURT: Read the bottom.

MR. GRUTMAN: Which page are you speaking of, your Honor?

THE COURT: Let me see 10-A.

MR. GRUTMAN: Yes, your Honor.

THE COURT: Read this down here and particularly the last paragraph.

(Pause.)

THE WITNESS: This letter of credit was not

effective at the time of receipt. We contacted the Central Bank of Nigeria regarding the ports of loading, ports of shipments.

THE COURT: Also insurance, I believe?

THE WITNESS: Yes. As soon as this was cleared, the credit was amended because it was in favor of the beneficiary. The beneficiary couldn't draw against the letter of credit, and when we received the clarification showing information from the Central Bank of Nigeria, the credit was amended regarding ports of shipments and insurance coverage. In that time that we received this we amended the credit and make the credit operative.

Q Mr. Juricek, we are in Central Europe. I want you to try a little harder. The reporter is trying to get down what you say.

A I will be available after dinner to make any clarification.

MR. KISSAM: I gather the witness has changed his testimony from your Honor's question?

THE COURT: As I understand what you are saying, as of the time they had that amendment on the bottom, the letter had not gone into effect and it was necessary to get additional information, at which time you believe an unconditional irrevocable confirmed letter

of credit was issued?

THE WITNESS: Yes. We, as the Morgan Guaranty, do not issue the letter of credit unless all the terms and conditions are acceptable to Morgan Guaranty. In this case we made the reservation, the cover letter here, telling them what is wrong with the letter of credit. At the same time we Telexed to Central Bank telling them that the letter of credit is not complete as far as the loading ports and insurance. A couple of days after that, we received a reply and the credit was amended.

mb7 Juricek - direct

MR. GRUTMAN: I am laying a foundation.

Q According to the terms of the letter of credit, when was payment to be made?

A Upon presenation of the documents to Morgan Guaranty Trust Company.

Q And according to the letter of credit now in evidence, when the cement was loaded on board and a bill of lading, on-board bill of lading was signed accompanied by insurance certificates and a few other documents, then was payment supposed to be made by Morgan on presentation of those documents irrespective of whether the ship had yet sailed?

A We don't care about sailing.

Q The answer is yes?

A Yes, sir.

Q Fine. And were those documents, the first six which I have shown you, the ones against which payment was made for those six vessels?

A That's correct.

Q I now show you in the same folder with tabs on them the seventh through twelfth vessels, one for the Aristoteles; right; the eighth shipment is the Astrid; the ninth is the Ardenal; the tenth is the Sandrina; the eleventh is the Euna; and the twelfth is the Nikolaus H.

Did you have those documents presented to you at Morgan Guaranty for those latter six shipments?

A That's correct, they were presented.

Q And were those --

A And they complied with the terms of the letter of credit.

Q When those documents for those latter six vessels were presented at Morgan in compliance with the terms of the letter of credit, did Morgan pay on those documents?

A We haven't paid them.

MR. KISSAM: If your Honor please --

THE COURT: I do not understand his answer. Could you, Mr. Kissam?

MR. KISSAM: No, and I don't understand either these documents are not in evidence and he is testifying to their contents.

THE COURT: No, the question was did you understand his answer as to whether payment was made.

MR. KISSAM: No, I did not.

THE WITNESS: Payment wasn't made.

THE COURT: Was not made?

THE WITNESS: Was not made.

Q Were you instructed by Nigeria not to pay?

Yes or no.

A We were instructed by Central Bank of Nigeria not to pay any documents covering shipment -- not under this letter of credit but on any other letter of credit covering shipments of cement.

Q Mr. Juricek, we are having some difficulty hearing your answers.

A Yes.

Q So I again ask you to be responsive and to speak clearly.

A OK.

Q You have told us earlier, and I am almost through on this point, that when the documents complying with the letter of credit for this NAC contract --

MR. KISSAM: I object to all this leading to a witness obviously prejudiced. Furthermore, the last few answers are all based on documents which are not marked in evidence. We have not seen the documents. He is making all these statements --

THE COURT: The issue now is not the documents but whether payment was made. If you want the documents offered before we get to that question --

MR. GRUTMAN: I will offer the documents.

THE COURT: All right. I take it these are not

been informed that no vessel carrying cement, and so on and so forth.

MR. SIMMS: Your Honor, I just might point out, if Mr. Grutman is going to testify --

MR. GRUTMAN: You are right. I will defer it.

THE COURT: Let's move on with the witness. I am going to tell you gentlemen we are staying here until the witness gets done, so unless you want to stay here for supper, you better move along.

MR. KISSAM: May we strike Mr. Grutman's testimony?

THE COURT: Yes, Mr. Grutman's remarks will be stricken.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q Mr. Juricek, you are familiar with the letter of credit which provided by its text and by amendment that not only was Central Bank of Nigeria to pay for the cargo, but for demurrage as well; is that correct?

A That's correct.

Q At some time in September did Central Bank of Nigeria modify the provisions of the letter of credit?

A As far as demurrage is concerned?

Q Yes.

A Yes, sir.

Q Did NAC or Intrafinsa consent to that modification initiated by the Central Bank of Nigeria?

A No.

Q When Central Bank inserted these new conditions into the letter of credit, did that, from a banking standpoint, repudiate the original letter of credit?

MR. KISSAM: Objected to.

THE COURT: I am going to sustain that. This is a very definitely legal question. Indeed, it's one of the crucial points in the case.

MR. GRUTMAN: All right.

THE WITNESS: I shall answer?

THE COURT: No.

Q What effect did Morgan believe Nigeria's instructions concerning the letter of credit had on the letter of credit?

A Defaulting on letters of credit --

MR. KISSAM: Just a minute, please. I move to strike as completely irrelevant to this litigation.

THE COURT: I wouldn't say it's irrelevant. The question is --

MR. KISSAM: Morgan's thinking.

MR. GRUTMAN: His expertise.

THE WITNESS: Not mine, our legal department.

THE COURT: Yes, he is giving in effect a legal opinion at this time, and he can't do that. I will allow him to tell us, while it's certainly not binding on the Bank of Nigeria, I will allow him to tell us what Morgan did, if anything, after that.

Q Fine. When the Nigerians in September changed the terms of the letter of credit, what did Morgan do?

A First of all, we notified all the beneficiaries what has been done by Central Bank.

Q Yes?

A And the people, the officers who were involved --

MR. KISSAM: I object to that.

A -- doing business with Nigeria.

MR. KISSAM: I move to strike the answer.

MR. GRUTMAN: He is telling us what Morgan did.

THE COURT: Let me hear it first, and then I will see if he has a basis for his statement.

A They contacted the legal department, and together they prepared some wire, some Telex to Central Bank telling them what means his default on these letters of credit.

THE COURT: Were you involved in the preparation of these Telexes to Central Bank?

THE WITNESS: Regarding the changes in the letter of credit or regarding our response?

THE COURT: Yes.

THE WITNESS: Not at all. It was strictly a business of legal department and officers who handled the account of Central Bank of Nigeria.

THE COURT: He is not competent to testify to that.

MR. KISSAM: I move to strike his testimony.

THE COURT: Yes, it's stricken.

Q Were you directed by your superiors what to do with the letter of credit?

MR. KISSAM: I object to whether he was or wasn't.

THE COURT: I will allow it.

A We adjusted the letters of credit, that's all we could do, not to pay.

Q Mr. Juricek, do you know what a repudiation or dishonor of a letter of credit is?

A Very well, sir.

Q Have you ever experienced such a thing before in your banking carrier?

MR. KISSAM: That is objected to.

A Not during my life.

THE COURT: Strike the word "before."

Q Had you ever experienced such a thing before?

A Not during my life.

MR. KISSAM: I object to that. This is an assumption that this is a repudiation. I move to strike the answer.

THE COURT: Had you ever seen a repudiated letter of credit?

THE WITNESS: No, I had not.

Q To your knowledge, had Morgan ever repudiated a letter of credit before?

A No.

MR. KISSAM: That is objected to.

THE COURT: I will allow that.

THE WITNESS: They would spend their last penny not to do it.

Q Had Morgan ever repudiated a letter of credit before?

A No.

MR. KISSAM: I object to that, your Honor. Repudiation is one thing, following out a client's instructions is another.

THE COURT: All right. Nevertheless, let's move along.

THE WITNESS: No commercial bank can afford anything like that.

Q Why?

A Because that bank would be out of business right away.

Q Which bank?

A The bank who would default on their irrevocable letter of credit. Such a bank would be out of commercial international business.

Q Except, Mr. Juricek, subsequent to the Central Bank of Nigeria advising Morgan to do what it did in the case of these cement letters of credit, has Morgan continued to do business with the Central Bank of Nigeria on letters of credit?

A They have been doing business after this change in the cement credits including confirming some of the credits.

Q You mean confirmed letters of credit?

A That's right.

Q But, sir, again if this is confidential information --

MR. KISSAM: I object to a volunteered statement by the witness.

Q Don't volunteer anything.

nsb-2 Juricek-cross

Guaranty I could go back.

THE COURT: They recommended him to other banks.

A For the corresponding banks of Morgan Guaranty Trust Company. It's up to December 10 or 15. I don't think they would recommend me now after my testimony here.

Q How did you happen to become a witness? How did anybody know about you?

A Sir, when I was involved in this transactions, in the Morgan Guaranty Trust Company office, I was really involved. I was helping everybody because all these people here they practically didn't know anything. They needed certain help. The policy of the bank is to help exporters so importers who don't have the knowledge to accomplish, to satisfy the Letter of Credit.

Q Under what circumstances did you come here as a witness here today. You have been sitting in the court all week.

A Not all week, three days.

MR. GRUTMAN: He said he was subpoenaed, your Honor.

Q When were you subpoenaed?

A When was it? Let me think about it.

TESTIMONY OF GEORGE W. RYAN, OFFICER OF FEDERAL RESERVE BANK OF NEW YORK AT TRIAL OF NATIONAL AMERICAN ACTION

nsp7

GEORGE W. RYAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE COURT: Counsel, do you want to make an application?

MR. RINGSMUTH: My name is Don Ringsmuth. I am an officer and assistant counsel for the Federal Reserve Bank in New York.

We are a little concerned over the scope of Mr. Ryan's testimony for a number of reasons which relate to our role as a central bank. I am notparticularly concerned by what he may say with respect to Nigeria. However, I am concerned over disclosing this kind of information in the light of the fact that we are the accounts for upwards of 135 or so countries. I am not wholly involved with the issues involved here. I think it is entirely appropriate that he respond to questions concerning the jurisdictional questions, as I understand them. It would be in my judgment inappropriate for him to respond to such questions as to the number of or the amount of assets that we hold on behalf of any fine central bank or government. This is not the kind of information that is available under the Freedom Information Act for any fine country or Morgan Guaranty.

MR. SANDLER: Except for the preclusion order, is there anything to prevent us from obtaining a transcript of the testimony yesterday?

THE COURT: Unfortunately, the attorney from Morgan Guaranty has left. I do not think I should pass on that in his absence.

MR. SANDLER: I believe the attorney for Morgan Guaranty did not make any request for the information to be withheld. I believe it came solely from the attorneys for Nigeria.

THE COURT: They made the application, but Morgan Guaranty hearily endorsed it and spoke up for it. I would have to hear him.

MR. KISSAM: I made the application because at that moment Mr. Hoffman had not been involved in the case directly.

THE COURT: I know they want to keep it secret. Banks always want to keep everything secret.

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q What is your occupation?

A I am a banker.

Q Are you also a lawyer?

A No, I am not.

Q For how many years have you been a banker?

A 15 years.

Q For what length of time have you been connected with the Federal Reserve Bank?

A The same length of time.

Q What is the official title of that bank?

A Federal Reserve Bank of New York.

Q What is your present job status or position with the bank?

A I am a manager in the foreign department.

Q What is the Federal Reserve Bank, please, Mr. Ryan?

A It is the Central Bank of the United States.

Q Is it the central bank in the sense that the Bank of France or the Bank of England is the central bank?

A That is correct.

Q What are the functions which the Federal Reserve performs as the central bank of the United States?

A One of its principal functions is the implementation of the United States monetary policy.

Q How about some other functions?

A Check-clearing, transfer funds, maintaining accounts for foreign central banks and governments.

Q Can private individuals have checking accounts

consistent with what you would like to think, isn't it?

A Yes.

Q I will not ask you about 129 other foreign governments and central banks with whom the Federal Reserve has business affairs. I will ask you some questions concerning the Government of Nigeria. Are you familiar with the banking transactions conducted between the Government of Nigeria and the Federal Reserve?

A In a general way.

Q For what length of time have you had that general familiarity?

A Since my whole career has been in the foreign department of the bank, I would have to say 15 years.

Q Drawing on that body of experience, when do you recollect the Government of Nigeria first opened banking relations with the Federal Reserve?

A The central bank account was opened in 1960.

Q Between 1960 and let's say 1973, if you had to graph the volume of business and the dollars in transactions, what would that graph look like?

MR. KISSAM: I object. What relevancy is this?

THE COURT: He wants to establish that the volume of business grew sharply in the period around 1975 and 1975.

MR. GRUTMAN: Right.

MR.KISSAM: Does that make any progress with the case?

MR. GRUTMAN: A little bit.

THE COURT: I would say the value of objecting to it in terms of progress does not equal the value of getting the answer out.

A I would hazard a guess it would fairly a flat line on the graph.

Q Did there come some time when there was a sharp upturn in the business conducted between Nigeria and the United States through the Federal Reserve?

A Yes, I would say the period 1973, 1974.

Q And 1975 and 1976, is that continuing?

A Yes.

Q Among the things that the Federal Reserve Bank does for its member banks and central banks, does it issue letters of credit?

A It does not.

Q Is it forbidden to issue letters of credit?

A Not to my knowledge.

Q By custom and practice it never does, does it?

A As far as I know.

Q If a foreign government wanting to conduct busi-

Q Do you have any knowledge concerning an arrangement which was entered into beginning somewhere around 1973 where the Morgan Guaranty Trust Company had a right to draw on Federal Reserve funds standing to the credit of the Government of Nigeria or its central bank?

A Yes.

Q When did that custom, practice or procedure originate?

A I am not sure, but I would say it is prior to 1974.

Q Was that pursuant to a written agreement?

A Between ourselves and the central bank of Nigeria and I presume with Morgan Guaranty as well.

Q Do you recollect that there was such a written agreement?

A Between ourselves and the central bank.

Q At the time of the inception of that arrangement giving Morgan the right to draw funds out of the Federal Reserve for the benefit of Nigeria and from its account in New York, what was the ceiling, if there was one, on the amount that Morgan could withdraw on any one day?

A One million dollars.

Q For what length of time was Morgan precluded from drawing down any more than one million from the

Federal Reserve to meet the obligations of Nigeria?

A That I don't know off the top of my head.

Q Do you recollect from the recesses of your memory if there came a time when the one million dollars ceiling was escalated to a higher amount?

A Yes.

Q When did that come?

A I would say some time in 1974, but I am not sur

Q Do you recollect what the next stepped-up level was concerning Morgan's right to withdraw funds of Nigeria out of the Federal Reserve Bank of New York to meet Nigeria's obligations through Morgan Guaranty?

A The next increment?

Q Yes, sir.

A Three million dollars, I believe.

Q And to your knowledgewas it ever increased above three million dollars?

A Yes.

Q When was that?

A I believe in November of '75.

Q What was the ceiling, if there was one, which was imposed in November of '75?

A No ceiling.

Q Unlimited, right. In 1974 and 1975, do you recollect that the Morgan Guaranty Trust Company regularly drew funds out of the Federal Reserve from the account of the Government of Nigeria or the Central Bank of Nigeria?

A I would say that's correct, but again without looking at the records.

Q Mr. Ryan, have you ever testified before?

A No, no.

Q If you know something precisely, of course, you can tell us that. If you may not have a to the last cent recollection or precise day, just tell us to the best of your recollection. Within that context, was it the daily and customary practice of Morgan Guaranty to draw funds of Nigeria from the Federal Reserve to meet Nigeria's obligations?

mbp2 Ryan-direct

MR. KISSAM: I object to the use of the word "obligations." The testimony was that if Morgan Guaranty was honoring a letter of credit for something, they would use the funds in the bank, and I gather that on certain occasions if the funds were inadequate, that additional funds would be supplied. But I don't think it's an obligation. I think it's carrying out a contract.

THE COURT: All right. Just rephrase the word "obligation."

Q Fine. How frequently did Morgan call upon the Federal Reserve to supply it with funds to meet Nigeria's needs through Morgan Guaranty in New York?

A I believe it was frequent, but whether it was daily I don't know.

Q And when they did call, what were the general sizes of the drawdowns?

A You mean subsequent to November of '75?

Q Yes.

A That I really don't know.

Q Was it in the millions?

A I would presume it was.

Q Mr. Ryan, in 1975, what was the amount of money held by the Federal Reserve in New York belonging to the Government of Nigeria?

MR. KISSAM: I object to that, if your Honor please, as irrelevant.

THE COURT: I will allow it, except that 1975 is a long period. You can have a maximum and minimum during that time.

Q Give me the average amount of money held in the Federal Reserve for the Government of Nigeria or its Central Bank.

MR.KISSAM: If your Honor please, I don't really see the necessity of publicising these facts unless the facts are useful to the question at hand.

THE COURT: They could be.

MR.KISSAM: What difference does it make if the amount is X or Y?

THE COURT: I would say a hundred million is more, it's a hundred times one million.

MR. KISSAM: That is correct, but the process is still there.

THE COURT: Well, unfortunately some cases talk in terms of volume. I think we are dealing with volume so great here that it makes it unimportant, but I don't want to presuppose that.

MR. KISSAM: I would like to record an objection because I don't think the disclosure of this type

of information is proper unless absolutely necessary, and I don't see how it's necessary.

THE COURT: Your objection is noted.

Do you recall the average balances during '75?

THE WITNESS: No, I do not.

THE COURT: Can you give us a range?

THE WITNESS: I really can't. I mean, not from my recollection.

Q If you can't, I am going to ask for the documents which I have subpoenaed. While you may not be able to give us to the last million, can you give us some idea of the size of those deposits maintained at the Federal Reserve in the name of Nigeria or its Central Bank in 1975?

THE COURT: Did they run in excess of a billion dollars?

THE WITNESS: They may have.

THE COURT: Were they certainly in excess of $100,000,000?

THE WITNESS: Yes, yes.

THE COURT: All right, we are in a six to -- excuse me, let's count that -- we are in a nine to ten figure range.

MR. GRUTMAN: Yes.

THE COURT: Or as the bankers like to say, a high nine figure, possibly ten figure.

please.

THE COURT: Overruled.

MR. KISSAM: The witness has shown no qualifications,

THE COURT: He has been asked if he knows. If he doesn't know, he doesn't know. If he does know, you can pursue how he knows.

MR. KISSAM: I was hoping you'd hear my objection.

THE COURT: I heard it.

MR. KISSAM: I mean the witness.

A I have no way really of knowing what the underlying transaction is.

Q In your job as manager of foreign activities of the Federal Reserve, how closely do you have contact with the business of Nigeria and the Federal Reserve?

A Fairly close, but that doesn't mean that we would look into the underlying transaction.

Q Do you know whether or not Nigeria receives substantial deposits from American oil companies?

A I believe they do.

Q Would Exxon be such a company?

A It could be.

Q Mobil?

A Again, I'd hazard a guess, yes.

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Q Are these deposits made to the account of Nigeria made in New York from those oil companies?

A I guess they are. I am not sure, though.

Q And again without precisely giving us the digits, would it be fair to say that we are dealing with deposits in that area in the eight and nine figure category?

A Certainly in the seven-figure category.

Q That was so in 1975?

A That's correct.

Q And so in 1976?

A That's correct.

Q And from such contact as you have had with those deposits, can you say whether or not you have any knowledge about the underlying transactions and their -- withdrawn.

Have you looked into the activities of Nigeria in the United States from a commercial standpoint?

A No, we have not.

Q Have you ever seen whose accounts the funds were drawn on that were deposited into Nigeria's account other than the bank out of which they originated?

A I may have if they are -- if a question ever arose.

THE COURT: Let me see if I can understand this process a bit better. I would assume that foreign nations

question?

MR. GRUTMAN: The question is a little rough, your Honor.

Q Is it not a fact that most of those deposits, those very large deposits standing to the credit of Nigeria are as a result of commercial transactions conducted in the United States?

MR. KISSAM: That question was asked before, objected to, I believe.

THE COURT: No, he indicated he didn't know before, but maybe he knows it as restated.

Do you know the answer to that?

MR. KISSAM: If he didn't know it before, I don't know why he would know it now.

MR. GRUTMAN: Watch, Mr. Kissam.

THE COURT: Do you know the answer to that question?

THE WITNESS: I would say, generally speaking, that we have noted some deposits by oil companies. Whether there are other transactions that might be construed by you as others are commercial transactions, that I really don't know.

THE COURT: Are you familiar with whether or not Nigeria a favorable credit balance with the United States?

A I can't.

Q You don't know?

A I really don't know.

Q The moneys that Nigeria accumulates on the books of the Federal Reserve, to your knowledge, are any of those funds invested in the United States?

A Yes.

Q What kind of investments are made in the United States with the funds that come into the Federal Reserve?

MR.KISSAM: I object, if your Honorplease.

THE COURT: Overruled.

MR. KISSAM: Does he now want to know the names of the particular companies and so forth?

MR. GRUTMAN: Please.

THE COURT: Answer the question as best you can.

A Primarily in U.S. Government securities.

Q Such as?

A Treasury Bills, Treasury Notes.

Q Could you give us some idea of the quantified magnitude of what those investments in the United States are for the Government of Nigeria, or what they were in '75 and '76?

MR. KISSAM: I object on the ground

of no relevancy whatever.

THE COURT: I have a doubt that putting money into government funds is doing business in the sense that these cases deal withit, but there is no need to worry about that now. I will allow him to answer the question.

MR. KISSAM: Does the volume count?

MR. GRUTMAN: It sure does.

THE COURT: I would guess if it's important, the volume counts. I am not sure it is.

Q Would you tell us?

A Would you rephrase the question or restate the question?

MR. GRUTMAN: Mr. Birmbaum, would you oblige us with the question being reread?

(Question read.)

A I would say over that period that the greatest percentage were in U.S. Government securities.

Q How much dollars?

A In terms of dollars,I don't know without going to the records.

Q Was it in thousands, millions, tens of millions, hundreds of millions?

A Probably in '75 and maybe even in '76 hundreds of millions.

MR. GRUTMAN: Separate.

A What time period?

Q If we were doing a Fortune list of largest holders of United States securities from the customers of the Federal Reserve Bank who are foreign countries, where would Nigeria rank in '75 and '76?

A I would say fairly high in '75. '76 I would say that probably they slipped down a bit.

Q Would they be among the top 10 in '75?

A I would make it maybe the top 20.

Q That is respectable, isn't it? And when they slipped in '76, how far down did they go?

MR. KISSAM: Is this really important, your Honor?

THE COURT: Well, no, but I am hoping we will get over it soon.

MR. GRUTMAN: Judge, if Mr. Kissam would stipulate that his client --

THE COURT: You know his problem. Just get over this rapidly.

MR.GRUTMAN: Very well.

THE COURT: When they slipped in '76, how far back did they go, top 30?

THE WITNESS: I would say that might be correct.

Q When Nigeria would make purchases of United States Treasury Bills or other securities, who would make the purchase for them?

A The Federal Reserve Bank of New York.

Q How would that instruction to make the purchase and debit their account be communicated to you?

A We have an automatic -- what we call an automatic investment program for them which they have given us certain guidelines with respect to the types of investments that we are allowed to acquire for them.

Q Did you have a discretionary account of a certain specified dollar amount which you could invest for them in securities of your choice?

A Basically, it was a program whereby funds, any excess funds above a certain level would be invested in accordance with the written instructions that we had received from them.

Q Besides Treasury Bills and such securities, did you ever purchase for them other kinds of securities?

MR. KISSAM: If your Honor please,what is the relevance of this?

THE COURT: Overruled.

A I don't believe so.

Q But you are not sure?

A No, the Federal Reserve would hold them in custody for the Government of Nigeria.

Q Who would buy them for the Government of Nigeria, if you know?

A They could go to anyone to buy them in this country.

Q And did Morgan ever buy them for them?

A I have no idea.

Q Mr. Ryan, have you exhausted for us all of the activities which the Federal Reserve performed in 1975 and 1976 for the Government of Nigeria?

A That's a pretty broad question.

Q If there is something that you haven't yet touched upon that might be germane, I am asking you to tell his Honor what other things did the Federal Reserve do for the Government of Nigeria or its Central Bank other than thosekinds of activities which you specifically referred to in answering questions previously posed.

A We may have provided them with some technical advice with respect to such things as, again this is just from recollection, for example, such things as currency destruction.

Q Currency destruction?

A Destruction.

Q What else?

A Many central banks come to us for information similar to that. We may have provided some training programs for some of their staff people.

Q Nigerians?

A Employees of the Central Bank of Nigeria.

Q And when the Central Bank employees came here for what length of time would they stay?

A I really don't know.

Q When they came, who paid them?

A They paid their own way.

Q What else? Anything else?

A Well, we may have bought foreign exchange for them, for Central Bank.

THE COURT: What do you mean by buying foreign exchange?

THE WITNESS: They may have need for French francs or marks, Swiss francs, whatever. They may come to us to buy that exchange.

Q As a matter of fact, you know that certain people engage in buying foreign exchange as a business in and of itself; isn't that true?

A That's correct.

Q When the Nigerians sent people to you for

training, how frequently would they come?

A Well, I don't know. I mean, I know they have --

Q Besides training, would they come over here themselves to deal with you on any --

A They might periodically.

Q How frequently ?

A I don't know. I mean, I take them in the class of all the other visitors we have from Central Banks, and I really can't single out how frequent.

Q The way in which you list the Nigerian funds in your bank, would you give us how its titled? What is the name of the account?

A The Federal Government -- presently?

Q Yes.

A The Federal Government of Nigeria.

Q What was it in '75 and '76?

A In '75 it was in the name of the Central Bank of Nigeria.

Q And in '76?

A I believe in February of '76 the account in the name of the Federal Government of Nigeria was established.

Q When in 1976 you transferred funds from the Federal Reserve to Morgan, did you transfer funds out of

the Federal Republic of Nigeria for the account of the Central Bank of Nigeria as it was maintained at Morgan?

A Assuming it was after February?

Q Yes.

A It would have been out of the Federal Government account on our books, and I don't know whether it went to the Central Bank account or what account it was in Morgan, if in fact there were accounts.

Q Other than the change in the name from Central Bank to the Federal Republic of Nigeria, were both of those accounts ostensibly the same?

A Yes.

THE COURT: What purpose was served by changing the name of the account, if you know?

THE WITNESS: I don't know. I mean, I can speculate but I don't know.

Q Over at the building that the Federal Reserve maintains here in the financial district, you keep bullion, do you not, gold?

A That's correct.

Q But all the money that is accumulated there, that is not all physically present, is it?

A That's correct.

Q With respect to the Government of Nigeria,

DEPOSITION OF MORGAN GUARANTY TRUST COMPANY BY ARTHUR J. BROWN AND PAUL WINSTON FITZPATRICK ON APRIL 18, 1978

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC., Plaintiff, -against- FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 2801 (L.W.P.)
DECOR BY NIKKEI INTERNATIONAL, INC., Plaintiff, -against- FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 2348 (L.W.P.)
CHENAX MAJESTY, INC., Plaintiff, -against- FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 3045 (L.W.)

Deposition of MORGAN GUARANTY TRUST COMPANY OF NEW YORK, by ARTHUR J. BROWN, Assistant Treasurer, and PAUL WINSTON FITZPATRICK, Vice President.

Deposition of MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as a non-party witness, by ARTHUR J. BROWN, Assistant Treasurer, and PAUL WINSTON FITZPATRICK, Vice President, pursuant to Notice, Subpoena Duces Tecum and Order of Magistrate Schreiber, taken at the offices of Morgan Guaranty Trust Company of New York, 23 Wall Street, New York, N.Y. on April 18, 1978 at 10:30 a.m., before a Notary Public of the State of New York.

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Appearances:

MESSRS. BAILEY MARSHALL HOENIGER & FREITAG
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MESSRS. KISSAM, HALPIN & GENOVESE
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By: JAMES G. SIMMS, Esq., of Counsel

MR. HOFFMAN: I think that is what you meant to say.

MR. HOENIGER: Yes, and that you had not quite committed yourself.

MR. HOFFMAN: Exactly. I don't think it came out quite that way.

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A R T H U R J. B R O W N, having first been duly sworn, was examined and testified as follows:

EXAMINATION BY
MR. HOENIGER:

Q Mr. Brown, for the record, would you state your full name and home address?

A Arthur J. Brown, 329 Jackson Avenue, West Hempstead, New York.

Q Mr. Sandler and I will both be using, "Morgan," to mean Morgan Guaranty Trust Company of New York; is that agreeable?

A Fine.

Q Are you now employed by Morgan?

A Yes.

Q In what capacity?

A I'm an assistant treasurer.

Q How long have you been employed by Morgan?

A Since 1958.

Q Will you trace your career, just briefly, at Morgan?

A In 1958 I joined the bank as a junior clerk; spent the next 17 years, or so, in the Letter of Credit Department.

I left the Letter of Credit Department as Assistant Department head and joined the African Territory.

Q When was that?

A In 1974.

Q Could you place the time in 1974, Mr. Brown?

A September. I was in the African Territory from 1974, as Administrative Assistant.

In 1976 I was promoted to Assistant Treasurer, and I have been in that capacity ever since.

Q Still within the African Territory?

A Still within the African Territory, and I've been in that capacity ever since.

Q And is the African Territory part of some larger division at Morgan?

A The African Territory is part of the Middle East, Africa Area, within the International Banking Division.

Q Does Nigeria fall within the African Territory?

A Yes.

Q Who is your immediate superior.

A Paul Fitzpatrick.

Q Was that also true for all of 1975?

A Yes.

Q Are you familiar with a Ralph Bunche, Jr.?

A Yes.

Q In 1975 was he, to your knowledge, employed by Morgan?

A Yes.

Q In what capacity?

A He was an assistant vice president.

Q And what was his specific area of responsibility?

A He was responsible for the English speaking countries of Sub-Sahara Africa.

Q Did that include Nigeria?

A Yes.

Q How long did he hold that particular responsibility, Sub-Sahara Africa, the English speaking part?

A Until what time?

Q Yes, from when to when?

A I don't know when he began that responsibility, but he was in that capacity until November of 1977.

Q Is he still employed by Morgan?

A Yes.

Q Do you know his present capacity and responsibility?

A Yes.

Q What is it?

A He's a vice president in the Eurocurrency project, finance group, at our London office.

Q And did Mr. Bunche already hold the previous position of responsibility when you assumed your position in the African Territory in September of 1974?

A Yes.

Q Do you know a man named Charles Juricek?

A Yes.

Q Was Mr. Juricek employed by Morgan at some time?

A Yes.

Q. Can you place the time for me, or at least when his employed ended?

A His employment ended I believe during 1976.

Q As a result of retirement?

A Yes.

Q And do you know how many years he had been with Morgan prior to 1976, just looking for a range?

A He had joined the bank I believe in 1957 or 1956.

Q And in 1975, what was his job with the bank?

A His classification was that of unit head, and he was in charge of the section of the letter-of-credit department which issued new letters of credit for exports.

Q And was that unit territorially limited?

didn't it?

A Yes.

Q And you don't recall?

A No.

Q How long did that part of the meeting last, at which Mr. Simms was present?

A About ten minutes, 15 minutes.

Q Okay, Mr. Brown, do you recall, or do you know whether anyone connected either with the Nigerian Government, or with Central Bank, had any meetings with any Morgan personnel in 1975, relating to any cement contracts or Letters of Credit?

MR. HOFFMAN: Please repeat the question.

(Pending question read.)

A Yes.

Q What is your substantive answer?

A Excuse me?

Q You have answered, "Yes," you know or you recall. Now, what do you know or recall?

A Oh, I recall that there was a meeting, at some point, during that time, when an official of the Central Bank of Nigeria was in the bank for a meeting to discuss the cement situation.

Q Can you tell me who the official was?

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A Yes.

Q Please do.

A A Mr. Kukoyi.

Q What was his position with Central Bank at the time?

A I believe he was Deputy Chief of Operations.

Q Okay, had there been previous communications to Morgan from Central Bank setting up that meeting; telexes?

A Yes.

Q Or whatever?

A Yes.

MR. HOENIGER: I call for their production. I call for the production of all communications and memoranda relating to that meeting.

MR. HOFFMAN: I will take that under advisement.

MR. HOENIGER: Off the record.

(Discussion off the record.)

Q Was there one, or more than one meeting, of Morgan people with Mr. Kukoyi?

A More than one.

Q How many?

A I cannot say beyond saying several.

Q Was he at Morgan, or meeting with Morgan people, several days?

A Yes, on several occasions he did meet with us, yes.

Q Can you place the time in 1975?

A No.

Q Do you have any records at all that would refresh your recollection; telexes, memoranda, or whatever?

A If we had anything, it would only be a telex from Central Bank, asking us to receive Mr. Kukoyi, and maybe our acknowledgment of that telex.

Q Did you attend all the meetings with Mr. Kukoyi?

A No.

Q How many of them did you attend?

A I missed one.

Q Well, how many then did you attend?

A Well, I said there were several meetings.

Q There were several meetings, okay. How many did you attend?

A Okay, so I attended all except one.

Q Who else attended the meetings at which you were present?

A Mr. Bunche.

Q That is all?

A Yes, Ralph Bunche.

Q Who was at the meeting that you missed?

A It may have been Mr. Burrows, one of our colleagues.

Q Is that B-u-r-r-o-u-g-h-s?

A B-u-r-r-c-w-s.

Q What was Mr. Burrows' position, at that time, with Morgan?

A Mr. Burrows was an ~~administrative~~ officer's assistant.

Q Is he still with the bank?

A Yes.

Q Here at 23 Wall Street?

A Yes.

Q And is he still an administrative assistant?

A No, Mr. Burrows is an Assistant Treasurer.

Q In what department or division?

A The African Territory.

Q So he works under you now; is that correct?

A No, he works with me.

Q With you?

A Yes.

Q Thank you. All right, did you make any notes at all, at any of the meetings with Mr. Kukoyi that you attended?

A No.

Q Prior to Mr. Kukoyi's coming here, had you been advised of what he wanted to discuss specifically?

A No.

Q At the first meeting that you and Mr. Bunche attended, the first meeting with Mr. Kukoyi that you attended,

that meeting was attended by the three of you, Bunche, Kukoyi and you; right?

A We were there, yes.

Q Was there anybody else there?

A Yes.

Q Who?

A Mr. Adegbayemu.

Q Is that one name or two?

A Yes, one name.

Q All right, in as much detail as you can recall, Mr. Brown, what was said by each of the four people present at that meeting?

A I don't recall too much of the detail, except that the purpose of the meeting was for the Central Bank to visit the United States, and principally their attorneys, to discuss the cases against them in New York.

Q Do you recall what cases those were?

A No.

MR. SIMMS: Mr. Hoeniger, could I ask the witness a question on the same subject you are on?

MR. HOENIGER: Could you reserve it for your cross, Mr. Simms, please?

MR. SIMMS: Sure.

Q As far as you recall, Mr. Brown, was there more than

one lawsuit pending, at that time, the time of that first meeting?

A There may have been.

Q You don't recall?

A No.

Q Okay. Are there any documents at all, in Morgan's possession, that reflect anything whatever about those meetings with Mr. Kukoyi and Mr. Adegbayemu?

A No.

Q None whatever?

A No.

Q Were there ever such documents?

A No.

Q No notes were taken?

A That's right. Could I add one thing to that?

Q Sure. Go right ahead.

A Mr. Kukoyi and Mr. Adegbayemu's visit to Morgan Guaranty were more of a courtesy nature than an exploratory or advisory nature.

They called on us at the bank to let us know they were in town. We made their hotel accommodations, but beyond that, there wasn't anything of any substance that took place between us.

Q Really chit-chat?

A That's right.

Q I see. Mr. Brown, do you recall writing a letter to Central Bank, I believe it was late in 1975 -- I am looking for it and will produce it to you -- advising Central Bank that you thought litigation was likely to ensue and you felt they should retain competent New York counsel?

A I don't know if I wrote the letter, but I know that such a letter or telex was written, yes.

MR. HOENIGER: Would you please mark as Plaintiff's East Europe (Morgan) Exhibit 1 for identification, what appears to be a copy of a telex from R. J. Bunche to Central Bank, attention Mr. O. O. Vincent, Deputy Governor, dated 10/24/75.

(Copy of telex, above described, was marked for identification Plaintiff's East Europe (Morgan) Exhibit 1, this date.)

Q Mr. Brown, I show you Plaintiff's East Europe's Exhibit 1, for identification, and ask you if that is a copy of a telex that Mr. Bunche sent to Central Bank?

A Yes.

Q And is that the telex we just had reference to in the prior question?

A Yes.

Q To your knowledge, did Central Bank ask Morgan to

make a recommendation of possible New York counsel for it?

A Yes.

Q Was that done by telex?

A Probably.

MR. HOENIGER: I call for the production of all records relating to that subject. This is the only one that has been produced.

MR. SIMMS: I object to the request. I don't see the basis or relevance of any of that kind of communication to the issue before the Court.

MR. HOENIGER: Please note conference between Mr. Hoffman and Mr. Brown.

MR. HOFFMAN: I will take your request under advisement, Mr. Hoeniger.

MR. SIMMS: Could you explain, Mr. Hoeniger, the relevance of the request relating to the retention of counsel by Central Bank of Nigeria, with respect to litigation pending in New York against them?

MR. HOENIGER: That is a misstatement of my question, and, no. If Mr. Hoffman declines, I will explain the relevance to the Magistrate.

Q Was the firm of Kissam & Halpin, or Kissam, Halpin & Genovese, one of the firms that Morgan recommended to Central Bank?

A I understand it was to meet with their attorneys; with his attorney.

Q Now, you mentioned that there may have been a second meeting in 1976, at which cement contracts, or Letters of Credit thereunder, were discussed; is that correct?

A Yes.

Q Who was present at that second meeting?

A I was.

Q And from Nigeria?

A And Mr. A.

Q Was that several months later, or what?

A Yes.

Q And you were the only two people?

A Yes.

Q And had that again been set up by telex, that meeting?

A Yes.

Q By the way, for all these visits, the three visits that you have described, did you make hotel reservations for the Nigerians?

A I'm pretty certain that we did, yes.

Q Did somebody from Morgan meet them at the airport?

A No.

Q Now going to the third meeting that was only between-

this would be the second meeting in 1976 and the third meeting in the sequence here, the meeting solely between you and Mr. A.

What was discussed at that meeting?

A All I can recall is that on every occasion that I met with Mr. A, we always discussed the status of the pending cases.

Q In 1975 and 1976, what was Mr. A's position with Central Bank?

A He was and is the principal legal officer.

Q Okay. Now, you recall nothing about what was actually said, other than that it touched on pending lawsuits?

A That's right.

MR. HOENIGER: I call for the production of all recordations of data in Morgan's possession, relating to the second and third meetings in the sequence that we have just discussed.

MR. HOFFMAN: In other words, you want all documents relating to any of those two meetings?

MR. HOENIGER: Yes.

MR. HOFFMAN: I will take that under advisement.

MR. HOENIGER: My first request, relating to the first meeting, I have now made the same request for the other two meetings.

MR. HOFFMAN: Yes, I will take it under advisement.

MR. HOENIGER: My request, in other words, relates to all meetings in 1975 and 1976, to which Mr. Brown has testified.

MR. HOFFMAN: I will take that request under advisement, Mr. Hoeniger.

MR. HOENIGER: Okay.

Q Going back to Plaintiff's Exhibit 1, for identification, Mr. Brown, did you discuss the subject matter of this telex with Mr. Bunche, or with anybody else at Morgan?

A Yes.

Q With whom did you discuss it?

A Mr. Bunche.

Q Anyone else?

A Mr. Fitzpatrick, Boris Berkovitch.

Q And was Mr. Berkovitch employed by Morgan at that time?

A Yes.

Q In what capacity?

A Senior vice president and general counsel.

Q Is he still employed by Morgan?

A Yes.

Q In the same capacity?

A Yes. He is currently Senior Vice President and General Counsel.

Q I notice on Plaintiff's, East Europe's Exhibit 1, for identification, under the, "CC," that one of the people who apparently got a copy was Fritz Link.

Would you agree with that?

A Yes.

Q Who is Fritz Link?

A He's an attorney with Davis, Polk.

Q And Davis, Polk are Morgan's outside counsel; is that right?

A That's right.

Q How many discussions did you have, or were you present at, with either Mr. Bunche, or Mr. Fitzpatrick, or Mr. Berkovitch, or any of them in combination, relating to the subject matter of Plaintiff's Exhibit 1?

A Several.

Q Are there any notes, or memoranda, in Morgan's possession, relating to any of those discussions?

A I don't think so.

Q Are you sure?

A No, I'm not sure.

MR. HOENIGER: I request that a search be made and call for the production of any *such documents*.

MR. SIMMS: I object to the request, because I don't think it is at all relevant and outside the

permitted scope of this discovery proceeding.

MR. HOFFMAN: I will take the request under advisement and make specific objection to the production of any documents that have any relationship to any discussions at which Mr. Berkovitch, or any other attorney for Morgan Guaranty, was present.

Q Did those discussions relate primarily, as Plaintiff's Exhibit 1 states, to the possibility or likelihood of litigation being commenced against Central Bank, or Nigeria, or both?

MR. HOFFMAN: I object to that, to the extent that you are asking about any discussions at which Mr. Berkovitch, or any other attorney from Morgan Guaranty, was present.

Q Mr. Brown, I think you said primarily your discussions were with Mr. Bunche and possibly Mr. Fitzpatrick; is that correct?

A Yes.

Q At how many of those discussions was Mr. Berkovitch present?

A Several.

Q All right, going now to the ones --

And I don't accept your objection, but, okay, we'll get a ruling on it.

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Going to those discussions, Mr. Brown, where Mr. Berkovitch was not present, what was said?

MR. HOFFMAN: Objection.

Mr. Brown, was there any other attorney, representing Morgan Guaranty, present at any of those other discussions?

THE WITNESS: There were discussions at which there was not an attorney present, but I don't recall specifically the material that was discussed.

Q Did you agree with the message, or the thought expressed in Mr. Bunche's telex, Plaintiff's Exhibit 1?

A Did I agree with it?

Q Yes, when it was sent, or at about that time?

A Yes.

Q What was your basis for doing so, Mr. Brown?

A My basis for agreeing?

Q Yes.

A I thought it was an excellent idea for the Central Bank to retain someone to represent them here in New York.

Q Referring specifically to the sentence, "We believe that there is an increasing possibility that litigation against you may be instituted in New York," what was your basis for agreeing with that?

MR. SIMMS: I object. There is no relevance at all

to Mr. Brown's personal opinion, as to the telex that was sent out.

Q Will you answer the question, please, Mr. Brown?

A We had been contacted by various beneficiaries, if you would, under Letters of Credit, who, for one reason or another, were not receiving the moneys they thought were due to them, and in those conversations with these individuals they indicated that they may bring legal action against Nigeria and/or Central Bank, and for those reasons, we felt that it was time for Central Bank to retain counsel.

Q To your knowledge, has Morgan recommended, or included in a list of Recommended New York law firms, the Kissam, Halpin firm to other Morgan customers, other than Central Bank?

MR. HOFFMAN: I object.

MR. SIMMS: Note my objection also.

MR. HOENIGER: You are instructing him not to answer?

MR. HOFFMAN: I think that is a totally inappropriate question.

MR. HOENIGER: Okay, and do you instruct him not to answer?

MR. HOFFMAN: And I do instruct him not to answer.

MR. HOENIGER: I will now ask you to mark as

Plaintiff's, East Europe's (Morgan) Exhibit 2, a group of documents, commencing with what appears to be a copy of a form of master letter, dated December 22, 1975, and apparently an invitation to attend a conference at Morgan.

MR. HOFFMAN: Off the record.

(Discussion off the record.)

(Master letter, dated December 22, 1975, above described, was marked for identification Plaintiff's, East Europe (Morgan) Exhibit 2, this date.)

MR. HOENIGER: May we stipulate, Mr. Hoffman, that all of the papers that I have lying in front of me, all the Xerox copies, are papers which you delivered to me a day or two ago, and which were produced in your office, under the Magistrate's Order?

May we stipulate to that, so that I don't have to ask each time that these are all records kept by Morgan in the ordinary course of business?

Do you want to take a quick scan through them?

MR. HOFFMAN: No. The only thing that makes me at all hesitant --

Well, I will recognize anything you hand me that's from the files of Morgan Guaranty, and if I don't, I think Mr. Brown will. They are readily and clearly

identifiable by certain markings on them.

MR. HOENIGER: But we still need that.

MR. HOFFMAN: My only reluctance in stipulating to that effect is that in the past I have taken a very technical close reading of the business records section of the Federal Law in this regard, and, as you are probably aware, there are two tests that have to be met for business records to be admissible, and I am not necessarily sure that each one of these documents is necessarily within it, within the exception.

I think you might be better off, if you have a particular thing that you are interested in getting it on, I think you would be better off in asking Mr. Brown specifically.

I am really not trying to be difficult, but I am just not at all sure it all fits within the exception.

Q I show you now, Mr. Brown, a group of documents, which have been marked for identification Plaintiff's, East Europe (Morgan) Exhibit 2, and ask you if you can tell us what those are?

THE WITNESS: Can I hear the question again?

(Pending question read.)

A This is a copy of a letter that was sent to various members of the international trade community in New York,

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inviting them to attend the Bank, to hear the Nigerian Ambassador to the United States explain Nigeria's position, in regard to the cement situation.

Q And then the next number of pages consists of names, titles and addresses, or business affiliations; is that correct?

A That's right.

Q Is that the people to whom the letter of invitation from Morgan went?

A Yes.

Q Would you turn to the next document in that exhibit? Let me just look over your shoulder, if you don't mind.

MR. HOFFMAN: Perhaps you should mark it separately.

MR. HOZNIGER: I don't think so.

A This is actually the next document (indicating.)

Q Then the next document is headed, "Morgan Guaranty Personnel Attending"; is that right?

A Yes.

Q And that indicates you attended, Mr. Brown?

A Yes.

Q And did all the other Morgan people attend?

A Everyone on this list did.

Q All right. Let's turn to the next document, which

is a letter dated December 23, 1975, from Mr. Bunche to Edward O. Sanu, Nigerian Ambassador to the United States; is that correct?

A Yes.

Q And then there are similar letters from Morgan to four other Nigerian officials in the United States; is that correct?

A Yes.

Q Now, is there a record of who of the invited guests, actually, the two pages worth of invited guests, who actually attended?

A No.

Q Was there ever one?

A No.

Q Do you know who did not attend, who is listed on pages 2 and 3 of this exhibit?

A No.

Q You don't?

A No.

Q Did you yourself attend the meeting?

A Yes.

Q Was there a record or recording made of what was said at that meeting?

A No.

Q Were any notes taken by anyone, on behalf of Morgan?
A Not that I know of.
Q Am I correct in assuming that this was a meeting attended by some 30 or 35 people altogether?
A That sounds correct.
Q Okay, did you make any notes at all?
A No.
Q Had you been requested by anybody, on behalf of Nigeria or Central Bank, to act as host for this meeting? When I say, "you," I mean Morgan?
A Yes.
Q Who made that request?
A I don't recall.
Q Was that request made verbally or in writing?
A I'm sure it was in writing.

MR. HOENIGER: I call for the production of all documents in the possession of Morgan, relating to the setting up of that meeting, or to anything that transpired at that meeting, and a list of attendees.

MR. HOFFMAN: Is it fair to say that what you want is all documents relating to the meeting?

MR. HOENIGER: Absolutely.

MR. HOFFMAN: Because, as I understood the request, it could literally relate to anything that was said at

the entire meeting, which would mean, if I took it broadly enough, that we would give you the key to the bank.

MR. HOENIGER: Yes.

MR. HOFFMAN: I will take that under advisement.

MR. HOENIGER: Right.

Q Who spoke at that meeting?

A I don't recall anyone speaking, except for Mr. Sanu.

Q Did anybody from Morgan introduce him?

A I don't recall.

Q What did Ambassador Sanu say?

MR. SIMMS: Objection; irrelevant to the permitted scope of this deposition.

A I don't recall.

Q Go ahead, Mr. Brown. What were you saying?

A I don't recall exactly what he said, except that the subject of his speech was to explain Nigeria's position with regard to the actions that they took in the cement situation.

Q Is that all that you remember, Mr. Brown?

A Yes.

Q Did you listen to what the Ambassador said?

A Yes.

Q But all you recall is that it was an explanation, or his explanation of what the Nigerians had done to deal

with the cement situation; is that correct?

A Not what they had done so much as why they did it.

Q Do you recall anything of what he said about why they did it?

A Yes.

Q All right, that is what I am asking you, sir.

THE WITNESS: Could you repeat the question, please?

(Pending question read.)

A I recall that one of the reasons they did it was to prevent a drain on Nigeria's reserves, which was being caused by the drawings for demurrage under the Letters of Credit.

Q Do you recall anything else?

A No.

Q Does Morgan have a branch office in Nigeria?

A No.

Q To your knowledge, did any Morgan people meet with any Nigerian officials, and I am including Central Bank in that, when I say, "Nigerian," during either 1975, or 1976, away from these premises, 23 Wall Street, either at other Morgan premises in Nigeria, or any place else?

A Yes.

Q Did any of those meetings relate to the Nigerian cement contracts?

A Yes.

Q Tell me about the first one, who, where and when?

A I don't recall the sequence of the meetings, but Morgan Guaranty normally visits most of the clients in their home offices on a periodic basis, and this was the case with Nigeria.

We visit Nigeria two or three times every year.

Q Who is the, "we," Mr. Brown, as far as the 1975 period goes?

A 1975?

Q Yes.

A Mr. Bunche called on Central Bank in 1975.

Q Two or three times?

A Approximately, yes.

Q Anybody else from Morgan?

A During 1975?

Q Yes,

A I don't think so. I doubt it.

Q And I take it that a memorandum was made as to those meetings; is that correct?

A Yes.

MR. HOENIGER: Okay, I call for the production of all memoranda and any and all other documents relating to such 1975 meetings.

MR. HOFFMAN: I will take the request under advisement.

Q Now, would you take us through 1976, in the same way, Mr. Brown?

A I don't recall if we visited Nigeria during 1976. We attempted to do so. In February I was scheduled to visit Nigeria, in February of 1976, but there was a coup, at that time, and the first --

Q That was the one in which Brigadier Muhammud was killed?

A Yes. I believe that was February 12th or 13th of 1976.

So that attempt to visit was frustrated, and I don't recall if we were able to get back again.

It's possible that we went in December of 1976.

Q Would that have been Mr. Bunche again, or not?

A Mr. Bunche and I made the next trip.

Q You have been to Nigeria?

A Yes, several times.

Q Do you have records of the times of your personal visits, Mr. Brown?

A Yes.

Q And with whom you met?

A Yes.

Q And on those visits that you personally made, were

cement contracts, or Letters of Credit under the cement contracts, discussed?

A Yes.

Q And you made memos of those meetings?

A Yes.

MR. HOENIGER: I call for the production of all those records of Mr. Brown's, relating to any of those meetings.

MR. HOFFMAN: Mr. Brown, did you have any meetings prior to December of 1976 in Nigeria?

THE WITNESS: No.

MR. HOFFMAN: I will take the request under advisement, and bearing in mind the objection of counsel for the Central Bank of Nigeria to any discovery after September of 1976.

Q Going back to Plaintiff's Exhibit 2, Mr. Brown, did you have any part in suggesting or selecting any of the guests to be invited?

A By, "me," do you mean Morgan?

Q No, I mean you, personally.

A No.

Q Do you have any idea, for example, why Mrs. Evelyn Lord from Bankers Trust was invited?

A Yes.

Q Okay, please tell me.

A I believe Mrs. Lord is the officer in charge of Bankers Trust's relationships in Africa.

Q Do you have any idea of why two people from First National City Bank were invited?

A I believe Mr. Maserve has the same responsibility at Citibank as Mrs. Lord does at Bankers Trust.

I don't know Mr. DeMunnick.

Q Did Bankers Trust and Citibank have some particular relationship to the Nigerian cement contracts or Letters of Credit?

A Not to my knowledge.

Q Do you know then why these people were invited from those two banks?

A I think we may have been asked to invite representatives from the international community, and so, in trying to get a cross section, we may have chosen one or two individuals from each of the major banks.

Q Other than meetings that you have told us about this morning in this deposition, are there any other meetings that Morgan set up, at the request or suggestion of the Nigerians, dealing with cement contracts or Letters of Credit thereunder?

A I don't recall any other meetings.

Q Okay, other than meetings that you have described this morning, were there any other meetings, that you know about, between any Morgan people, and any Nigerian or Central Bank people, relating to cement contracts, or Letters of Credit thereunder?

MR. HOFFMAN: In 1975 and 1976?

MR. HOENIGER: Yes.

THE WITNESS: Would you repeat the question, please?

(Pending question read.)

A No.

MR. HOFFMAN: His answer was, "No," Mr. Hoeniger.

MR. HOENIGER: Yes, I got it. Off the record.

(Discussion off the record.)

Q Mr. Brown, how many Letters of Credit did Morgan issue under cement contracts, or advise under cement contracts, on behalf of Central Bank?

MR. HOFFMAN: From?

MR. HOENIGER: Late 1974 through the middle of 1976.

A About 14.

Q Did Morgan add its own confirmation to any of those Letters of Credit?

A No.

Q Did Morgan issue any Letters of Credit, which were confirmed by it, in relation to any Nigerian cement contracts,

during that period?

MR.HOFFMAN: Objection, because that's a legal impossibility, I think.

THE WITNESS: Yes, it is.

MR. HOFFMAN: It is either issued or confirmed.

A You don't confirm your own credit.

Q. All right, thank you.

A If you issue a credit, you don't have to confirm it.

Q Thank you. You advised 14 such letters; right?

A Yes.

Q On behalf of Central Bank?

A Yes.

Q Did Morgan do anything whatever, as to any other Letters of Credit under Nigerian cement contracts, during that period?

A Yes.

Q What?

A We confirmed other Letters of Credit.

Q How many?

A Three.

Q Who were the beneficiaries of those?

A One beneficiary was Nix.

Q N-i-x?

A Nix International.

A Yes.

Q Who paid that charge, Central Bank or the beneficiary?

A I would say that the Central Bank paid the charge.

Q In all three cases?

A To the best of my knowledge, yes.

Q Well, that is a matter of record, isn't it, Mr. Brown?

A Yes, certainly.

Q So when you get the transcript, or when Mr. Hoffman does, just check that against the records, and if your answer was incorrect, you will have a chance to correct it.

What was the total amount of Letters of Credit advised or confirmed by Morgan, on behalf of Central Bank, or any other Nigerian governmental entity in 1975?

MR. HOFFMAN: For all commodities?

MR. HOENIGER: Yes.

MR. HOFFMAN: I object, as being outside the scope ordered by the Magistrate, but if you know the answer, Mr. Brown, you can give it.

Q Just a magnitude.

A In 1975?

Q Yes. Would it be several hundred million?

A Yes.

Q Half a billion?

A Possibly.

Q How much of that was accounted for by Letters of Credit under cement contracts, and again just roughly?

A Under three hundred million.

Q So it would be more than half then, right, or approximately half?

A Approximately half.

Q Would you give me the same figures for 1976, total dollar volume of Letters of Credit, and then what part thereof, if any, was accounted for by cement contracts?

A The figures I gave you for cement contracts were for cement Letters of Credit, issued from mid-1974 through mid-1976.

It's difficult for me to estimate which ones were issued in 1976.

Q Aside from advising Letters of Credit, what other functions did Morgan perform for Central Bank in 1975 and 1976?

A We did some credit -- we provided credit information. We assisted with their transfer of funds.

Q How did you do that?

A By making payments on their behalf.

Q I would like to explore that with you, Mr. Brown.

What sort of payments?

A Payments for commercial transactions; purchases they

may have made in the United States.

Q Does that mean that Morgan issued bank checks?

A In some cases, but in most cases the transfers are from one account on our books to another bank, the clearing house, or another bank, that might have had an account with us.

Q Would that include what I would call wire or cable transfers?

A Yes.

Q In other words, and just so that I am sure I understand you, you would instruct the suppliers bank to credit his account and then Central Bank's account with Morgan would be debited; is that correct?

A Yes.

Q My recollection is that Mr. Fitzpatrick also testified that Morgan paid various expenses of the Nigerian Embassy?

A Yes.

Q Do you have any knowledge of that?

A Yes.

Q Okay, how is that done?

A From time to time, Central Bank of Nigeria would ask us to make a payment, on their behalf, to a certain Embassy any place in the world, as payment for their operating expenses, or salaries.

Q Does that happen quite regularly, or frequently?
A Relatively frequently, but I couldn't say that it happens regularly.
Q Has Morgan also made payments to other entities, on behalf of Central Bank, or Nigeria, such as the American Express Company?
A Yes.
Q Has Morgan made payments to or for any Nigerian consulates?
A Yes.
Q How about payments for the Nigerian Mission to the UN, or to that Mission?
A I don't have knowledge that we actually did that, but I could say that we probably did.
Q Do you have knowledge of a Nigerian Philatelic Agency here in New York?
A No.
Q Do you know if Morgan ever made or received any payments from the Nigerian Philatelic Agency here in New York?
A A specific company called the Nigerian Philatelic Agency?
Q Well, that's specifically what it says in the phone book.
A I've never heard of that company.
MR. HOFFMAN: Off the record.

(Discussion off the record.)

Q Has Morgan had any business dealings with Nigeria National Airways?

A I've been on their planes.

Q Right. Does Morgan handle any money transactions with or for them?

A I'm not aware of any.

Q Okay, does Morgan handle any banking transactions with or for any Nigerian entity, other than the ones you have already spoken of?

THE WITNESS: Would you read that back, please?

(Pending question read.)

A I don't understand that.

Q Well, you have told us about various kinds of payments that Morgan makes: Letters of Credit; wire transfers?

A On behalf of Central Bank?

Q Yes, on behalf of Central Bank, and I am asking you whether, to your knowledge --

Strike that question.

What other activities does Morgan perform for Central Bank, or any other Nigerian governmental unit or agency?

MR. HOFFMAN: For the period 1974 through 1976?

MR. HOSNIGER: Yes, referring to the time frame

1974 through 1975.

A Central Bank, or any other Nigerian government what?

Q Agency or unit.

A We provide training, from time to time.

Q Yes, for Nigerian bank people?

A Yes.

Q Central Bank people?

A Yes.

Q Is a charge made to Central Bank for that?

A No.

Q Is Nigeria Morgan's largest black African client or customer?

A In terms of?

Q Profitability?

A Probably.

Q In 1975, how many Nigerians, or other Central Bank employees, were trained by Morgan?

MR. HOFFMAN: Could you read that back, please?

(Pending question read.)

MR. HOFFMAN: I don't understand the question.

MR. HOENIGER: I will rephrase it.

Q You stated that Morgan provides training or instruction for Central Bank employees; right?

A Yes.

Q Okay, my question is, how many such people did Morgan provide such services for, training or instruction, in 1975?

A Approximately five or six.

Q And in 1976?

A I would have to assume that 1976 was about the same number of people. There were about the same number of people coming to us from Central Bank, about five or six.

Q And these are typical two-week courses, or what?

A No.

Q How would you describe them?

A We have one course that runs for about six weeks, during January/February of every year.

There's a second course, that runs for about four weeks, five weeks, during June/July, every year, and then, from time to time, Central Bank sends us individuals to acquaint themselves with specific areas of interest, and these individuals do not participate in a formal program.

We arrange for them to visit with people at the bank, to acquaint themselves with certain specific areas.

Q Does Morgan have records, with respect to Central Bank of Nigeria personnel who attended the formal courses, the two formal courses in 1975, either one or both of the two formal courses in 1975, and either one or both of those

formal courses in 1976?

A Yes.

MR. HOENIGER: I call for the production of those records.

MR. HOFFMAN: I will take it under advisement.

Q Does Morgan maintain records, with respect to people from Central Bank who come over here informally, the second category you mentioned, to get some exposure to Morgan?

A Do we maintain records?

Q Yes. Do you know how many such people there were? Does Morgan maintain such records?

A To a certain extent, yes.

MR. HOENIGER: Okay, I call for the production of those records for 1975 and 1976.

MR. HOFFMAN: I will take that under advisement.

MR. HOENIGER: I will next ask you to mark as Plaintiff's, East Europe (Morgan) Exhibit 3, a group of three telexes, starting with a telex from A.J.Brown to Central Bank, attention O. G. Otiti, dated July 28, 1976.

(Three telexes, above described, were marked for identification Plaintiff's, East Europe (Morgan) Exhibit 3, this date.)

Q I show you Plaintiff's Exhibit 3, for identification,

Mr. Brown, and ask you if those three documents relate to one of the formal courses that you have just told us about?

A No.

Q No?

A No.

Q What do they relate to?

A They relate to, as you call it, an informal course.

Q I see, and what does, "attachment," mean in your telex?

A This is the terminology that the Central Bank of Nigeria uses to indicate that they want someone to spend some time with us to study a specific area of commercial banking.

They refer to that as a period of attachment.

Q May I see that exhibit again, please?

A Yes.

MR. HOENIGER: I would like to go off the record for a minute.

(Discussion off the record.)

Q Mr. Brown, prior to, let's say the middle of August, 1975, were there any discussions or communications, that you know about, between Morgan and Central Bank, on the subject of cement contracts? By that I mean any kind of general discussion?

A No.

Q Some time in August or September of 1975, did Morgan receive instructions from Central Bank to "amend" all of the cement Letters of Credit?

A Yes.

Q Did those instructions cause any concern at Morgan?

A Initially, no.

Q Did there come a time when they caused concern?

A Yes.

Q Tell me about that. When, how, what, who, et cetera?

A They began to cause concern when the Letters of Credit were amended and the beneficiaries did not agree to the terms of the amendment.

Q Were all of the 17 cement Letters of Credit that we have discussed made subject to a specific set of international Letter of Credit rules or brochure?

A Yes.

Q And were all the cement Letters of Credit irrevocable and confirmed Letters of Credit, insofar as Central Bank was concerned?

A No.

Q Would you explain your answer, Mr. Brown?

A They were all irrevocable but not confirmed. They were all not confirmed.

MR. HOENIGER: I think we are having a communication problem.

Will you please mark as Plaintiff's, East Europe (Morgan) Exhibit 4, a document entitled, "Central Bank of Nigeria Documentary Credit," dated 4 August 1975, credit No. CBN/BO/75/201, consisting of two pages.

(Two-page document, above described, was marked for identification Plaintiff's, East Europe (Morgan) Exhibit 4, this date.)

Q Mr. Brown, I show you Plaintiff's Exhibit 4, for identification, and ask you if this is a copy of a document which Morgan received from Central Bank?

A Yes.

Q Now, were Central Bank documents, substantially similar in form, received by Morgan, with respect to the other 16 cement Letters of Credit?

A No.

Q I don't mean that all the terms are the same, the dollar amount, but that they were substantially similar?

A No.

Q With respect to how many of the total of 17 Letters of Credit was a document like this received from Central Bank?

A How many?

Q Yes, how many out of the total of 17?

A 14.

Q And the three on which you were requested to add your own confirmation were different?

A Slightly different, but not substantially different.

Q Can we agree, Mr. Brown, that the text of Plaintiff's Exhibit 4 starts:

"Dear Sirs, We hereby request you to advise our irrevocable/transferable abroad Documentary Credit in favor of East Europe Import-Export, Inc."; is that correct?

A Yes.

Q Can we also agree that just before the signature of Central Bank's Bills Manager, there appears:

"Except otherwise stated this credit is subject to Uniform Customs and Practice Documentary Credits (1962 Revision) Chamber of Commerce brochure No. 222"; is that correct?

A Yes.

Q Okay, with respect to the Letter of Credit established by Central Bank under Plaintiff's Exhibit 4, and advice to my client, East Europe by Morgan, was the consent of the beneficiary here, East Europe, required for any amendment to the Letters of Credit?

MR. HOFFMAN: I think that is a question of law.

MR. SIMMS: I agree.

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Q In your experience, or in your opinion, Mr. Brown?

MR. HOFFMAN: I object. It is a question of law.

You can ask whether it was the practice of Morgan to ask for consent.

That's a legitimate question, if you want to ask that.

Q Okay, are you familiar with Chamber of Commerce brochure No. 222?

A Yes.

Q Do you know what that brochure says with respect to amendments to Letters of Credit?

MR. HOFFMAN: I object. The brochure speaks for itself.

MR. HOENIGER: I am asking him whether he knows. I didn't ask him what it says.

MR. HOFFMAN: You can answer the question.

THE WITNESS: Would you repeat the question, please?

(Pending question read.)

A Not specifically, but I have an idea of what it says.

Q What is your idea?

MR. HOFFMAN: I object.

MR. SIMMS: I object also.

MR. HOFFMAN: It speaks for itself. I can't imagine what the relevance is.

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MR. SIMMS: There is no relevance.

MR. HOFFMAN: If you want to go ahead, then go ahead, but I don't see what you are trying to accomplish.

MR. SIMMS: Mr. Hoeniger, can't we agree that if you are going to question the witness about amendments to CPC, we should at least have it in front of us, and the document does speak for itself.

Now off the record.

(Discussion off the record.)

Q After Central Bank instructed Morgan, in or about September of 1975, to amend at least the 14 Letters of Credit, what, if anything, did Morgan do?

MR. SIMMS: I object to the form of the question.

There is no evidence that Central Bank ever requested Morgan to amend, or do anything other than advise beneficiaries of its own action.

Q After Morgan was instructed by Central Bank to advise the beneficiaries of at least the 14 Letters of Credit, that they had been amended by Central Bank, what, if anything, did Morgan do?

A I believe we advised the beneficiaries of the Central Bank's amendment.

Q Okay, were there any discussions within Morgan, that you know of, with respect to those instructions from

Central Bank?

A At the time that we first received the instructions, no, there were not any discussions, that I know of.

Q Okay, subsequently were there such discussions?

A Eventually there were discussions, yes.

Q Did you participate in them?

A Yes.

Q Who else participated?

A Various individuals in the Letter of Credit department: Mr. Bunche, Mr. Fitzpatrick --

Q How about Mr. Juricek?

A Yes.

Q Mr. Koebel?

A Yes.

MR. SIMMS: Mr. Berkovitch?

THE WITNESS: Yes.

Q In all of them did Mr. Berkovitch participate?

A No.

Q Fine. Was the question discussed, as to whether Central Bank had the right to make these amendments, which it had instructed Morgan to advise?

MR. SIMMS: I object to the question. It calls for a legal conclusion.

MR. HOENIGER: I asked if there was a discussion

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of that question.

MR. HOFFMAN: Go ahead and answer.

THE WITNESS: Could I have the question again, please

(Pending question read.)

MR. HOFFMAN: I will permit the witness to answer, to the extent that the discussion did not involve Mr. Berkovitch, or any other attorney for Morgan Guaranty.

A Yes.

Q What was said and by whom?

MR. SIMMS: Same objection.

Q Go ahead and answer.

A I can only recall what the general feelings within the bank were at the time, and I think that everyone in the bank agreed that the Central Bank would find itself in a difficult position if it were to issue an amendment to a Letter of Credit without considering the agreement of the beneficiary.

Q Without obtaining the agreement of the beneficiary, or considering it?

A I say, "considering." Without obtaining is acceptable, yes.

Q Isn't it a fact, Mr. Brown, that Morgan sought opinions from one or more law firms in New York City, with respect to those instructions?

MR. HOFFMAN: I object and direct him not to answer.

MR. HOENIGER: I did not ask him for the content. I just asked him for the fact.

MR. HOFFMAN: You can ask him whether, around this time, Morgan Guaranty consulted counsel. That is certainly a permissible question, but when your question goes into the subject matter --

MR. HOENIGER: It didn't.

MR. HOFFMAN: You certainly did. You said whether they asked for opinions as to whether it was proper for Central Bank to get these amendments.

MR. HOENIGER: I will withdraw my question and ask this instead:

Q At or about this time, or thereafter, did Morgan consult attorneys with respect to the possible consequence of the Central Bank amendments, which Central Bank had instructed Morgan to advise to beneficiaries?

MR. HOFFMAN: I object and direct the witness not to answer.

I will allow you to answer, or allow him to answer, rather, as to whether, at about this time, they consulted their attorneys.

I don't think the reason for consulting attorneys, or the nature of the requests, are proper testimony.

If you will listen to your question read back, you

will find you are going into that again.

Q At or about this time, did Morgan consult attorneys, with respect to the instructions received from CBN?

MR. SIMMS: It's the same question. You are not limiting your question, Mr. Hoeniger. You are incorporating a whole answer given and a whole subject matter testified to in your question.

MR. HOENIGER: Mr. Simms, I have been quite deeply into the attorney-client privilege in other cases, and most certainly the general subject of the consultation may be identified, but what may not be identified, if the privilege is invoked and is upheld, is the specific information given by the client, or the specific advice given by the attorney.

MR. HOFFMAN: I would prefer that you ask questions of the type: did either the people in the African Territory, or the people relating to Nigeria, or the Letter of Credit people, consult attorneys, on this point.

MR. HOENIGER: I will stand on the last question, as I phrased it.

MR. HOFFMAN: Well, I object to it and will direct him not to answer.

Q Were there any consultations with attorneys, that you know of, following the discussions that you have

testified about?

MR. HOFFMAN: You can answer that question.

A Yes.

Q Did you participate in any meetings with attorneys?

A Yes.

Q Other than an attorney, or attorneys, and Morgan people, was anybody else present at any of those meetings?

Was there somebody there from, or on behalf of Central Bank, for example?

A No.

Q Was there anybody else present, who was not either from the lawyers, or from the lawyers' office, or from Morgan?

A No.

Q At none of those meetings?

A No.

Q They were strictly between Morgan and counsel?

A That's right.

Q Did Morgan have any communications with Central Bank, relating to the instructions, Central Bank's instructions, to Morgan, that it advise the beneficiaries that Central Bank had amended the 14 Letters of Credit?

THE WITNESS: Can you repeat that, please?

(Pending question read.)

is an objection to the examination proceeding, we will have to await a ruling from the Magistrate.

MR. SANDLER: The only problem there is that we wanted this examination to go as quickly as possible, and with as little inconvenience as possible to your client, and it seems to me that the procedure you are now suggesting, and the one that Mr. Simms is suggesting, seems to be one that would consume as much time as possible to your client.

MR. HOFFMAN: That's why I expressed the hope a moment ago that during the luncheon recess you could work it out.

MR. HOENIGER: Is there a question pending?

(Pending question read.)

A I don't understand the question.

MR. SIMMS: I object to the question on form, too. It assumes that, in fact, the action taken by Central Bank amounted to an amendment to the Letter of Credit.

Q After Morgan's consultation with counsel, did Morgan communicate either its views or counsel's views to Central Bank?

A To my knowledge, we did not.

MR. HOENIGER: Would you next mark as Plaintiff's,

A That's right.

Q Can we agree that under the printed words, or next to the printed line, "Total lines and major banks," there appears: "We believe we are the only U.S. commercial bank to have an account."

Have I read it correctly?

A Except there is not any period.

Q It is, "account" unquote. Thank you, Mr. Brown.

Was it your understanding, as of that time, July, 1975, that you were the only United States bank with which Central Bank had an account relationship?

A No.

Q What does that line mean to you, Mr. Brown?

A It means that --

MR. SIMMS: I object to the form of the question, and I object also on the basis that you have not established that Mr. Brown is the author of the document, or that language, and if he is not, what his interpretation of the language is is not at all relevant to this proceeding.

Q Was Morgan the only correspondent for Central Bank in the United States in July of 1975?

A No.

Q Okay, what other American banks had a similar

relationship as Morgan did with Central Bank?

A Federal Reserve Bank of New York.

Q That is not a commercial bank, of course?

A That's right.

Q Okay, was Morgan the only commercial bank in the United States that acted as correspondent for Central Bank?

A Yes.

Q Is that still true today?

A Yes.

Q Is that the meaning of the line which I read into the record?

A Yes.

MR. SIMMS: I object again to the question.

MR. HOENIGER: It's been answered.

MR. SIMMS: I move to strike the answer.

MR. HOENIGER: Mark this as the next in order.

(Copy of credit authorization, above referred to, dated May 2, 1975, was marked for identification Plaintiff's, East Europe (Morgan) Exhibit 7, this date.)

Q Mr. Brown, I show you what has been marked for identification as Plaintiff's Exhibit 7, and I take it that that is the same kind of form as the previous one; is that correct?

MR. HOFFMAN: You mean the same kind of form as 6?

Exhibit 31, this date.)

Q Mr. Brown, I show you Plaintiff's Exhibit 31, for identification, which comprises three articles from magazines or newspapers, relating to East Europe, or Robert Ross, and I represent to you that they were in the Morgan files for East Europe.

I will ask you, first of all, whether you have seen those before?

A I think I did see them before.

Q Do you know how they came to be in the Morgan, East Europe file?

A No.

Q Did Morgan, to your knowledge, go out and try to get some documents on East Europe or Robert Ross?

A Not to my knowledge.

Q Is there similar background material, so far as you know, in the files of any of the other 14 or 17 beneficiaries?

A It's possible that there is.

Q If there is, was that material collected or kept at Central Bank's request, or on Morgan's own initiative?

A No, I would say it was done on Morgan's own initiative.

Q Was Morgan requested to furnish credit information as to any of the 14 or 17 beneficiaries to Central Bank, or

to Nigeria?

A We may have been asked to furnish that information, yes, but I can't say, for certain, that we were specifically asked to investigate any one of these 14, but we may have been asked to do so.

Q In 1975 or 1976, Mr. Brown, did Central Bank sometimes ask you to furnish a credit report, or ever report on people with whom Nigeria was thinking of doing business?

A Yes.

Q Are those files, for either 1975 or 1976, still available?

A I would say that they are, but we would have to go -- yes, I would say that they are available.

Q Are they separate files?

A Yes.

Q What are they called?

A Well, an inquiry about a particular subject company, that inquiry would be kept in the file of the subject, so that if we were to produce anything, we would have to know the name of the subject we are investigating.

Q So they are not kept altogether in some file such as, "Credit inquiries," or some such file?

A Not to my knowledge.

Q Is there some sort of cross indexing, or cross

reference, for credit inquiries from Nigeria?

A Not to my knowledge.

Q Mr. Brown, if you will look at these documents, which constitute Morgan letters to beneficiaries, you will see very frequently words to the effect:

"We have received a telex from our principals, to the effect that," and then you quote it and say, "This is without engagement or responsibility on our part."

A Yes.

Q Am I correct in assuming that during 1975 and 1976, you used that language, too, or substantially similar language?

A Yes.

Q Or, "our principals have advised us that ..."

A Yes.

Q And, at least in respect to the 14 Letters of Credit, to which Morgan did not add its own confirmation, you understood Morgan's function to be to carry out the instructions and to communicate the instructions of Central Bank, with respect thereto; is that correct?

MR. SIMMS: I object to the form of the question.

MR. HOENIGER: Let me withdraw it.

Q With respect to the 14 Letters of Credit that Morgan did not independently confirm but simply advised,

is it your understanding that Morgan's function was to carry out Central Bank's instructions, with respect thereto?

A Only to the extent that we clearly understood the instructions.

Q And if you clearly did not understand them, you normally sought clarification; right?

A Yes.

Q So that you could carry out instructions that were clearly understood?

A Yes.

Q Now, Mr. Brown, with respect to all of the documents that we have marked as exhibits for identification, let me just ask you two wrap-up questions, in case I have missed any individual ones.

Are all of them kept at Morgan in the normal course of its business?

A Yes.

Q And, secondly, is it Morgan's regular course of business to keep such records?

A Is it our business to keep such records?

Q Or part of your business?

A Yes.

MR. HOENIGER: Okay, I have no other questions, at this time, subject to anything that Mr. Sandler's

MR. SIMMS: I am not going to tell you. I can't tell you that right now.

P A U L F I T Z P A T R I C K, having first been duly sworn, was examined and testified as follows:

EXAMINATION BY
MR. HOENIGER:

Q Mr. Fitzpatrick, may we please have your name and residence address for the record?

A Paul Fitzpatrick, 250 Lotte Road, Ridgewood, New Jersey.

Q Mr. Fitzpatrick, in late December of 1978, I believe, you testified in the United States District Court, for the Southern District of New York, in a case in which National American Corporation was plaintiff, and the Federal Republic of Nigeria and Central Bank of Nigeria, were defendants; is that correct?

A That is correct.

Q At that time you stated that you were a Vice President of Morgan Guaranty, in charge of Morgan's activities in Africa; is that correct?

A That is correct.

Q Is that still the position you occupy?

A Yes.

Q If you were asked the same questions right now,

by Mr. Sandler and myself, as you were asked at the National American trial, would you make the same answers?

A Yes.

MR. HOENIGER: Thank you very much, Mr. Fitzpatrick.

MR. HOFFMAN: May I state for the record, in the interests of only being fair to both the parties and to Mr. Fitzpatrick, of course, that he was asked to make certain estimates at that time.

MR. HOENIGER: Of course, of course.

MR. HOFFMAN: And they are still just estimates.

MR. HOENIGER: Of course, that is understood.

A R T H U R J. B R O W N, resumed and testified further as follows:

EXAMINATION BY
MR. SANDLER:

Q Mr. Brown, when was the first Letter of Credit for payment of cement issued by the Central Bank of Nigeria, that was advised through the Morgan Guaranty?

A During the first half of 1974.

Q Can you be more specific?

A No.

Q What was the total number of Letters of Credit advised and confirmed through the Morgan, issued by the

Central Bank of Nigeria, for payment of cement, the total number of such Letters of Credit?

A Confirmed or advised?

Q Yes.

A 17.

MR. SIMMS: Is the question confirmed or advised?

MR. SANDLER: Confirmed and advised.

MR. SIMMS: That doesn't make sense. He's answering another question.

Q How many such Letters of Credit were confirmed and advised?

A 17.

Q Were they all of the same approximate magnitude, namely, $14,400,000?

A No.

Q Can you tell me how many were for $14,400,000?

Were they for approximately $14 million, each one?

A Not all of them, no.

Q Were some bigger?

A Yes.

Q How many were bigger than $14 million?

A Three or four.

Q What was the largest, that you are aware of?

A Approximately $28 million.

Q Who was the beneficiary of that Letter of Credit?

MR. SIMMS: What is the relevance of that, Mr. Sandler?

A I couldn't say.

MR. HOENIGER: Excuse me for interrupting. I would just like to request -- I have the 14 that were advised, and if I have not done it already, I would like to request copies of the three that were confirmed.

MR. HOFFMAN: I will take that under advisement.

Q What was the smallest Letter of Credit?

A The smallest Letter of Credit?

Q Yes, issued by the Central Bank of Nigeria, and advised or confirmed through the Morgan, for payment of cement?

A I would say in the neighborhood of $14 million.

Q How many Letters of Credit were larger than $16 million?

A Three or four of them.

Q Could you give me the size of those Letters of Credit that were larger than $16 million?

A Around $25 million.

Q What was the size of the Letters of Credit that were confirmed by the Morgan?

A Around $25 million.

Q Which one was $25 million?

A Roughly somewhere around maybe $26, $28, in that area.

Q Do you know the amounts of payments made by the Morgan Guaranty against those Letters of Credit?

A I don't know the amounts, no.

Q Do you know approximately what they were?

A No.

Q Do you know if one-half of the value of those Letters of Credit was paid out?

A No, I don't know that.

Q Do you know if, after September 15, 1975, the Morgan refused to pay any drafts submitted against those Letters of Credit, which Morgan had advised?

A You're speaking about 17 Letters of Credit?

Q Yes.

A I would say, yes.

Q Were any of the drafts, which the Morgan refused to pay, submitted against Letters of Credit, which were confirmed by the Morgan?

A Yes.

Q Can you tell me the circumstances of that refusal?

A Yes.

Q Go ahead, please, sir.

A If drawings are made and the documentation to support

the drawings does not conform with the terms of the Letter of Credit, it is the normal practice for the bank to refuse payment.

Q In connection with the refusal to pay against the confirmed Letters of Credit, did such refusal have anything to do with amendments of the Letters of Credit, to which the Morgan felt the beneficiaries drafts did not comply?

THE WITNESS: Could you repeat that question?

(Pending question read.)

MR. HOFFMAN: I object to the question.

I think I know what you are trying to get at, Mr. Sandler.

Are you trying to ask whether any of these refusals to pay had anything to do with any of these amendments of the Central Bank, which beneficiaries did not agree to?

MR. SANDLER: Yes.

MR. HOFFMAN: Is that the question?

MR. SANDLER: Yes.

MR. HOFFMAN: We are talking about confirmed credits now.

THE WITNESS: Yes.

MR. HOFFMAN: In other words, is that the reason for non payment?

THE WITNESS: Could you restate the question?

Q All right. Were the confirmed Letters of Credit amended by the Central Bank during that period?

A Yes.

Q Were the amendments substantially the same as those amendments which complied to the non confirmed Letters of Credit, that took place during September and October of 1975?

A I would say, yes.

Q Did the Morgan refuse to pay drafts against the confirmed Letters of Credit, because, in their opinion, the drafts did not comply with those amendments?

A No.

Q In what respects did the Morgan feel that the drafts failed to comply with the requirements of the confirmed Letters of Credit?

A There were irregularities in the documents.

Q With respect to the confirmed Letters, did the Morgan make payment after September 15, 1975?

A To my knowledge, we did not.

Q Were drafts submitted to the Morgan, after September 15, 1975, with respect to those confirmed Letters?

A What gives me a problem here is the date.

Q September 15, 1975, I believe, is the date of the

first cable advising the Morgan to amend the Letters of Credit, to require certification of drafts.

A All right, if they are the circumstances, I would say that we did receive the drawings under those confirmed Letters of Credit.

MR. HOENIGER: Which you honored?

THE WITNESS: Which we refused to pay, because of discrepancies.

Q Did the discrepancies have anything to do with the failure of the drafts to be certified?

A I don't understand what you mean by the certification.

Q The Central Bank requested that all drafts be certified.

A They did not.

MR. HOFFMAN: Mr. Sandler, perhaps I can help you, because I am personally familiar with some of this, so that if I can make this statement, I will be able to give you the information you want.

There were some confirmed credits still outstanding, that were quite old, and my understanding is that they had no demurrage provisions.

A couple of documents were presented, and the bank discovered that the vessels upon which the cement was loaded appeared to have sailed several weeks before

the cement supplier and said that the documents were forged, and on the return date of the motion for summary judgment, the motion was withdrawn, and that's the last we've heard from that litigation.

MR. HOENIGER: Thank you.

MR. HOFFMAN: And it was only one case.

MR. HOENIGER: All right, thank you.

EXAMINATION BY

MR. SANDLER (Continued):

Q Do you know how many drafts the Morgan refused to honor against advised Letters of Credit, because the drafts were not certified?

MR. SIMMS: I am going to object on the form of the question. Until you can establish what you mean by certified drafts, I think it is improper to use the terminology.

MR. SANDLER: This is the terminology that was used in the cables of September 15 and September 19, 1975 from the Central Bank to the Morgan.

Q Are you familiar with those cables, Mr. Brown?

A Yes.

Q Are you familiar with the fact that those cables contained the word, "certified," in them?

A Yes.

Q Can you state what the word, "certified," as used in those cables, meant to you, as an officer of the bank?

A Yes, I think the way the original amendment or request by the Central Bank would have been made to us, is that we were not to make payment until the invoice was certified by the Central Bank, in the first instance, and then, later, they said the invoice had to be certified by the Nigerian Ports Authority, but I understand what you mean by, "certified," and, to my knowledge, every invoice that was presented to us, without certification, under the advised Letters of Credit, was rejected.

Q This is subsequent to September 15, 1975?

A Yes.

Q Do you know how many such invoices were presented to you?

A No.

Q Would you have any idea as to the dollar volume of such invoices?

A No.

Q Is there anyone at the bank who would have an idea as to the dollar volume?

A Yes, our Letter of Credit file would have a record of documents presented and rejected for those reasons.

MR. SANDLER: I call for the production of such

documents.

MR. HOFFMAN: I will take it under advisement.

MR. SIMMS: I object to the request, unless you can explain the relevance. That is not proper discovery.

MR. SANDLER: At the proper time I will explain the relevance.

MR. HOFFMAN: Would you read the request back?

(Record read.)

Q With respect to the 17 Letters of Credit which the Morgan either advised or confirmed, am I correct in assuming that each such letter of credit had a different beneficiary?

A That's a reasonable assumption.

Q In other words, no beneficiary had more than one Letter of Credit, to your knowledge?

A Not to my knowledge; that's right.

Q Do you know if any of the beneficiaries resided outside of the United States?

A Yes.

Q Which beneficiaries, to your knowledge, resided outside of the United States?

A I couldn't give that information right now.

Q Do you know approximately how many resided outside of the United States?

A I understand that of the original beneficiaries to the

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2046

17 Letters of Credit, approximately three or four. You know, a relatively small number of them resided out of the United States, which was indicated to me by their addresses.

Q Prior to the cables of September 15 and September 19, 1975, had you had any discussions, or had anyone at Morgan had any discussions, with representatives of the Nigerian Government, or the Central Bank of Nigeria, about the problem in the Port of Nigeria, namely, clogging of the Port?

A That was a general topic of conversation.

Q But did you discuss that with any Nigerians?

A Yes.

Q Did you, personally, have such discussions?

A Yes.

Q When did you first have such a discussion?

A As soon as it became a news item that the Port was congested, it was a common subject of conversation to discuss the situation in the Port; when they expected it would be cleared up; what steps might have been taken to clear it up.

Q Did you have discussions with any representatives of the Nigerian Government, or the Central Bank of Nigeria, about that topic?

A Yes.

Q With whom did you have such discussion?

A With -- I can't be specific as to the individuals, but I can recall discussing it with several people who visited us on these attachment courses, or the participants in the seminars that we run.

Q Did you discuss it with any officials --

A Excuse me, but not on an official basis.

Q Did you have any advice, prior to September 15, 1975, or, in other words, did any information come to you, that the Central Bank of Nigeria might amend the Letters of Credit, in order to effect some solution to the problem at the harbor, at the Port of Lagos?

In other words, the cable of September 15, 1975, caught you by surprise?

A Yes.

Q Did you have any conversations with others at the bank, regarding that cable?

MR. SIMMS: I thought we went through this on Mr. Hoeniger's direct.

Q Did you have such conversations with others, conversations about the cable, with others at the bank?

A Yes.

Q As far as you know, was it a surprise to all of them?

A Yes.

do you know whether the beneficiaries requested advisement through Morgan, or whether that was Central Bank's election?

A I don't know.

Q In the period that we have been discussing, which I believe you have told us was from some time in 1974 through the middle or late summer of 1975, the time when these cement Letters of Credit were issued, as I calculated it, from these figures, and using an average price of $60 per ton, Morgan advised or confirmed Letters of Credit for somewhere between 4.7 and 5 million tons of cement in that period.

Prior to the time that the Port congestion in Nigeria became a topic of common knowledge and conversation, did the total volume of the cement Letters of Credit, or the underlying cement tonnage, raise any questions, or form the subject of any discussions in Morgan, that you were aware of?

Do you understand my question, Mr. Brown?

A Yes, but I would like you to repeat it.

Q Okay, at some point, did you become aware that someone here was raising his eyebrows and saying, in effect, "Hey, aren't they ordering an awful lot of cement?"

A Yes.

Q That did happen?

Form 11-4-1135A

526a

M.G.T. CO. OF

CREDIT DEPARTMENT FILE COPY

EXHIBIT 1 TO DEPOSITION OF MORGAN GUARANTY - OCTOBER 24, 1975 TELEX FROM MORGAN GUARANTY TO CENTRAL BANK OF NIGERIA

886

CENTRAL BANK OF NIGERIA
LAGOS, NIGERIA

ATTN: MR. O. O. VINCENT
DEPUTY GOVERNOR

CREDIT FILE
Permanent X
Temporary
Other (Spec.)
Mid. East & Afri. Terr.

117 844

R. J. Bunche
10/24/75
Terr. #9

WE ARE BEING APPROACHED WITH INCREASING FREQUENCY BY BENEFICIARIES OF YOUR LETTERS OF CREDIT. WE BELIEVE THAT THERE IS AN INCREASING POSSIBILITY THAT LITIGATION AGAINST YOU MAY BE INSTITUTED IN NEW YORK. UNDER THE CIRCUMSTANCES, WE THINK IT ADVISABLE FOR YOU TO ENGAGE FIRST RATE LEGAL COUNSEL EXPERIENCED IN COMPLEX COMMERCIAL LITIGATION TO PROTECT YOUR INTERE REGARDS.

RALPH BUNCHE

CC: MESSRS. FRITZ LINK
STEVE HOFFMAN
DAVIS POLK & WARDWELL

J-x
P. E. & (Morgan) Ex A
I
4.18.78
J M

CREDIT DEPARTMENT FILE COPY

EXHIBIT 3 TO DEPOSITION OF MORGAN GUARANTY -
JULY 28, 1976 TELEX FROM MORGAN GUARANTY TO CENTRAL
BANK OF NIGERIA AND JULY 15, 1976 TELEX FROM
CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY

A. J. BROWN

CENTRAL BANK OF NIGERIA X 116/344
LAGOS, NIGERIA
ATTN: A. O. C. OTITI

JULY 28, 1976

TERRITORY 9

806

REFER YOUR TELEXES JULY 15 AND JULY 24 WE HAVE ARRANGED A TWO WEEK ATTACHMENT COURSE IN OUR COMMERCIAL CREDITS DEPARTMENT FOR MR. O. C. ATANDA BEGINNING SEPTEMBER 27, 1976, AND FOR MR. F. A. EGWAKHIDE BEGINNING JANUARY 17, 1977 STOP IF YOU WISH US TO ARRANGE HOTEL RESERVATION PLEASE TELEX ARRIVAL INFORMATION TO MY ATTENTION.

REGARDS,

A. J. BROWN

I-4

P. E. E (Morgan) Ex #3

41878

92027 BADER EG

620106A MGT UW

019824 75 JL 16 A 8:44

WUI NYK

COM044 NYA035 LAGOS 76/75 15 12233

MORGAN GUARNTY TRUST COMPANY NEWYORK

MR LANGER 25/37

MR 45 681

RE OUR PREVIOUS DISCUSSIONS ON STAFF TRAINING X IT WILL BE MY PLEASURE IF YOU WOULD PLEASE ARRANGE A TWO-WEEX ATACHMENT COURSE FOR OUR MR O. O. OTANDA FOR THE 2ND HALF OF SEPTEMBER 1976 ON LETTERS OF CREDIT AND PLEASE ALSO ASSIST

~~COL 45 681 2ND 1976~~

~~2/COM044 MORGAN 25~~

IN MAKING SIMILAR ARRANGEMENTS FOR MR F.A. EGWAXIHIDE FOR THE 2ND HALF OF JANUARY 1977 XX THANK YOU FOR YOUR CO-OPERATION XX

CBANK LAGOS

FROM: CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA 7/15/76 GMC

~~COL~~ 1977 XX XX ALSO 2ND

~~SENT 0831A GCLO~~

620106A MGT UW

WUI NYK

MORGAN GUARANTY TRUST COMPANY OF NEW YORK TELEGRAM MORGAN GUARANTY TRUST COMPANY OF NEW YORK

EXHIBIT 5 TO DEPOSITION OF MORGAN GUARANTY - JULY 14, 1976 LETTER FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos
PRIVATE MAIL BAG 12194 : CABLES : CENBANK :
TELEPHONE .....

14th July, 1976.

Dear Sir,

NON-CONFIRMATION OF DOCUMENTARY LETTERS OF CREDIT

Further to our letter of 9th June, 1975 (the photocopy of which is attached), I write to inform you that the Central Bank's policy on the above-mentioned subject remains unchanged. We are unwilling to have our Letters of Credit confirmed by any other bank including our foreign correspondent banks in national interests which include the following:-

(i) By virtue of its position, bouyant foreign reserve and standing, the ability of the Central Bank to honour its engagements under Letters of Credit is not in doubt. This is very well known to our correspondent banks who have our authority to pay at sight drafts drawn under our credits provided the documents presented are in order.

(ii) The need to conserve the country's foreign reserves demands that such avoidable charges as confirmation fees on letters of credit opened by a Central Bank of our own status should not be entertained.

J-4

P.E.E (Morgan) Exhibit 5
4.10.78

(iii) Since confirmation fees, if paid by either the government or the overseas suppliers will necessarily increase landing cost of imported goods, it is just right, as an anti-inflationary measure, not to indulge in the costly exercise of getting our documentary credits confirmed by our correspondent banks either at the expense of the importing Ministry or that of the suppliers which will be the beneficiaries to the credit.

In order to avoid delays and conflicts, you are advised to make it abundantly clear to your suppliers/agents when signing contracts with them that Letters of Credit opened by the Central Bank of Nigeria do not require the confirmation of any other bank for the reasons outlined above, and also ensure that no clause requiring such confirmation is entered into in any Contract Agreement. The Letters of Credit (Irrevocable) opened by the Central Bank will only be advised to the beneficiaries by our correspondent banks.

Please be assured that non-confirmation of Letters of Credit will not in any way cause a delay to your transactions with us particularly when the beneficiaries are the ultimate suppliers and are reputable, some of whom have had previous dealings with you and this point has been made clear to them during the negotiations for the relative contracts.

Yours faithfully,

A.O.G. Otiti,
CHIEF OF BANKING OPERATIONS.

(45)

EXHIBIT 8 TO DEPOSITION OF MORGAN GUARANTY -
OCTOBER 7, 1975 TELEX FROM MORGAN GUARANTY TO UNIVERSAL
GRAIN COMPANY

UNIVERSAL GRAIN COMPANY

112 HIGH HOLBORN

LONDON WC1 6JX ENGLAND

OAKES/ts

10/7/75

CONL. CREDITS

VIA TELEX #25730 (AAB-UNIGRAIN LONDON)

REFERENCE YOUR TELEX 10/1 AND AT THE REQUEST OF EAST EUROPE IMPORT WE INFORM YOU THEY ARE BENEFICIARY OF CREDIT MENTIONED IN YOUR TELEX WHICH WAS ADVISED BY US TO THEM WITHOUT ANY RESPONSIBILITY ON OUR PART UNDER REFERENCE A-12122

P.E.E (Morgan) Ex #8-II
4-18-78

532a

EXHIBIT 9 TO DEPOSITION OF MORGAN GUARANTY - OCTOBER 7, 1975 LETTER FROM MORGAN GUARANTY TO BERGBAU HANDEL AND SEPTEMBER-OCTOBER 1975 TELEXES BETWEEN MORGAN GUARANTY AND CENTRAL BANK OF NIGERIA

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

October 7, 1975

On all communications please refer to
OUR REFERENCE NUMBER
12122/A
A

Bergbau Handel
Berlin
G.D.R.

Dear Sirs:

We are informed by Central Bank of Nigeria, Tinubu Square Lagos, Nigeria

that they have amended their credit CBN/BO/75/201

established in favor of East Europe Import Export Inc., 440 Park Avenue, South, New York 10016 and which is transferred to yo as follows:

Documents for payment of demurrage must be certified for payment by the Central Bank of Nigeria, Lagos, Nigeria. All other conditions remain unchanged. In connection with the above your attention is invited to our letter to you dated September 30, 1975 quoting cables from the Central Bank of Nigeria, Lagos, Nigeria.

All others terms and conditions remain unchanged.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

ALFRED ACCESS

J-4
Ex. 9

533a 003035 75 OC -3 A 1:26

ETH011CTB057 LWA660 MA441

NY CO NGLS 033

GOS 33/30 2 2330

ROGANBANK

EWYORK

35 REFERENCE YOUR CABLE 22/9/75 AND OURS 15/9/75 AND

19/9/75 STOP WE ADVISE THAT ALL OUTSTANDING CREDITS BE

AMENDED AS PER BOTH OUR CABLES STOP

35576

~~35576 CENBANK LAGOS~~

FROM: CENTRAL BANK OF NIZERK NIGE

LAGOS, NIGERIA JW 10/2/75

COL 35 22/9/75-15/9/75 19/9/75 35576

X

CENTRAL BANK OF NIGERIA

LAGOS

NIGERIA
662-24-261

OAKES/ts

9/22/75

CONL. CRE

Reference

~~RESEND~~ YOUR CABLE 15TH AND 19TH REFERRING TO ALL CREDITS STOP WE HAVE NOTED YOUR INSTRUCTIONS AND ASSUME ALL OUTSTANDING CREDITS SHOULD BE AMENDED STOP PLEASE CABLE ADVISE US URGENTLY SHALL WE AMEND ALL OUTSTANDING CREDITS PER BOTH YOUR CABLES

23580

ZCZC 232194 RC022 PDD1453 RMX0655 UWS961 LWA365 MA3529

UBAZ CO NGLS 023

LAGOS 23 19 2046

MORGANBANK

NEWYORK

16 PLEASE STOP DEMURRAGE PAYMENTS AGAINST SPECIFIED DOCUMENTS UNLESS SUCH DOCUMENTS HAVE BEEN CERTIFIED FOR PAYMENT BY THE CENTRAL BANK OF NIGERIA STOP

OD 16659 CEDANK LAGOS

COL 16 16'59

FROM: CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA 9/19/75 OD

TRUE VERIFIED

LAGOS 44/15 2333

536a

MORGANBANK

NEWYORK

9 WE REFER TO ALL OUR CREDITS WITH YOU TODATE AND INFORM YOU THAT ALL COMMERCIAL INVOICES PRESENTED CONCERNING THE CREDITS MUST BE CERTIFIED INVOICES STOP NOTE THAT THEY SHOULD BE CERTIFIED BY THE BENEFICIARIES OR THEIR AGENTS STOP

09659 ~~BENAMK LAGOS~~

FROM: CENTRAL BANK OF NIGERIA

~~GOL-9-09659-RPT-09659~~ LAGOS, NIGERIA 9/15/75 VS

EXHIBIT 12 TO DEPOSITION OF MORGAN GUARANTY - NOVEMBER 14, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 WALL STREET, NEW YORK, N.Y. 10015

New York November 14, 1975

INTERNATIONAL BANKING DIVISION

IN REPLYING PLEASE REFER TO
Commercial Credits

East Europe Import Export Inc.
460 Park Avenue South
New York, New York 10016

Gentlemen:

Re: Central Bank of Nigeria, Lagos
L/C CBN/30/75/201
Our Ref: A-12122

Without engagement or responsibility on our part and at the request of Central Bank of Nigeria, Lagos we attach a copy of the text of a Press Conference October 29, 1975 given by the Commissioner for Transport which gives in detail Government decision on the current cement contracts.

Yours very truly,

Authorized Signature

J-4
Ex. 12

EXHIBIT 16 TO DEPOSITION OF MORGAN GUARANTY -
SEPTEMBER 29 AND 30, 1975 DEBIT TICKETS OF MORGAN GUARANTY

M.G.T. CO. OF N.Y.
FORM 46-4-4978 7/74 200M

DEBIT TICKET - SEE "X" BELOW

MONEY TRANSFER WIRE AND CABLE DEPARTMENT

TRANS. CODE	VALUE DATE
4090	SEP 30 1975

CHECKED | AUTHORIZED | DATE

POST

FOR FOLLOWING MESSAGE(S) SENT TO:

ADDRESSEE:
CENTRAL BANK OF NIGERIA
TINUBU SQUARE
LAGOS, NIGERIA

ATT: RO ANGEORO BILLS MANAGER

ACCOUNT NUMBER

CHARGE THIS MESSAGE TO:

- [ ] FOREIGN $ A/C OF ADDRESSEE
- [ ] EXPENSE A/C NO:
- [X] CAPITAL CREDITS DEPARTMENT

33

OACS/1c
ORIGINATOR (NAME)
9/29/75
DATE
REFER REPLY TO
CAPITAL CREDITS
DEPARTMENT

MEMO TITLE OF ACCOUNT CREDITED

ACCRUED TELEGRAPH AND CABLE CHARGES IN AMOUNT SHOWN ABOVE

REFER OURS 9/16, 22 AND 26 CREDIT CBN/BO/75/201 FAVOR EAST EUROPE
IMPORT EXPORT REFERENCE CLARIFICATION OF PORTS OF LOADING AND
WHETHER SHIPMENTS FROM SPANISH AND EAST GERMAN PORTS ACCEPTABLE
STOP REQUEST IMMEDIATELY REPLY OUR A 12122

J-4
Ex. 16

M.G.T. CO OF N.Y.
FORM 46-4-1975 7/74 200M

DEBIT TICKET – SEE "X" BELOW

MONEY TRANSFER WIRE AND CABLE DEPARTMENT

TRANS. CODE 4090 | SEP 29 1975

CHECKED: B | AUTHORIZED | DATE | POST

FOR FOLLOWING MESSAGE(S) SENT TO:

CENTRAL BANK OF NIGERIA
TINUBU SQUARE
ADDRESSEE LAGOS , NIGERIA

ACCOUNT NUMBER | ATTN: RO AJEMORON - BILLS MANAGER

CHARGE THIS MESSAGE TO:

[ ] FOREIGN $ A/C OF ADDRESSEE
[ ] EXPENSE A/C NO.
[X] COMMERCIAL CREDITS DEPARTMENT

12 85

D.OAKES/MO
ORIGINATOR (NAME)
SEPTEMBER 26,19
DATE
REFER REPLY TO
COMMERCIAL CRED
DEPARTMENT

MEMO TITLE OF ACCOUNT CREDITED

ACCRUED TELEGRAPH AND CABLE CHARGES IN AMOUNT SHOWN ABOVE.

REFERENCE YOUR CREDIT CBN/ZO/75/201 FAVOR EAST EUROPE IMPORT EXPORT AND OUR CABLES 9/9, 9/16, & 9/22 ASKING CLARIFICATION OF PORTS OF LOADING WITHOUT YOUR REPLY STOP YOUR CABLE 9/4/75 STATES SHIPMENT FROM ANY PORT EXCEPT THOSE PORTS NOT PERMITTED ON CONTRACT STOP BENEFICIARY STATES CONTRACT DOES NOT HAVE ANY RESTRICTIONS REGARDING SHIPPING PORTS STOP THEY INFORM US THEY HAVE SHIPS READY IN SPANISH AND EAST GERMANY PORTS STOP MAY WE ACCEPT SHIPMENTS FROM SPAIN AND EAST GERMANY PLEASE CABLE YOUR REPLY URGENTLY OUR A 12122

WE REPEAT CABLE REPLY URGENTLY

540a

205666 75 SP-5 A 6 22

EXHIBIT 18 TO DEPOSITION OF MORGAN GUARANTY -
AUGUST 26, 1975 AND SEPTEMBER 4, 1975 TELEXES
FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY

620106A MGT UW

WUI NY TELUS 154 0624 09/05K

ZCZC TDS576 LNL043 LWB827 MA2123

UWNY CO NGLS 103

LAGOS 103/100 4 2352

MORGANBANK

NEWYORK

TEST VERIFIED

98 OUR CREDIT NO CBN/BO/75/201 YOUR'S A-12122 STOP PLEASE
AMEND SBJECT CREDIT AS FOLLOWS:-

11. (A) [SHIPMENT TO BE MADE FROM ANY PORT EXCEPT THOSE PORTS
NOT PERMITTED ON CONTRACT].

12 (B) [DEMURRAGE IS PAYABLE AT ANY TIME UPON PRESENTATION TO
MORGAN GUARANTY OF THE FOLLOWING DOCUMENTS TIME SHEETS AND

COLL CBN/BO/75/201 A-12122

J-4
Ex. 18

MA2123 MOR PAGE2/48

STATEMENT OF FACTS DULY CERTIFIED AS CORRECT BY OMIT

THE SHIPS MASTER AND SHIP AGENT #3 THIRD CHARTER PARTY

BILL OF LADING ACCEPTABLE

#4 (C) INSURANCE TO COVER F P A RISK ONLY

ADVISE BENEFICIARIES URGENTLY STOP ALL OTHER TERMS AND

CONDITIONS OF THE CREDIT REMAIN UNCHANGED STOP

98722 CEBANK LAGOS

From Central Bank of Nigeria

COLL 98722

Lagos, Nigeria 9/4/75

705

~~In Between #3 & 4 Add P.~~

~~(As the above Point #3 is not clear to us we are Connecting our Principals And No Drawings will be [illegible] Pending Receipt of [illegible]~~

NNNNO

620106A MGT UW

WUI NY TELUS 154 0626 09/05K

OF NEW YORK

232194A NGT UR

RCAUY ADO POSH77

ZCZC 232194 RC040 PDE0344 RNG4320 UVS330 L'JA494 HAZ2386

URAZ CO NGLS 208

LAGOS 208/199 26 0432

MORGANBANK

NEWYORK

AS OUR CREDIT CBN/BO/75/201 FAVOUR EAST EUROPE IMPORT EXPORT NEW YORK AND YOURS A-12122 OF AUGUST 15 AND 20 STOP WE HAVE CONTACTED OUR PRINCIPAL FOR THEIR DECISION ON REQUIRED AMENDMENTS TO CREDIT STOP WE SHALL REVERT AHEN ADVISED STOP PLEASE INCOROORATE/THE FOLLOWING DE[illegible] TO AMEND/TO ADDITIONAL)

~~COLL 86 CBN/30/75/201 A 12122 15 20~~

MA2333 MORGANBANK PAGE2/50

Demurrage Clause :

INSTRUCTIONS OF CREDIT CBN/30/75/201 WHICH READS:- "UNLOADING OF EACH CONSIGNMENT OF CEMENT SHALL BE COMPLETED WITHIN TEN DAYS THE CASE OF ANY GREATER OR LESSER QUANTITY STOP AT THE ELAPSE OF SUCH SUCO PERIOD DEMURRAGE NOT EXCEEDING US DLRS4,100 PER

COLL CBN/30/75/201 10,000 DLRS4,100

MA2388 MORGANBANK PAGE3/50

DIEN SHALL BE FOR THE ACCOUNT OF THE BUYER PROVIDED THAT THE SELLER SHALL HAVE GIEN GIVEN DUE NOTICE TO THE BUYER OF THE ARRIVAL AT LAGOS/APAPA OF EACH EUACH SUCH CONSIGNMENT AND SHALL BE PAID IN ACCORDANCE WITH NORMAL INTERNATIONAL PRACTICE UNDER THE TERMS OF THE LETTER OF CREDIT. STOP SUCH

COLL NIL

TELEGRAM

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

TELEGRAM

MA2388 MORGANBANK PAGE4/49

PERIOD SHALL BE RECKONED FROM ~~WK~~THE TIME OF COMMENCEMENT OF THE NEXT WORKING PERIOD AFTER PRESENTATION OF NOTICE OF READINESS TO DISCHARGE BY THE MASTER OF THE VESSEL WHETHER BERTHED OR OTHERWISE'' STOP ALL OTHER TERMS AND CONDITIONS OF CREDIT REMAIN UNCHANGED STOP ADVISE BENEFICIARY STOP

86366 CEBANK LAGOS

Typist Add 2 Pt.

The Term "In Accordance with Normal International Practice" Mentioned in the foregoing is not clear To Us And we have Contacted our Principals in this Regard. we Therefore Reserve the Right To Amend

COLL CONDITIONS OF CREDIT 86366

This Advice when clarification is Received. In the Mentime No DRAWINGS HEREUNDER will Be Honored By us.

Note To Beneficiary: our Principals inform us they have Contacted ojeners with Regard To our Cables of Aug 15, 18 & 20th And will further Contact us their decision on Required Amendments.

Central Bank of Nigeria
Lagos 8/26/75

NNNN

810

075826AUG0

232194A MGT URO

EXHIBIT 20 TO DEPOSITION OF MORGAN GUARANTY -
NOVEMBER 12, 1975 LETTER FROM MORGAN GUARANTY TO EAST EUROPE
AND NOVEMBER 10, 1975 LETTER FROM MORGAN GUARANTY
TO CENTRAL BANK OF NIGERIA

November 12, 1975

2-2/1

East-Europe Import Export Inc.
440 Park Avenue South
New York, New York 10016

Attention: Mr. Robert Ross

Dear Sirs:.

OUR REFERENCE A 12122

We acknowledge your letter of November 6, 1975 with regard to rejection of amendments under the captioned reference.

We have forwarded your comments to the Central Bank of Nigeria

Yours very truly,

Alfred Kobel
Assistant Treasurer

/ph

J-4
Ex. 20

November 10, 1975

2-5/1

Central Bank of Nigeria
Tinubu Square
Lagos, Nigeria

Dear Sirs:

YOUR CREDIT NO. CBN/20/75/201
OUR REFERENCE A12122

We enclose a copy of a letter from the East-Europe Import Export Inc., enclosing copies of our advice to them along with what appears to be a cable from you to them.

In view of their rejection of amendments and their demand for payment please provide us with your early instructions.

Yours very truly,

Alfred Koebel
Assistant Treasurer

Enclosure

/ph

EXHIBIT 21 TO DEPOSITION OF MORGAN GUARANTY - AUGUST 28, 1975 AND SEPTEMBER 8, 1975 LETTERS FROM MORGAN GUARANTY TO EAST EUROPE (ALSO REPRODUCED HEREIN AT PAGES 168a - 169a)

2-75-4M

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

FORM 11-4-946E

2

August 28, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A-12122

East Europe Import Export Inc.
440 Park Avenue South
New York, N. Y. 10016

Dear Sirs:

We are informed by Central Bank of Nigeria, Lagos, Nigeria thaty they have amended their Credit No. CBN/BO/75/201 established in your favor as follows:

1. "The following is incorporated under additional instructions:
Demurrage Clause: "Unloading of each consignment of cement shall be completed within ten days the case of any greater or lesser quantity stop At the elapse of such period demurrage not exceeding US Dlrs4,100 per diem shall be for the account of the buyer provided that the seller shall have given due notice to the buyer of the arrival at Lagos/Apapa of each such consignment and shall be paid in accordance with normal international practice under the terms of the letter of credit. Such period shall be reckoned from the time of commencement of the next working period after presentation of notice of readiness to discharge by the master of the vessel whether berthed or otherwise"

The term "In accordance with Normal International Practice" mentioned in the foregoing is not clear to us and we have contacted our principals in this regard. We therefore reserve the right to amend this advice when clarification is received. In the meantime NO DRAWINGS HEREUNDER WILL BE HONORED BY US, covering demurrage.

Note to Beneficiary: Our principals inform us they have contacted openers with regard to our cables of August 15, 18 and 20th and will further contact us their decision on required amendments.

All other terms and conditions remain unchanged.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

J-4

P. E. E. (Morgan) Ex. #21-ID
4.18.78

548a

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK

INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

September 8, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A 12122

East Europe Import Export Inc.
440 Park Avenue South
New York,N.Y.10016

IF DOCUMENTS PRESENTED DO NOT CONFORM TO THE CREDIT TERMS AND WE ARE REQUESTED TO FORWARD THEM FOR APPROVAL OR CABLE FOR INSTRUCTIONS OUR EXPENSES AND FEES WILL BE FOR YOUR ACCOUNT AND WILL BE DEDUCTED FROM ANY REMITTANCE MADE UNDER THIS CREDIT.

Dear Sirs:

We are informed by Central Bank of Nigeria, Lagos, Nigeria

that they have amended their Credit No. CBN/BO/75/201

established in your favor

as follows:

1. Shipment to be made from any port except those ports not permitted on contract.
2. Demurrage is payable at any time upon presentation to Morgan Guaranty of the following documents, Time Sheets and statement of facts duly certified as correct by the ships master and ship agent.
3. Charter Party bill of lading acceptable.
4. Insurance to cover F.P.A. Risk only.

We cabled to our principals for the names of ports which are not permitted by contract and in the meantime no drawings will be honored hereunder.

All others terms and conditions remain unchanged.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

OFFICE COPY—NOT NEGOTIABLE

EXHIBIT 24 TO DEPOSITION OF MORGAN GUARANTY - OCTOBER 22 AND 24, 1975 TELEXES FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY

FMOG024CTC710 LWA921 MA1403

UINY CO NGLS 169

LAGOS 169/167 23 2343

MORGANBANK

NEWYORK

59 REFERENCE OUR CABLES OF 19/9/75 AND 29/9/75 ON DEMURRAGE PAYMENTS AND FOLLOWING THE DECISION REACHED AT THE RECENT MEETING IN LAGOS BETWEEN THE RENEGOTIATING AND RESCHEDULING OF DELIVERY PANEL SET UP BY THE FEDERAL GOVERNMENT AND THE VARIOUS CEMENT SUPPLIERS UNDER OUR LETTERS OF CREDIT THE UNDERLISTED

COL 59 19/9/75 29/9/75 RENEGOTIATING RESCHEDULING UNDERLISTED

MA1403 MORGANBANK P2/50

DOCUMENTS ARE REQUIRED ALONG WITH DEMURRAGE CLAIMS AND SHOULD BE FORWARDED DIRECT TO THE PORTS MANAGER NIGERIAN PORTS AUTHORITY - APAPA, NIGERIA:

1. SUPPLIERS INVOICE
2. NOTICE OF READINESS
3. CONTRACT AGREEMENT
4. CHARTER PARTY AGREEMENT
5. STATEMENT OF FACTS

J-4
Ex. 24

COL ~~1-2-3-4-5-6-7-8-~~ ARRIVED-SHIPS~~** X~~

MA1403-MORGANBANK-P3/44

THIS PROCEDURE IS INTENDED TO FACILITATE THE CERTIFICATION OF THE DOCUMENTS BY NIGERIAN PORTS AUTHORITY BEFORE DEMURRAGE CLAIMS ARE PAID ~~X~~ STOP PLEASE ADVISE ALL BENEFICIARIES OF OUR LETTERS OF CREDIT WHICH COVER DEMURRAGE TERMS STOP MR IJEWERE WHO WILL BE CALLING ON YOU NEXT

COL ~~FACILITATE THE CERTIFICATION~~ AUTHORITY ~~X-BENEFICIARIES~~ ~~IJEWERE~~

~~P4/17~~

WEEK WILL COLLECT DOCUMENTS IN RESPECT OF DEMURAGE YOU HAVE PAID SO FAR X 59743

CEBANK LAGOS

FROM: CENTRAL BANK OF NIGERIA

LAGOS NIGERIA 10/24/75 10/23/75 [illegible]

COL ~~59743~~

Doml Credits

NNNNBOOHO34CTBO26 LWA770 MA0074

UINY CO NGLS 176

LAGOS 176 21 2359

MORGAN GUARANTY TRUST CO

NEWYORK

54 WE REFER TO OUR CABLE OF 29TH SEPTEMBER REGARDING REGISTRATION AND

TWO MONTHS CLEARANCE FOR SHIPS SAILING TO NIGERIA X THIS REGULATION WILL NOW APPLY ONLY TO SHIPS CARRYING CEMENT X NO PAYMENT SHOULD BE MADE UNDER OUR LETTERS OF CREDIT FOR ANY SHIP

COL 54/29TH

MA0074 MORGAN PG2/50

CARRYING CEMENT UNLESS ON OUR SPECIFIC AUTHORISATION X WE ARE FULLY AWARE OF OUR OBLIGATIONS AND WE HAVE DISCUSSED WITH ALL THE BENEFICIARIES OF LETTERS OF CREDIT FOR CEMENT THEAMENDMENTS WE PROPOSE TO THE LETTERS OF CREDIT X IN VIEW OF OUR PORTS SITUATION WE CANNOT ACCEPT ANY DEFIANCE

STOP SHIPMENT OF CEMENT X PAYMENT SHOULD THEREFORE NOT BE MADE FOR CEMENT SHIPS X WE SHALL ADVISE YOU THE AMOUNT OF DEMURRAGE DUE ON EACH SHIP AFTER NECESSARY DOCUMENTS HAVE BEEN CHECKED AND CERTIFIED X PLEASE ENSURE THAT PAYMENT FOR

552a

COL 28TH

MA0074 MORGAN PG4/26

LETTERS OF CREDIT IN RESPECT OF ALL OTHER CARGO BESIDES CEMENT ARE PAID IN ACCORDANCE WITH THE TERMS OF THE LETTERS OF CREDIT X

54658 CENBANK

FROM: CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA 10/21/75 10/22/75 GMC

COL 54658

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

553a

EAST EUROPE IMPORT EXPORT INC.

440 PARK AVENUE SOUTH
NEW YORK N. Y. 10016
(212) 686-7590

EXHIBIT 26 TO DEPOSITION OF
MORGAN GUARANTY - NOVEMBER 6, 1975
LETTER FROM EAST EUROPE TO MORGAN
GUARANTY

November 6, 1975

#400714

Morgan Guaranty Trust Company
of New York
International Banking Division
23 Wall Street
New York, N.Y. 10015

12122

Gentlemen:

In reference to the Letter of Credit issued by the Central Bank of Nigeria, Lagos, Nigeria, their Letter of Credit No. CBN/BO/75/201, this is to confirm that we are refusing to accept the amendments issued, referring to your letter of October 1, 1975, your telex Reference Lagos 83/82 27 2356 and your telex of October 1, 1975 of which enclosed you will find photostatic copies.

We are demanding payment of our Invoice No. 08241 of October 10, 1975 in the amount of $624,750.00.

Very truly yours,

EAST EUROPE IMPORT EXPORT INC.

Robert Ross

RR:CM

ROBERT ROSS

Encs.

cc: S. Pisar
J. Dickler

P.E.E. (Morgan) Ex #26
4.18.78

AFFIDAVIT OF DR. UCHE AKUBA, SWORN TO JUNE 28, 1978, IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	:	77 Civ. 2809 (L.W.P.)
CHENAX MAJESTY, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	:	77 Civ. 3045 (L.W.P.)
	:	A F F I D A V I T
DECOR BY NIKKEI INTERNATIONAL, INC., Plaintiff, - against - FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	:	77 Civ. 2348 (L.W.P.)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DR. UCHE AKUBA, being duly sworn, deposes and says:

1. I am the president of Chenax Majesty, Inc. and I make this affidavit in rebuttal to statements made by defendants' counsel in defendants' supplemental memorandum in support of their motion to dismiss and in opposition to plaintiffs' motion for summary judgment.

2. With respect to Chenax, defendants and their counsel make misstatements of fact unsupported by the record. On page 29 of the memorandum, defendants state:

> "Each plaintiff contends that in disregard of its request to have its letter of credit advised through its own bank, Central Bank established the letters of credit to be payable through Morgan Guaranty in New York."

On pages 32-33 of the memorandum, defendants go on to say:

> "...with respect to the cement related letters of credit, the place for payment was designated by Central Bank at the request of or as an accommodation to the individual cement suppliers."

In the case of Chenax, no request or accommodation could be claimed. As defendants explain on page 32 of the supplemental memorandum, the use of Morgan Guaranty was purely for defendants' own convenience. In fact it had a very detrimental effect on us. Our German bank was to open two letters of credit, one in favor of our cement supplier, and the other in favor of the shipowner. The beneficiaries of these letters of credit would then submit their documents to our German bank in order to draw against the letter of credit in their favor. Our German bank would then have to pay those beneficiaries, then replace those beneficiaries' invoices with our own and then submit those documents to Morgan Guaranty in New York so that we could draw against the Central Bank letter of credit in our favor. Our best estimate was that the documents from Germany would reach Morgan Guaranty through the mails 10 days after the date on the bill of lading, and would take another 14 days before reaching Central Bank of Nigeria in Lagos. That would make a total of no less than 24 days after the date on the bill of lading. Article 41 of the Uniform Customs and Practice for Documentary Credits, which governs the letters of credit in question provides as follows:

> "Not withstanding the requirement of Article 37 that every credit must stipulate an expiry date for presentation of documents, credits must also stipulate a specified period of time after the date of issuance of the Bills of

> Lading or other shipping documents during which presentation of documents for payment, acceptance or negotiation must be made. If no such period of time is stipulated in the credit, banks will refuse documents presented to them later than 21 days after the date of issuance of the Bills of Lading or other shipping documents."

My concern, expressed in the letter of April 29, 1974 to Central Bank of Nigeria, was that the documents might not reach the Central Bank of Nigeria within, in the instant case, 21 days after the date of issuance of the bills of lading. In order to avoid the possibility that Central Bank of Nigeria would refuse payment against them for being "stale", which is the expression used if they are not presented in time, after our German bank had already paid our suppliers, I requested that Morgan Guaranty be permitted to accept "stale" documents on behalf of Central Bank of Nigeria. However, that amendment was not granted, and consequently, we would have had to hand carry the documents from the German bank to Morgan Guaranty in order to save the time that could have been lost if the documents were sent, as is customary, through the mails. And, since twenty-four shipments were contemplated, and since such documents are very valuable, such procedure would have been a severe burden on us. Consequently, anyone with any familiarity with letters of credit would have known that payment at or through Morgan Guaranty was in no way an accommodation to us.

3. Secondly, with respect to the language quoted above from page 29 of defendants' memorandum, Chenax did not request that its letter of credit be "advised" through its bank. Our contract with the Nigerian Ministry of Defence clearly states that the letter of credit was to be confirmed through our German bank. There is a very significant difference between advising a letter of credit and the confirmation of same. The Central Bank of Nigeria's failure to have the letter of credit confirmed by our bank was defendants' first breach of the contract. In fact

when I saw that the letter of credit issued to Chenax was not confirmed, and after having accepted the fact that Morgan was to be used in the transaction, on May 8, 1974, I cabled Central Bank requesting confirmation by Morgan (Exhibit "A"). In view of what has transpired, Central Bank's May 27, 1975 letter to me (Exhibit "B") asserting that there is no need for confirmation since "we are irrevocably committed to honor our engagements under this credit", is almost amusing.

4. I would now like to address defendants' contention that plaintiff Chenax could not perform its obligations under the cement contract. Transcommerce Warehandels GmbH & Co. refused to accept the transfer of the letter of credit, because, contrary to the terms of the agreement between Chenax and defendant Nigeria, the letter of credit was not confirmed. Prior to the refusal of acceptance of the letter of credit, Chenax had made its own shipping contract (Exhibit "C"). Despite the withdrawal of Transcommerce, the cement which Transcommerce had originally obtained for Chenax, was available for Chenax's use. (See Exhibit "D", letter of August 14, 1975 from our shipping broker, M.G. Pamies Shipbrokers, S.A. confirming the availability of the cement). Actually, the withdrawal of Transcommerce from the transaction would have greatly increased Chenax's profits, which would no longer have to be shared with it.

5. With respect to defendants' contention that the plaintiff Chenax could not perform, the Court should also take note that the letter of credit at issue provided for payment of $60 per metric ton of cement. Since cement could be acquired for shipment c.i.f. Lagos, Nigeria, at a price of a little more than $50 per metric ton, the $60 price left the cement suppliers a large margin for negotiation. There was absolutely no problem to obtain cement for the amount of money that the letters of credit enabled

Chenax to pay. Consequently, until defendants revoked the letter of credit, Chenax was always ready, willing and able to perform its obligations.

6. As noted in my affidavit of January 5, 1978, before the negotiating committee would speak with any of the cement suppliers, they required the cement suppliers to sign a discharge agreement, equivalent to a general release. They, thereafter, offered to renegotiate the cement contracts at $50 per ton, rather than the $60 price, which the original agreements provided for. I have been to Nigeria many times since the fall of 1975, and can assure the Court that Nigeria has continually been importing cement into Lagos, not at the $60 per ton price, but at a much cheaper one. Therefore, to the extent that defendants deny any commercial motivation for their actions which precipitated this litigation, their denials are belied by the facts.

WHEREFORE, I respectfully request that defendants' motion to dismiss be denied and that Chenax's motion for summary judgment be granted.

DR. UCHE AKUBA

Sworn to before me this
28th day of June, 1978

LEWIS S. SANDLER
Notary Public, State of New York
No. 31-4653111
Qualified in New York County
Term expires March 30, 1979

LEWIS S. SANDLER
Notary Public, State of New York
No. 31-4653111
Qualified in New York County

MGMNYBT HSB 559a

PH:077495126002 05/08/75

ICS IPMMTZZ CSP

1 2122299476 MGM TDMT NEW YORK NY 05-08 0742A EST

ZIP 10003

western union Mailgram

EXHIBIT A TO AKUBA AFFIDAVIT - MAY 8, 1975 CABLE FROM AKUBA TO CENTRAL BANK OF NIGERIA

CHENAX MAJESTY INC DR U AKUBA
1 UNION SQ WEST
NEW YORK NY 10003

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

INTL LT TDMT NEW YORK NY 97/95 05-08 0742A EST
INT LT CENTRAL BANK OF NIGERIA ATTN CHIEF OF BANKING OPERATIONS
LAGOS (NIGERIA)
REFERENCE YOUR LC CBN/BO/75/79 ADVISED BY MORGAN GUARANTY OF NEW YORK IN OUR FAVOR WE URGENTLY REQUEST CONFIRMATION BY MORGAN BECAUSE OF THE NATURE OF OUR COMMITMENTS TO OUR MANUFACTURER AND SHIPS CHARTER PARTY STOP WE HEREBY UNDERTAKE TO PAY COSTS OF CONFIRMATION STOP OUR CONTRACT WITH MINDEF STIPULATES CONFIRMED LC WHICH WE ASSUMED WOULD BE CONFIRMATION BY YOUR OVERSEAS CORRESPONDENT BANK STOP THREE OF OUR SHIPS ARE STANDING BY TO LOAD PENDING YOUR PROMPT ACTION
DOCTOR UCHE AKUBA AUTHORIZED SIGNATURE CHENAX MAJESTY INC

COL CBN/BO/75/79
07:43 EST

MGMNYBT HSB

EXHIBIT B TO AKUBA AFFIDAVIT -
MAY 27, 1975 LETTER FROM CENTRAL BANK OF NIGERIA TO CHENAX

103

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos

PRIVATE MAIL BAG 12184: CABLES: CENBANK:

TELEPHONE

Our Ref: CBN/BO/75/79 27th May, 1975.

The Director,
Chenax Majesty,
1 Union Square West,
New York 10003,
U.S.A.

Dear Sir,

Letter of credit for U.S.$14,400,000.00
in favour of Chenax Majesty of 1, Union Square,
West, New York 10003, U.S.A.

I write to inform you that no confirmation is required for credits opened by us directly with our correspondent Banks, of which Morgan Guaranty Trust Company, New York is one.

We are irrevocably committed to honour our engagements under this credit. Moreover, our correspondent Morgan Guaranty Trust Company has our authority to pay the beneficiary the full value of this letter of credit through your bank on presentation of relevant shipping documents to them in New York; provided the documents are in order (Photocopy of our letter of authority dated 25th April, 1975 to our correspondent bank attached). As a Government Bank and a prime Bank, no supplier should have any cause to doubt our ability to pay our bills promptly. The question of our correspondent banks confirming our letters of credit should, therefore not arise.

We are sending a copy of this letter to our correspondent Bank, Morgan Guaranty Trust Co. New York, U.S.A. and you may wish to contact them for any further information you may require about us.

Yours faithfully,

Bills Manager

EXHIBIT C TO AKUBA AFFIDAVIT -
CHENAX SHIPPING CONTRACT

RECOMMENDED

Issued to come into force for fixtures on and after 15th September 1922.

The Documentary Council of The Baltic and White Sea Conference.

(The Baltic and International Maritime Conference)

UNIFORM GENERAL CHARTER

AS REVISED 1922

(only to be used for trades for which no approved form is in force)

Madrid, 1st August 19 75.

Owners. 1. IT IS THIS DAY MUTUALLY AGREED between Messrs. PEARL MARIN SHIPPING - Stockholm (Sweden)

Owners of the ~~steamer or motor-vessel~~ to be nominated by Owners

of ..... tons ~~gross~~ net Register and carrying about ..... tons of deadweight cargo.

Position. now trading

and expected ready to load under this Charter about (See add. clauses)

Charterers. and Messrs. CHENAX MAJESTY INC.

of ..... as Charterers.

Where to load. That the said vessel shall proceed to ARGUINEGUIN (Las Palmas ..... or so near thereto as she may safely get and lie always afloat, and there load a full and complete cargo ~~(if shipment of deck cargo agreed same to be at Charterers' risk)~~ of cement in bags with max. 24 feet draft. Owners option load vessels on more draft "naabsa" (not always afloat but safely aground)

~~(Charterers to provide all mats and/or wood for dunnage and any expenses required,~~ the Owners allowing the use of any dunnage wood on board if required) which the Charterers bind themselves to ship, and being so loaded the vessel shall proceed to 1 (ONE) Port of NIGERIA to be declared by Charterers'

Destination. on sailing or before arrival and such port to have a permissible draft in accordance with vessels' sailing draft

as ordered on signing Bills of Lading or so near thereto as the ~~may~~ safely get and lie always afloat and there deliver the cargo on being paid freight on ~~delivered~~ intake quantity as follows U.S.$ 16,60 (SIXTEEN AMERICAN DOLLARS

Rate of freight. AND SIXTY CENT) per metric ton FIOS

Owners' Responsibility Clause. 2. Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (~~unless stowed by~~ master been responsible for proper stowage servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

And the Owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever.

Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused.

Charter Clause. 3. The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property.

4. ~~Should it be impossible, owing to any cause, to discharge at the port of destination, the Charterers to have the option of ordering the vessel to a safe and accessible port within the range of the ports mentioned in clause 1 hereof, and there discharge the cargo on payment of freight as per this Charter and all extra expenses incurred thereby.~~

Payment of Freight. ~~5.~~ Freight to be paid at mean rate of exchange ruling on day or days of payment, the amounts of the cargo being bound to pay freight on account during delivery, if required by Captain or Owners.

Cash for vessel's ordinary disbursements at port of loading to be advanced by Charterers if required at highest current rate of exchange, subject to two per cent ~~commission, insurance, etc.~~

Liners. ~~6.~~ ~~Vessel not to be compelled to sign Bills of Lading for any port or place unless the same be stated in the Bill of Lading.~~

~~Should vessel be ordered to more than one discharging berth, Charterers to pay for any extra expenses incurred thereby.~~

~~Vessel not to be detained for the purpose of surveying the state of cargo, unless specially agreed to, nor answerable for any loss of time thereby caused.~~

~~Vessel not to be required to enter any ice-bound port, or any place where she may be exposed to the risk of being frozen in or damaged, or to proceed to any place or wharf which is not safely accessible or where she always lies aground.~~

~~Vessel not to be obliged to force ice on any part of the voyage, or to follow any ice-breaker.~~

~~If, on account of ice, vessel cannot get to or remain at the place of discharge, Charterers to have the option of keeping vessel waiting until it is considered safe for her to proceed to the place of discharge, or ordering her to a safe port where she can discharge without risk of being frozen in.~~

~~Any delay arising from ice to be for Charterers' account and vessel to be compensated for detention thereby caused.~~

~~If vessel is prevented from reaching or entering or getting out of any place of discharge by reason of ice, she may proceed to the nearest place where she can get out and there discharge her cargo at Charterers' risk and expense.~~

~~Should vessel be frozen in during the voyage, the act to be considered as an act of the perils of the sea.~~

~~Should vessel be frozen in at port of loading, Charterers to have the option of cancelling this Charter, or of keeping vessel waiting until the ice is reported to be open for vessels of her class.~~

~~Should vessel be frozen in at port of loading, Owners to have the option of cancelling this Charter, or of keeping vessel waiting for such time as they may think proper.~~

~~Should vessel be frozen in at port of loading, Owners to have the option of sending vessel to another port to load.~~

~~Should vessel be frozen in at port of loading, Owners to have the option of sending vessel to another port to load.~~

~~Should vessel be frozen in at port of loading, Owners to have the option of sending vessel to another port to load.~~

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~~Should vessel be frozen in at port of loading, Owners to have the option of sending vessel to another port to load.~~

CHENAX MAJESTY INC.

562a

as Charterers.

Whereas it is that the said vessel shall proceed to ARGUINEGUIN (Las Palmas ... or so near thereto as she may safely get and be always afloat, and there load a full and complete cargo ~~[illegible]~~ of cement in bags with max. 24 feet draft, Owners option load vessels on more draft "naabsa" (not always afloat but safely aground)

~~(Charterers to provide all mats and/or wood for dunnage and any expenses required,~~ the Owners allowing the use of any dunnage wood on board if required) which the Charterers bind themselves to ship, and being so loaded the vessel shall proceed to 1 (ONE) Port of NIGERIA to be declared by Charterers' on sailing or before arrival and such port to have a permissible draft in accordance with vessels' sailing draft

as ordered on signing Bills of Lading or so near thereto as she may safely get and lie always afloat and there deliver the cargo on being paid freight—on ~~delivered~~ intaken quantity—as follows U.S.$ 16,60 (SIXTEEN AMERICAN DOLLARS AND SIXTY CENT) per metric ton FIOS

2. Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (~~[illegible]~~ Master been responsible ~~[illegible]~~ proper stowage servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

And the Owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever.

Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused.

3. The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property.

4. ~~The freight to be paid in cash without discount on delivery of the cargo~~ at mean rate of exchange ruling on day or days of payment, ~~the receivers of the~~ cargo being bound to pay freight on account during delivery, if required by Captain or Owners.

Cash for vessel's ordinary disbursements at port of loading to be advanced by Charterers if required at highest current rate of exchange, subject to two per cent ~~[illegible]~~

~~[illegible]~~ to take the goods with her own tackle and to load the full cargo in ... running working days. Charterers to procure and pay the necessary men on shore or on board the lighters to do the work there, vessel only heaving the cargo on board.

If the loading takes place by elevator cargo to be put free in vessel's holds, Owners only paying trimming expenses.

Any pieces and/or packages of cargo over two tons weight, shall be loaded, ~~stowed and discharged by Charterers at their risk and expense.~~

Time to commence at 2 p.m. if notice of readiness to load is given before noon and at 8 a.m. next working day if notice given during office hours after noon.

The notice to be given to the Shippers, Messrs. CEMENTOS ESPECIALES, S.A., Las Palmas — CH. MAJESTY INC.

Time lost in waiting for berth to count as loading time.

6. Cargo to be ~~received by Merchants at their risk and expense alongside the vessel not beyond the reach of her tackle and to be discharged in~~ ~~running working days.~~ Time to commence at 2 p.m. if notice of readiness to discharge is given before noon, and at 8 a.m. next working day if notice given during office hours after noon.

Time lost in waiting for berth to count as discharging time.

7. ~~Ten running days on~~ demurrage at the rate of U.S.$ 0,40 per mton loaded per day or pro rata for any part of a day, ~~payable day by day~~, to be allowed ~~Merchants~~ ~~altogether~~ at ports of loading and discharging.

8. Owners shall have a lien on the cargo for freight, dead-freight, demurrage ~~and damages for detention.~~ Charterers shall remain responsible for dead-freight and demurrage ~~(including damages for detention)~~, incurred at port of loading. Charterers shall also remain responsible for freight and demurrage ~~(including damages for detention)~~ incurred at port of discharge, but ~~only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.~~

9. The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this Charterparty, but should the freight by Bills of Lading amount to less than the total chartered freight the difference to be paid to the Captain in cash on signing Bills of Lading.

Strike, War and Ice-Clauses. Cancelling Clause.

10. *Strike-Clause, War-Clause and Ice-Clause as below.*

11. Should the vessel not be ready to load (whether in berth or not) on or before the ..... Charterers have the option of cancelling this contract. ~~arrival at port of loading. Should the vessel be delayed on account of average or otherwise, Charterers to be informed as soon as possible, and if the vessel is delayed for more than 10 days after the day she is stated to be expected ready to load, Charterers have the option of cancelling this contract, unless a cancelling date has been agreed upon.~~

General Average.

12. General average ~~payable according to York-Antwerp Rules 1924~~ in London/Geneva in Owners' option ~~but settled according to English practice. Each vessel to contribute even if not entered for the voyage. Average to be settled through regular average adjusters at the Owners' option (see clause 7).~~

Indemnity.

13. Indemnity for non-performance of this Charterparty, proved damages, not exceeding estimated amount of freight.

Agency.

14. In every case the Owner shall appoint his own Broker or Agent both at the port of loading and the port of discharge.

Brokerage.

15. 4,5 % brokerage on the freight/dead freight and demurrage is due, 2% less address; 2,5% to M.G.PAMIES, SHIP-BROKERS; SA

In case of non-execution at least 1/3 of the brokerage on the estimated amount of freight and dead-freight to be paid by the Owners to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be mutually agreed.

GENERAL STRIKE CLAUSE

Neither Charterers nor Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this contract.

If there is a strike or lock-out affecting the loading of the cargo, or any part of it, when vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, Captain or Owners may ask Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, Owners shall have the option of cancelling this contract. If part cargo has already been loaded, Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

If there is a strike or lock-out affecting the discharge of the cargo on or after vessel's arrival at or off port of discharge and same has not been settled within 48 hours, Receivers shall have the option of keeping vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this Charterparty and of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

GENERAL WAR CLAUSE

If the nation under whose flag the vessel sails should be engaged in war and the safe navigation of the vessel should thereby be endangered either party to have the option of cancelling this contract, and if so cancelled, cargo already shipped shall be discharged either at the port of loading or, if the vessel has commenced the voyage, at the nearest safe place at the risk and expense of the Charterers or Cargo-Owners.

If owing to outbreak of hostilities the goods loaded or to be loaded under this contract or part of them become contraband of war whether absolute or conditional or liable to confiscation or detention according to international law or the proclamation of any of the belligerent powers each party to have the option of cancelling this contract as far as such goods are concerned, and contraband goods already loaded to be then discharged either at the port of loading, or if the voyage has already commenced, at the nearest safe place at the expense of the Cargo-Owners. Owners to have the right to fill up with other goods instead of the contraband.

Should any port where the vessel has to load under this Charter be blockaded the contract to be null and void with regard to the goods to be shipped at such port.

No Bills of Lading to be signed for any blockaded port, and if the port of destination be declared blockaded after Bills of Lading have been signed, Owners shall discharge the cargo either at the port of loading, against payment of the expenses of discharge, if the ship has not sailed thence, or, if sailed at any safe port on the way as ordered by Shippers or if no order is given at the nearest safe place against payment of full freight.

GENERAL ICE CLAUSE

PORT OF LOADING

a) In the event of the loading port being inaccessible by reason of ice when vessel is ready to proceed from her last port or at any time during the voyage or on vessel's arrival or in case frost sets in after vessel's arrival, the Captain for fear of being frozen in is at liberty to leave without cargo, and this Charter shall be null and void.

b) If during loading the Captain, for fear of vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for Owners' benefit for any port or ports including port of discharge. Any part cargo thus loaded under this Charter to be forwarded to destination at vessel's expense but against payment of freight, provided that no extra expenses be thereby caused to the Receivers, freight being paid on quantity delivered (in proportion if lumpsum), all other conditions as per Charter.

c) In case of more than one loading port, and if one or more of the ports are closed by ice, the Captain or Owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account as under section b or to declare the Charter null and void unless Charterers agree to load full cargo at the open port.

d) This Ice Clause not to apply in the Spring.

PORT OF DISCHARGE

GENERAL STRIKE CLAUSE

Neither Charterers nor Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this contract.

If there is a strike or lock-out affecting the loading of the cargo, or any part of it, when vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, Captain or Owners may ask Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, Owners shall have the option of cancelling this contract. If part cargo has already been loaded, Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

If there is a strike or lock-out affecting the discharge of the cargo on or after vessel's arrival at or off port of discharge and same has not been settled within 48 hours, Receivers shall have the option of keeping vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this Charterparty and of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

GENERAL WAR CLAUSE

If the nation under whose flag the vessel sails should be engaged in war and the safe navigation of the vessel should thereby be endangered either party to have the option of cancelling this contract, and if so cancelled, cargo already shipped shall be discharged either at the port of loading or, if the vessel has commenced the voyage, at the nearest safe place at the risk and expense of the Charterers or Cargo-Owners.

If owing to outbreak of hostilities the goods loaded or to be loaded under this contract or part of them become contraband of war whether absolute or conditional or liable to confiscation or detention according to international law or the proclamation of any of the belligerent powers each party to have the option of cancelling this contract as far as such goods are concerned, and contraband goods already loaded to be then discharged either at the port of loading, or if the voyage has already commenced, at the nearest safe place at the expense of the Cargo-Owners. Owners to have the right to fill up with other goods instead of the contraband.

Should any port where the vessel has to load under this Charter be blockaded the contract to be null and void with regard to the goods to be shipped at such port.

No Bills of Lading to be signed for any blockaded port, and if the port of destination be declared blockaded after Bills of Lading have been signed, Owners shall discharge the cargo either at the port of loading, against payment of the expenses of discharge, if the ship has not sailed thence, or, if sailed at any safe port on the way as ordered by Shippers or if no order is given at the nearest safe place against payment of full freight.

GENERAL ICE CLAUSE

PORT OF LOADING

a) In the event of the loading port being inaccessible by reason of ice when vessel is ready to proceed from her last port or at any time during the voyage or on vessel's arrival or in case frost sets in after vessel's arrival, the Captain for fear of being frozen in is at liberty to leave without cargo, and this Charter shall be null and void.

b) If during loading the Captain, for fear of vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for Owners' benefit for any port or ports including port of discharge. Any part cargo thus loaded under this Charter to be forwarded to destination at vessel's expense but against payment of freight, provided that no extra expenses be thereby caused to the Receivers, freight being paid on quantity delivered (in proportion if lumpsum), all other conditions as per Charter.

c) In case of more than one loading port, and if one or more of the ports are closed by ice, the Captain or Owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account as under section b or to declare the Charter null and void unless Charterers agree to load full cargo at the open port.

d) This Ice Clause not to apply in the Spring.

PORT OF DISCHARGE

a) Should ice (except in the Spring) prevent vessel from reaching port of discharge Receivers shall have the option of keeping vessel waiting until the re-opening of navigation and paying demurrage, or of ordering the vessel to a safe and immediately accessible port where she can safely discharge without risk of detention by ice. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the impossibility of reaching port of destination.

b) If during discharging the Captain for fear of vessel being frozen in deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to the nearest accessible port where she can safely discharge.

c) On delivery of the cargo at such port, all conditions of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

FOR THE OWNERS

FOR THE CHARTERERS

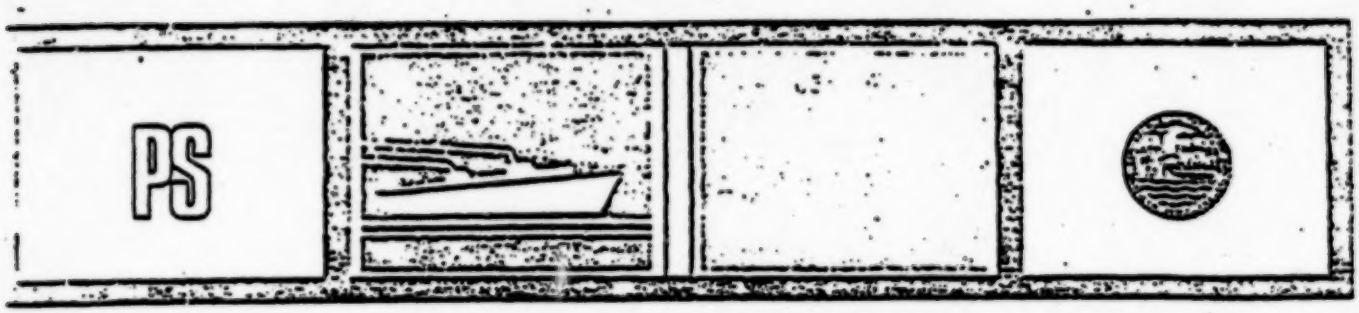
AS AGENTS ONLY

M. G. [illegible], SHIPBROKERS, S.A.
Jorge Juan [illegible], S.A.
MADRID-[illegible] - SPAIN

Printed and sold by
[illegible] Knudsen Ltd.
[illegible] Copenhagen.

EXHIBIT D TO AKUBA AFFIDAVIT -
AUGUST 14, 1975 LETTER FROM M.G. PAMIES,
SHIPBROKERS, S.A. TO CHENAX

PS



M.G. PAMIES, SHIPBROKERS, S.A.

Messrs Chenax Majesty Inc.
80 Wall Street, Suite 614,
New York, N.Y. 10005.
U. S. A.

Madrid, 14th August, 75.

Gentlemen,
Ref Cement Spain to Nigeria - M/V "OURANOPOLIS 2"

As we have advised you by phone and now confirm by this letter, the above mentioned vessel had to be discharged after completion of loading due to the fact that the vessel sprang a leak and had to be sent for repairs. Under these conditions, the Owners sold the vessel and it is now trading under the name "HAMLET".

The Owners nominated the M/V "GIANT CARLOEMME" but due to the new port regulations in Nigeria as per international information (BIMCO) Owners have now decided to postpone sending any more vessels for loading or to Nigeria till these difficulties are clarified, yet they are ready to load if we can get a letter from Nigeria stating that their vessels will be discharged as it is impossible two months in advance as per new regulation.

The cement factory, Cementos Especiales, has the cement waiting at the quays.

We as brokers authorise you to use this letter here and anywhere it may be needed as proof that vessels were ready and loading and that business will continue soonest situation is clear.

We are looking for to see you and discuss together which attitude to take regarding this and other business.

Yours faithfully,
M.G.PAMIES, SHIPBROKERS, s.a.

M.G. PAMIES, SHIPBROKERS, S.A.
Jorge Juan, 118, 2.º A.
MADRID-28 - SPAIN

CHARTERING, SALE & PURCHASE AND CONSTRUCTION OF SHIPS

Cables: CELTIBROK - MADRID

ADDENDA TO PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS

ADDENDA TO PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT

EAST EUROPE IMPORT-EXPORT INC.

567a

440 PARK AVENUE SOUTH
NEW YORK, N. Y. 10016
686-7590

October 10, 1975.

Messrs.
Morgan Guaranty Trust Co.
Of New York
Commercial Credits Department
15 Broad Street
New York, New York 10015

Re.: L/C Nº A-12122/B
CBN/BO/75/201

Gentlemen:

Enclosed you will find the following documents related to the above-mentioned L/C:-

1.—Our commercial invoice Nº08241 dated 10/ 10/ 75 in the amount of US $ 624,750. covering the CIF Lagos/Apapa value of 10,500 m.t. of cement shipped to the Ministry of Defence, Lagos.

2.—Non-negotiable copy of B/L Nº 1 dated 10 / 10 /75 , marked freight prepaid on board M/v TORENIA evidencing shipment of 10,500 m.t. of cement and 6,300 empty spare bags to the Ministry of Defence, Lagos Nigeria.

3.—Non-negotiable copy of Insurance Certificate issued by Plus Ultra Insurance Co., Madrid, Spain Nº 101 under Policy Nº 4.401.246 covering insured value of US $ 687,723.75

4.—Draft for US $ 624,750.00 drawn on you, as required by L/C A-12122/B

Very truly yours,

EAST EUROPE IMPORT-EXPORT INC.

Enclosures

Shipper

INTRAFINSA
AS AGENTS FOR
EAST EUROPE IMPORT-EXPORT. INC.

BILL OF LADING

B/L No. 1

To be used with Charter-Parties. Code Name "Conlinebill". Edition 1974. Issued for use in International Trade by The Baltic and International Maritime Conference.

Reference No. 1001

Consignee

TO ORDER

Notify address

NOTIFY:
THE PERMANENT SECRETARY,
MINISTRY OF DEFENCE
LAGOS, NIGERIA -

ORIGINAL

Vessel: M/V TORENIA

Port of loading: ANY PORT (BILBAO)

Port of discharge: LAGOS/APAPA

Number of original B/Ls: 2/2

Shipper's description of goods	Gross weight
210,000 50 KGS-G/N BAGS	"10,500 METRIC TONS OF PORTLAND CEMENT CONFORMING TO B.S.S. 12/1958 - PACKING IN 6 PLY KRAFT PAPER BAGS EACH CONTAINING 50 KGS. G/N. 6,300 - 6 PLY EMPTY SPARE BAGS"

FREIGHT PREPAID

ON BOARD VESSEL
TORENIA
FAMAGUSTA
18 OCT. 1975

(of which being responsible for loss or damage howsoever arising)

on deck at Shipper's risks the Carrier not

Freight payable as per CHARTER-PARTY dated _____

FREIGHT ADVANCE

Received on account of freight:

Time used for loading _____ days _____ hours.

SHIPPED [illegible]

All the terms, conditions, liberties, and exceptions of the Charter-Party are herein incorporated.

This Bill of Lading shall have effect subject to the provisions of any legislation relating to the carriage of goods by sea which incorporates the rules relating to Bills of Lading contained in the International Convention, dated Brussels 25th August, 1924 and which is compulsorily applicable to the contract of carriage herein contained. Such legislation shall be deemed to be incorporated herein, but nothing herein contained shall be deemed a surrender by the Carrier of any of the rights or immunities or an increase of any of the responsibilities or liabilities under such legislation. If any term of this Bill of Lading is repugnant to any extent to any legislation by this clause incorporated, such term shall be void to that extent but no further. Nothing in this Bill of Lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from, or limitation of, liability.

Weight, measure, quality, quantity, condition, contents and value unknown.

IN WITNESS whereof the Master or Agent of the said Vessel has signed the number of Bills of Lading indicated above all of this tenor and date, any one of which being accomplished the others stand to void.

Place and date of issue
ANY PORT (BILBAO) 10/10/75

Signed by

VESSEL
TORENIA
FAMAGUSTA

EAST EUROPE IMPORT - EXPORT INC.

440 PARK AVENUE SOUTH 569a
NEW YORK, N. Y. 10016
686-7590

INVOICE NO. 08241

INVOICE DATE October 10,1975

SHIPPED TO LAGOS/APAPA, NIGERIA

SOLD TO
THE PERMANENT SECRETARY
MINISTRY OF DEFENCE
LAGOS, NIGERIA

ER NO.	YOUR ORDER NO.	SALESMAN	TERMS	SHIPPED VIA	PPD OR COLL
122/B			SIGHT L/C	M/V TORENIA	

NTITY	DESCRIPTION	PRICE	AMOUNT
,000 S G/N GS	10,500 METRIC TONS PORTLAND CEMENT AS PURCHASED BY MINISTRY OF DEFENCE, LAGOS AS PER CONTRACT AGREEMENT SIGNED ON JUANUARY 28, 1975", CONFORMING TO BSS 12/1958 PACKING IN 6 PLY KRAFT PAPER BAGS EACH CONTAINING 50 KGS. G/N	US $ 59.50 PER METRIC TON	624,750.=
	6,300— 6 PLY EMPTY SPARE BAGS SUPPLIED FREE OF COST.		
	TOTAL C. I. F. LAGOS/APAPA PORT	US	$ 624,750.=

NOTE: THIS PARTIAL SHIPMENT AS PER CONTRACT AGREEMENT BETWEEN THE PERMANENT SECRETARY, MINISTRY OF DEFENCE AND EAST EUROPE IMPORT-EXPORT INC., 440 PARK AVENUE SOUTH NEW YORK, N. Y. 10016, DATED JUANUARY 28TH, 1975.

WE CERTIFY TRUE AND CORRECT

PLUS ULTRA
COMPAÑIA ANONIMA DE SEGUROS GENERALES
Inscrita en el Registro Mercantil de Madrid, hoja n.º 5830, folio 20, tomo 174
RESERVAS INTEGRAS EN ESPAÑA

Capital suscrito: Pesetas 120.000.000
Completamente desembolsado

Domicilio Social: MADRID
PLAZA DE LAS CORTES, 8
Telegramas: PLUSULTRA MADRID

CERTIFICADO DE SEGURO

Pól. Flot. Núm. 4.401.246 Cupón Núm. 101 Fecha 10 de OCTUBRE DE 1975

«PLUS ULTRA», de acuerdo con las Condiciones Generales y Particulares mecanoescritas de la Póliza marginada, asegura, por cuenta propia o de quien corresponda, a:

INTERNATIONAL TRADE AND FINANCE ESPAROLA, S. A.
AVENIDA DE BRASIL, 5
MADRID - 20, SPAIN.

las siguientes mercancías:

210,000 50 KGS-G/N BAGS	"10,500 METRIC TONS OF PORTLAND CEMENT CONFORMING TO B.S.S. 12/1958 - PACKING IN 6 PLY KRAFT PAPER BAGS EACH CONTAINING 50 KGS. G/N.
	6,300 - 6 PLY EMPTY SPARE BAGS"

contra los riesgos de: F.P.A. AS PER INSTITUTE CARGO CLAUSES.

en su viaje actual de: ANY PORT (BILBAO) a LAGOS/APAPA

transportadas por: M/V TORENIA mediante la Prima de %

Capital asegurado: US$538,125.00
Plus 27.8% 149,598.75
Total Insured US$687,723.75

LIQUIDACION

	PRIMA NETA	DCHOS. Y ACCESORIOS	TOTAL
Importe del recibo			

En caso de avería, el receptor de la mercancía deberá dirigirse para la inspección y estimación del daño al Comisario de Averías:

antes de ser levantada del muelle o introducida en el Depósito Comercial. Sin este indispensable requisito la Compañía no aceptará ninguna reclamación.

10 de OCTUBRE de 197 5

EL ASEGURADO

INTERNATIONAL TRADE & FINANCE ESPAÑOLA, S. A.
-INTRAFINSA-

PLUS ULTRA

571a

Sight Draft No. 1

DRAWN UNDER IRREVOCABLE CREDIT N° CBN/BO/75/201 OF THE CENTRAL BANK OF NIGERIA, TINUBU SQUARE, LAGOS NIGERIA.

No. 1001 Due _____

U.S.$ [redacted] OCTOBER 10th 1975

At _____ days after

sight pay to EAST EUROPE IMPORT-EXPORT, INC.

or order the sum of [redacted]

[redacted]

Value received

To MORGAN GUARANTY TRUST CO. OF NEW YORK
COMMERCIAL CREDITS DEPARTMENT
15 BROAD STREET, NEW YORK, N.Y. 10015

a Ross

East Europe Import Export
440 PARK AVENUE SO.
NEW YORK, N.Y. 10016

NNNN

022303 75 10 22 A 11: 03

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2321948 MGT URM0
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12122

Jurick
and
under

ZCZC 232194 RC016 PDE1489 RME6603 UXS309 LWA084 TMA9280
URAZ CO NGLS 079
LAGOS 79/78 21 2110

MORGANBANK
NEWYORK

85 YOUR CABLE DATED 14/10/75 SENT ON BEHALF OF EAST EUROPE
IMPORT EXPORT REFERS STOP AUTHORITY TO DEBIT OUR ACCOUNT CANNOT BE
GIVEN EXCEPT SUPPLIERS COMPLY IN FULL WITH FED GOVERNMENT
INSTRUCTIONS OF
19TH AND 29TH SEPTEMBER 1974 WHICH STIPULATE THAT PAYMENT OF
DEMURRAGE
CLAIMS CANNOT BE EFFECTED

AN GUARANTY TRUST COMPANY OF NEW YORK

TELEGRAM

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

TELEGRAM

~~HA9280 MORGANBANK PAGE 2/28~~

NLESS CERTIFIED FOR PAYMENT BY NIGERIAN PORTS
UTHORITY AND THAT SHIPS CARRYING CEMENT SHOULD OBTAIN
LEARANCE ALSO FROM NIGERIA PORTS AUTHORITY BEFORE SETTING
AIL X

~~85739 CEBANK LAGOS~~

FROM: CENTRAL BANK OF NIGERIA

~~L X 85739~~

LAGOS, NIGERIA 11/21/75 VS

GUARANTY TRUST COMPANY
OF NEW YORK

TELEGRAMS

OF NE

4-75-3M

FORM 11-4-6

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK

INTERNATIONAL BANKING DIVISION

23 WALL STREET, NEW YORK, N. Y. 10015

October 7, 1975

On all communications please refer to
OUR REFERENCE NUMBER
12122/A
A

Bergbau Handel
Berlin
G.D.R.

Dear Sirs:

We are informed by Central Bank of Nigeria, Tinubu Square Lagos, Nigeria

that they have amended their credit CBN/BO/75/201

established in favor of East Europe Import Export Inc., 440 Park Avenue, South, New York 10016 and which is transferred to as follows:

Documents for payment of demurrage must be certified for payment by the Central Bank of Nigeria, Lagos, Nigeria. All other conditions remain unchanged. In connection with the above your attention is invited to our letter to you dated September 30, 1975 quoting cables from the Central Bank of Nigeria, Lagos, Nigeria.

All others terms and conditions remain unchanged.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

ALFRED KOEBEL

Einschreiben

DEUTSCHE AUSSENHANDELSBANK
AKTIENGESELLSCHAFT

By Airmail

Morgan Guaranty Trust
Company of New York
23 Wall Street
New York N.Y. 10015

Vorsitzender des Aufsichtsrates:
Dr. Grete Witthowski
Vorstand: Dr. Helmut Dietrich, Präsident;
Heinz Lange, Lothar Neubert, Werner Polze,
Siegfried Schuster, Feodor Ziesche

DDR - 108 BERLIN,

Ihr Zeichen	Ihre Nachricht vom	Unser Zeichen	Kontrol	Unter den Linden 34/39
11F	10.9.75	166/722018/fc		14/10/75

Sehr geehrte Herren !

Betr.: Ihre Reference A 12122/A US$ 810.000.00

Auf Veranlassung unseres Begünstigten, der Firma Bergbau-Handel, 108 Berlin, senden wir Ihnen beiliegendes Akkreditiv zurück, da dieses Akkreditiv nicht den Bedingungen des Vertrages zwischen der Firma Bergbau-Handel und der Firma East Europe Import Export Inc., New York, entspricht.

Die Firma Bergbau-Handel hat sich bereits fernschriftlich mit ihrem Vertragspartner in Verbindung gesetzt-

Wir betrachten die Angelegenheit für uns als erledigt und zeichnen

Hochachtungsvoll
Deutsche Außenhandelsbank
Aktiengesellschaft

Anlage

Telefon: 22 03 21 Telegramm: DABANK Telex allgemein: 011 21 11 011 20 04 Devisenhandel Telex: 011 21 14/15/16 Telefon: 22 08 21 App.: 224, 267, 427, 450, 458 Code: Petersens International 3rd und 4th Ed. Postscheckkonto: Berlin Nr. 250 88

Betriebs-Nr. 00 327 016

15376

TRANSLATION DEPARTMENT

From Deutsche Aussenhandelsbank AG, Berlin, East Germany Date Mailed 10/14/75

To MGT NY Date Translated 10/21/75

Your Ref.: 11F, your letter dated: 9/10/75, our Ref.: 166/722018/fe

Re: Your reference A 12122/A US$810,000.-

At the request of our beneficiary, Bergbau-Handel, 108 Berlin, we are returning to you herewith the enclosed letter of credit, because this letter of credit does not comply with the conditions of the agreement between Bergbau-Handel and East Europe Import Export Inc., New York.

Bergbau-Handel already contacted their contracting party in this connection by telex.

We consider this matter closed as far as we are concerned.

Enclosures

Translated By hh Checked By

(44)

620106A MGT UW

UNIGRAIN LDN 25730.

OUR REF:-2012. DATED:-1ST OCTOBER 1975.

FOR MORGAN GUARANTEE TRUST -NEWYORK-

ATTENTION MR JURICEK-

WE ARE-
UNIVERSAL GRAIN COMPANY -
112 HIGH HOLBORN ,LONDON WC1 6JX
PHONE :01. 242.7482.
TELEX:-25730.(AAB-UNIGRAIN LDN).

ARE SERIOUSLY NEGOTIATING A SALE OF 50,000TONS CEMENT THROUGH OUR ASSOCIATES IN TURKEY TO EAST EUROPE IMPORT EXPORT,OF NEWYORK,WHO ADVISE US THEY HAVE A LETTER OF CREDIT NO.CBN/BO/75/201 IN THEIR FAVOUR FOR USD.14,280,000/= FROM YOU AGAINST WHICH THEY CAN TRANSFER PART TO COVER THEIR PURCHASE FROM US OF 50,000 TONS TURKISH CEMENT (VALUE USD 1,350,000.00).

SINCE MESSERS EAST EUROPE IMPORT EXPTRT ARE NOT PERSONALLY KNOWN TO US AND FOR THIS REASON HAVE ASKED US TO APPROACH YOU, WE WOULD APPRECIATE IF YOU WOULD BE GOOD ENOUGH TO CONFIRM THE EXISTENCE OF THE ABOVE-MENTIONED CREDIT AND THAT IT CAN BE USED FOR THEIR PURCHASE FROM US/OUR PRINCIPALS M/S EASTERN TRADE CORPORATION-

THANKING YOU IN ADVANCE.

REGARDS
P. BRAHAM.

620106A MGT UW

UNIGRAIN LDN 25730

MORGAN GUARANTY TRUST COMPANY OF NEW YORK
TELEGRAM
MORGAN GUARANTY TRUST COMPANY OF NEW YORK
TELEGRAM
MORGAN

(BENEFICIARY'S INSTRUCTIONS FOR PARTLY TRANSFERRING A CREDIT AND DESIGNATION OF PRIVILEGE OF INVOICE SUBSTITUTION)

Date Aug 28, 1975

Morgan Guaranty Trust Company of New York,
International Banking Division,
Commercial Credits Department,
23 Wall Street,
New York, N. Y. 10015

The undersigned acknowledges receipt of your advice No. 11067 of a credit issued in our favor, the terms of which are satisfactory. We now return your original advice of the said credit with all amendments and extensions to this date, if any, and hereby irrevocably transfer the said credit to the extent of $ 1,020,000.00 To: Goodson's and Company/ Productos Fontanet, Palma De Mallorca c/o Banco De Bilbao Palma De Mallorca SPAIN

upon the same terms and conditions as the said credit, including all amendments, extensions or increases thereof to date, if any, with the exception of the following:

1. QUANTITY OF MERCHANDISE AND UNIT PRICE: 20,000 M/T at US$51.00 Per M/T
(only if stated in credit and not in excess thereof.)
2. EXPIRATION DATE: Jan 15, 1976 LATEST SHIPMENT DATE: Sept 30, 1975

Please advise the transferee the full terms of this transfer with any exceptions noted above.

With regard to substitution of drafts and documents, we shall conform to Paragraph A Below ☐ Paragraph B Below ☐

(Beneficiary must designate A or B)

A. We will not substitute our drafts and invoices for those of the transferee. The transferee's draft and documents are to be applied to the terms and conditions of the credit and any amendments, in lieu of our draft and documents.

B. Upon payment by you of the drafts of the transferee under this transfer or at any time on your demand, we will deliver to you our drafts and commercial invoices drawn in accordance with the terms of the original credit; such drafts and invoices to be attached by you to the shipping documents in substitution of those presented by the transferee. You are then requested to deliver to us the invoices of the transferee, together with your check for the amount by which our draft exceeds the amount of the draft of the transferee. In the event we fail, at your demand, to deliver to you, the new drafts and invoices as specified above, you are authorized to forward the invoices and other documents accompanying the drafts of the transferee to your principals without any responsibility on your part or on the part of your principals for payment of the difference between the amount of the transferee's draft and the amount authorized to be paid under the original letter of credit.

You are to advise us of any amendments hereafter proposed to be made to the credit and we agree to promptly acknowledge receipt of such advice and state whether the proposed amendments are accepted by us or refused by us. Should we notify you of our acceptance of the amendments, it is understood that such acceptance is contingent upon the simultaneous acceptance of the amendment by the transferee.

We enclose our check for $ ——— representing your transfer commission at ——— of 1%, minimum $ ——— and in addition thereto, we agree to pay you, on demand, any expenses incurred by you or your correspondents in connection with the transfer of the said credit.

Re) 1) Please send the above to Banco De Bilbao Palma De Mallorca

2) Transfer fee is on the account of the Original buyer, Ministry of Defence of Nigeria.

Yours truly,

[signature] / PRESID
NIKKEI INTERNATIONAL INC
110 E 23st NYC 10010

THE ABOVE SIGNATURE WITH TITLE AS STATED CONFORMS WITH THAT ON FILE WITH US AND IS AUTHORIZED FOR THE EXECUTION OF THIS INSTRUMENT.

[illegible]
Signature (Bank) [illegible]
NEW YORK, N.Y. 10010

[signature]

8-66-1000 FORM 11-4-1100A

GOODSON'S AND COMPANY

MARCA REGISTRADA

PRODUCTOS FONTANET, S. A.

EXPORTADOR N.º [illegible]

Calle Honduras, 4 - 8 - Teléfonos 46 44 50 - 46 44 54 - 46 44 58 - Telegramas: BAFONTANET - Telex: [illegible]

PALMA DE MALLORCA

12th SEPTEMBER, 1.975

Impreso Asimaca

ASIMA

NAS EN PELANITX:
neral Mola, 118
léfono 58 01 84

PERMANENT SECRETARY
MINISTRY OF DEFENCE
LAGOS
NIGERIA.

N.º FACTURA

1/75

N.º BULTOS	MERCANCIA	VALOR UNITARIO	VALOR TOTAL
170.000 bags.	PORTLAND CEMENT, TYPE BSS/12/1958 PACKING IN 6 PLY KRAFT BAGS EACH CONTAINING 50 KGS. G/N ALSO 3 PLY EMPTY SPARE BAGS. - TOTAL AMOUNT 8.500 M.TONS. (TOTAL VALUE OF FOUR HUNDRED AND FIFTY NINE THOUSAND U.S. DOLLARS).	54,-$US. per tons.	459.000,- $US

MORGAN GUARANTY TRUST COMPANY

23 WALL STREET, NEW YORK, N. Y. 10015

DATE 9/29/75

WE ENCLOSE OUR CHECK [X]
WE CREDIT YOUR ACCOUNT [ ]
WE ENCLOSE ACCEPTED DRAFT [ ]

FOR $ 459,000.00 IN SETTLEMENT OF DRAFT UNDER

OUR REFERENCE NO. 11067

YOUR/THEIR REFERENCE NO.

FOR ACCOUNT OF AND CC:

MAIL TO →

GOODSON'S AND COMPANY
PRODUCTOS R FONTANENT, S A
PALMA DE MALLORCA

YOURS VERY TRULY,

DUPLICATE ADVICE

COMMERCIAL CREDITS DEPARTMENT

MORGAN GUARANTY TRUST COMPANY

23 WALL STREET, NEW YORK, N.Y. 10015

DATE 9/29/75

WE ENCLOSE OUR CHECK [X]
WE CREDIT YOUR ACCOUNT [ ]
WE ENCLOSE ACCEPTED DRAFT [ ]

FOR $ 50,988.00 IN SETTLEMENT OF DRAFT UNDER

DRAFT AMT 51,000.00 LESS CABLE CHGS 12.00 NET $50,988.00

OUR REFERENCE NO. 11067

REFERENCE NO.

FOR ACCOUNT OF:

MAIL TO →

NIKKEI INTERNATIONAL INC
110 EAST 23RD STREET
NEW YORK, NY 10010

YOURS VERY TRULY,

ADVICE

COMMERCIAL CREDITS DEPARTMENT

TRUST COMPANY 23 WALL STREET, NEW YORK, N. Y. 10015

9/29/75

.000.00

...gan Guaranty Trust Company OF NEW YORK

CC 26070

1-23
210

MAIL TO

ADV

581a

TRANSFORMERS OIL

New York, 9/29/75

LC/ 11067

Pay

MORGAN GUARANTY TRUST CO. $459,000 AND 00 CT

To the order of GOODSON'S AND COMPANY PRODUCTOS FONTANENT

COMMERCIAL CREDIT DEPARTMENT

T. J. Schneider

AUTHORIZED SIGNATURE

⑈500 260 70⑈ ⑆0 210⑉00 23⑆ 043 34 356⑈

582a

$ 510,000.00 9/26 19 75

SIGHT DAYS AFTER PAY TO THE ORDER OF

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

MORGAN GUARANTY TRUST COMPANY OF NEW YORK $510,000 AND 00 CTS DOLLARS

CHARGE TO ACCOUNT OF

TO MORGAN GUARANTY TRUST COMPANY

N.Y., N.Y.

NIKKEI INT'L INC.

No.

017 4-63-1M

R-74-17M

TRIPLICATE

FORM 11-4-521

-1 DATE 9/29/75

ICE OF
YMENT
TO

CENTRAL BANK OF NIGERIA
TINUBU SQUARE
LAGOS, NIGERIA
662 24 261

A/C NO.

WE HAVE PAID A DRAFT FOR YOUR ACCOUNT UNDER YOUR CREDIT NO. CBN/BO/75/169

[redacted]

OUR NO. A 11067 AND HAVE
DEBITED YOUR _____ ACCOUNT

FOR $ 510,000.00

YOUR DOLLAR ACCOUNT HAS BEEN DEBITED FOR OUR

PAYMENT COMMISSION $ 510.00 1/10 %

AIR MAIL CHARGES $ 2.00

TOTAL $ 510,512.00

BP

THE ORIGINAL DOCUMENTS PRESENTED TO US ARE ATTACHED HERETO: THE REMAINING DOCUMENTS IF ANY WILL BE FORWARDED BY NEXT MAIL.
THESE DOCUMENTS WERE FORWARDED AS INDICATED BELOW:

ORIGINALS BY MAIL

DUPLICATES BY MAIL

☐ CLEAN DRAFT

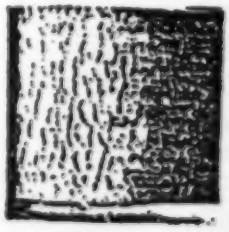
IS CONFIRMS OUR CABLE OB TODAY

WE DO NOT ASSUME ANY RESPONSIBILITY FOR THE CORRECTNESS, VALIDITY, OR GENUINENESS OF THE DOCUMENTS RECEIVED UNDER CREDITS OPENED WITH US, NOR FOR DESCRIPTION, QUALITY, QUANTITY OR DELIVERY OF THE GOODS PURPORTING TO BE REPRESENTED THEREBY.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

INTERNATIONAL BANKING DIVISION
COMMERCIAL CREDITS DEPARTMENT

23 WALL STREET, NEW YORK, N. Y. 10015



COPY

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
584a
23 WALL STREET, NEW YORK, N.Y. 10015

BANCO DE BILBAO
PALMA DE MALLORCA
SPAIN
ATTN: MR. MORAGUES

J. HASBROUCK

10/2/75

XX COML CREDITS

COML CREDITS

FURTHER TO OURCABLE OF SEPT. 19TH CONCERNING OUR REF A 11067/B FAVOR GOODS & COMPANY PRODUCTOS FONTANET PALMA DE MALLORCA AMENDED AS FOLLOWS LATEST SHIPMENT DATE EXTENDED TO OCTOBER 12, 1975 EXPIRATION DATE I.E. JANUARY-15,19 REMAINS UNCHANGED NOTIFY BENEFICIARY

48-4-813
8-74-100M

(BENEFICIARY'S INSTRUCTIONS FOR TRANSFERRING AN ENTIRE CREDIT WITHOUT INVOICE SUBSTITUTION)

Date May 16,1975

Morgan Guaranty Trust Company of New York,
International Banking Division,
Commercial Credits Department,
23 Wall Street,
New York, N. Y. 10015

Dear Sirs:

The undersigned acknowledges receipt of your advice No A-08740 of a credit issued in our favor, the terms of which are satisfactory. We now return the original advice of the said credit with all amendments and extensions, if any, and hereby irrevocably transfer the said credit and all amendments and extensions thereof, if any, to:

TRANSCOMMERCE WARENHANDELS GmbH & CO.D2000 HAMBURG 1 KATTREDELSBRUCK,

WEST GERMANY VIA SCHRODER,MUENCHMEYE,HENGST & CO.,BANK

You are to inform the transferee of this transfer and such transferee shall have sole rights as beneficiary under the credit, including any amendments, extensions or increases thereof without notice to or further assent from us.

We enclose our check for $ ═══ representing your transfer commission at ═══ of 1%, minimum $ ═══ and in addition thereto we agree to pay you, on demand, any expenses incurred by you or your correspondents in connection with the transfer of the said credit.

Yours very truly,

PRESIDENT

The above signature with title as stated conforms with that on file with us authorized for execution of this instrument.

BARCLAYS BANK
OF NEW YORK
200 PARK AVE. N.Y. N.Y. 10022

(Bank)

8-08-1000

FORM 11-4-1100

EINSCHREIBEN

SCHRÖDER, MÜNCHMEYER, HENGST & CO.
BANK

2000 Hamburg 1, Postfach 10 59 03

August 22, 1975
stö/Za

Morgan Guaranty Trust
Company of New York

New York 552.540

F.S./Telegramm-/Telefon-Bestätigung
Telex/Cable/Telephone-confirmation
Confirmation de télégramme/télex/téléphone

Ref.: 5/35127

Wir bestätigen unser Telegramm/Fernschreiben/Telefongespräch mit nachstehendem Wortlaut:
We beg to confirm herewith our cable/telex/telephone as follows:
Nous vous confirmons notre télégramme/télex/téléphone comme suit:

from: schröder, münchmeyer, hengst and co., hamburg
to: morgan guaranty trusxt co., new york

att. mr. charles juricek

re: letter of credit no. cbn/bo/75/79 from central bank of nigeria, lagos - your ref. a-08740 - our no. 5/35127

we refer to our telex of 14/8/75 and confirm to you that transcommerce warenhandels gmbh + co kg., hamburg, has returned to us the original l/c no. a-08740 unutilized. we are today airmailing this original credit to you. all charges in this connection are to the debit of chenax majesty inc., new york.

esemhabank hamburg +++

Hochachtungsvoll · Yours faithfully · Vous dévoués

SCHRÖDER, MÜNCHMEYER, HENGST & CO.

ppa. Zacharias

Telephone: 32 95-1
Cables: ESEMHABANK

Telex: 02/162151 General and Foreign
02/162554 Securities Department
02/162552 Foreign Exchange

Pearson International
Codes 3rd and 4th Ed.

Form. 404 R

ADDENDA TO PLAINTIFFS' SUR-REPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS

ADDENDA TO PLAINTIFFS' SUR-REPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NNNNBOOHO34CTB026 LWA770 MA0074

UINY CO NGLS 176

LAGOS 176 21 2359

MORGAN GUARANTY TRUST CO

NEWYORK

54 WE REFER TO OUR CABLE OF 29TH SEPTEMBER REGARDING REGISTRATION AND

TWO MONTHS CLEARANCE FOR SHIPS SAILING TO NIGERIA X THIS REGULATION WILL NOW APPLY ONLY TO SHIPS CARRYING CEMENT X NO PAYMENT SHOULD BE MADE UNDER OUR LETTERS OF CREDIT FOR ANY SHIP

COL 54/29TH

MA0074 MORGAN PG2/50

CARRYING CEMENT UNLESS ON OUR SPECIFIC

AUTHORISATION X WE ARE FULLY AWARE OF OUR OBLIGATIONS AND WE HAVE DISCUSSED WITH ALL THE BENEFICIARIES OF LETTERS OF CREDIT FOR CEMENT THEAMENDMENTS WE PROPOSE TO THE LETTERS OF CREDIT X IN VIEW OF OUR PORTS SITUATION WE CANNOT ACCEPT ANY DEFIANCE

024461 75 DE 19 A 10 06

589a

OM0073 LNL591

AGOS 47/44 18 2352

12/12a

RRCH MORGAN GUARANTY TRUST COMPANY

3 WALLSTREET NEWYORKNEWYORK10015

2 REFERENCE OUR CREDIT CBN/BO/75/201 AND YOUR LETTER

F 10-11-75 X NECESSARY ACTION IS BEING TAKEN CONCERNING

AYMENTS OF OUTSTANDING CLAIMS ON CEMENT SHIPMENTS AND

EMURRAGE X SHALL CONTACT YOU FURTHER SOONEST

12603 CENTRAL BANK LAGOS

FM CBN/BO/~~75/201 10-11-75 12603~~

IME 10AM

UI NYK

20106A MGT UW

FROM CENTRAL BANK OF NIGERIA

LAGOS NIGERIA 12/18 1015 AM RI

Bob Brown 3/15

P.E.E. (Morgan) Ex #27 -
4.18.78

DUPLICATE ORIGINAL ~~MAGISTRATE'S AMENDED RECOMMENDATION~~
FILED ON SEPTEMBER 28, 1978

DUPLICATE ORIG

Filed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants

77 Civ. 2809 (LWP)

U.S. DISTRICT COURT FILED SEP 28 1978 S.D. OF N.Y.

CHENAX MAJESTY, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 3045 (LWP)

DECOR BY NIKKEI INTERNATIONAL, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 2348 (LWP)

MAGISTRATE'S Amended RECOMMENDATION

This is an action for damages arising out of alleged breach of contracts for the purchase of cement and

documentary letters of credit established pursuant to those contracts. The cement contracts were entered into between plaintiffs and the Federal Ministry of Defense of Nigeria and, pursuant thereto, letters of credit were established in Nigeria by the Central Bank of Nigeria. The contracts and the circumstances surrounding their breach are substantially similar, so plaintiffs have consolidated their claims. Defendants have moved to dismiss for lack of jurisdiction. In addition, both sides have moved for summary judgment. The motions were referred to me by Judge Lawrence Pierce of this court for review and recommendation.

In each action jurisdiction is asserted pursuant to the Foreign Sovereign Immunities Act of 1976 (hereinafter the "Immunities Act"), 28 U.S.C. §1605, the relevant sections of which provide:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection

> with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. §1605(a)(1)-(2) (1976).

Defendants assert the defenses of lack of jurisdiction under the Immunities Act, sovereign immunity and act of state.

The purchase agreements in question are mimeographed form contracts in which each plaintiff agreed to supply the Ministry of Defense of Nigeria with 240,000 metric tons of cement. To pay for the cement, letters of credit were established in Nigeria by defendant Central Bank and made payable through Morgan Guaranty Bank in New York. Each letter of credit provides that it is irrevocable, transferable abroad and subject to the Uniform Customs and Practice for Documentary Credits, 1962 Revision, International Chamber of Commerce, Brochure No. 222. The only material differences in the contracts are with respect to the law which is to govern the contracts and the banks through which letters of credit are to be advised. The contracts entered into by plaintiffs East Europe Import-Export, Inc. and Decor by Nikkei International Inc. provide that they are to be governed by the laws of the United States and that letters of credit established pursuant

the contracts are to be advised through First National City Bank in New York City. The contract with plaintiff Chenax Majesty, Inc. states that it is to be governed by the laws of Switzerland, with the letters of credit to be advised through Schroeder, Muenchmeyer, Hengst & Co. of Hamburg, Germany.

The alleged breach of the cement contracts arose out of Nigeria's embargo on all shipping entering the Nigerian port of Lagos Apapa in August 1975. Nigeria had mounted a massive cement purchase program, including orders totalling over twenty million metric tons in 68 different contracts with suppliers throughout the world. The huge quantities ordered greatly exceeded the unloading capacity of Nigeria's deep water ports. Although Nigeria's experience with contracts of this nature indicated that they could expect delivery of only 10% of the orders, the principal port of Lagos Apapa eventually became so congested with cement-laden vessels that an embargo on all shipping was imposed to alleviate the burden on the port's facilities. There was some concern on the part of Nigerian authorities that the unexpected response to the cement orders resulted from suppliers' visions of huge demurrage [1] claims when the inevitable port

[1] Demurrage is a penalty imposed upon a consignee when a vessel is delayed in discharging its cargo. Hellenic Lines, Ltd. v. Director General of India Supply Mission, 319 F.Supp. 821 (S.D.N.Y. 1970), aff'd, 452 F.2d 810 (2d Cir. 1971). The Nigerian cement contracts provided for such penalties.

congestion delayed unloading. To enforce the embargo, Nigeria declared that all suppliers must henceforth give two months' advance notice of sailing and receive Nigerian permission for departure. Central Bank then cabled instructions to Morgan Guaranty Bank in New York, which in turn informed plaintiffs, that no letters of credit would be honored with respect to vessels transporting cement to Nigeria unless the letters of credit were accompanied by documents showing that Nigeria had been given two months' advance notice of the departure of each vessel and had approved the ship's departure. Plaintiffs contend that these instructions were a unilateral, unauthorized amendment of the terms of the letters of credit and therefore an anticipatory breach of the letters of credit and cement contracts.

This recommendation will principally discuss the issues presented by defendants' motions to dismiss, principally (1) whether this court has jurisdiction over defendant Nigeria pursuant to §1605 of the Immunities Act and (2) whether the act of state doctrine requires this court to decline to exercise Immunities Act jurisdiction on the grounds that the instant litigation would entail review of Nigeria's acts of embargoing its port and requiring prior notice and approval of cement shipments to Nigeria.

In 1976 the Immunities Act was passed to establish when and how parties can maintain lawsuits against foreign states and their entities in United States courts. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7, reprinted in [1976] U.S. Code Cong. and Ad. News 6604 (hereinafter the "House Report"). One of the principal purposes of the Immunities Act is to codify the "restrictive" principle of sovereign immunity, which provides that the immunity of a foreign state is restricted to suits involving the state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). Id. The Immunities Act also transfers the function of making determinations of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these decisions are made on consistent and purely legal grounds. Id. It was the intent of Congress to free the

Department of State from the pressures of foreign governments to recognize their immunity from suit and from adverse consequences resulting from unpopular determinations as to immunity status. Id.

The Immunities Act outines several types of situations in which foreign sovereigns should not be granted immunity, 28 U.S.C. §§1605-07, and provides federal subject matter jurisdiction whenever the foreign sovereign is not immune, 28 U.S.C. §1330(a). In addition, Congress created a long-arm statute for acquiring in personam jurisdiction over foreign sovereigns 28 U.S.C. §1330(b), and the due process requirement of minimum contacts is embodied within the Immunities Act itself, See House Report 6612, for each of the immunity provisions, §§1605-07, requires some connection between the subject matter of the lawsuit and the United States, thus prescribing the necessary contacts which much exist before United States courts can exercise personal jurisdiction.

The specific exception to immunity applicable to the instant suit is the "commercial activity" rule of §1605(a)(2) of the Immunities Act, which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case. . .

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States,

Congress has defined "commercial activity" as "including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct." House Report 6614. Moreover, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act." Id. at 6615. Congress explained that "the fact that goods or services are to be used for a public purpose is irrelevant: it is essentially the commercial nature of an activity or transaction that is critical," and pointed out that "a contract by a foreign government to buy provisions for its armed forces or to construct a government building constitutes a commercial activity." Id.

With respect to the third situation presented in §1605(a)(2), supra, Congress has stated that the provision embraces commercial conduct having a direct effect within this country and subjects such conduct to United States jurisdiction consistent with §18, Restatement (Second) Foreign Relations Law of the United States (1965), which provides:

> A state has jurisdiction to prescribe

> a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if-
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies: (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Comment (f) to §18 explains:

> The exercise of jurisdiction under the rule stated in Clause (b) of this section generally involves matters of an economic nature. In those circumstances, the rule stated in this clause does not require intent in the subjective sense and will usually deal with conduct which was intended to produce the effect within the territory in the sense that those responsible for the conduct had reason to foresee that the effect within the territory would result from the conduct outside.

See Markham v. Gray, 393 F.Supp. 163, 165-66 (S.D.N.Y. 1975), aff'd sub nom., Markham v. Anderson, 531 F.2d 634 (2d Cir. 1976).

The cement contracts are clearly commercial in nature and Nigeria's unilateral amendment of the letters of credit established pursuant to those contracts constitutes "an act outside the territory of the United States in connection

with commercial activity elsewhere." Therefore, the pivotal question for this court to determine is whether there has been a direct, foreseeable and substantial effect within the United States as a result of the amendment of the letters of credit.

All of the beneficiaries of the letters of credit were incorporated in New York and the letters were payable at Morgan Guaranty Bank in New York. Nigeria's amendment of the letters directly affected the beneficiaries in New York, for after the amendment none could collect the debts owed to it without the appropriate documents newly demanded by Nigeria. This effect was foreseeable by that nation, because it had entered contracts with New York corporations, made payable at a New York bank and expressly instructed Morgan Guaranty Bank in New York to dishonor letters of credit not complying with the amended payment procedures. Finally, the effects of the attempted amendment of the contracts are substantial, for over $42,000,000 worth of credit owed to the three plaintiffs has been cancelled. Accordingly, this court has subject matter jurisdiction pursuant to 28 U.S.C. §1605(a)(2).

Personal jurisdiction also exists over defendant Nigeria pursuant to §1330(b) of the Immunities Act. The legislative history of that section of the statute supports such a finding on the ground that Nigeria's conduct in connection with contracts hav

foreseeable and substantial effects in New York provides in and of itself, sufficient contact with this state for due process purposes.

In addition, quasi in rem jurisdiction can be found over Nigeria on the basis that it maintains substantial funds on deposit with the Federal Reserve Bank in the form of treasury bills and over Central Bank because it maintains sizeable accounts with Morgan Guaranty Bank which are used to pay a wide range of trade debts incurred by Nigeria. Finally, officia at Morgan Guaranty Bank have the power to transfer Nigeria's deposits at the Federal Reserve to Central Bank's account at Morgan Guaranty Bank if Morgan officials decide the level of deposits has fallen too low.[2]

In addition to its defense of lack of personal jurisdiction, Nigeria contends that the instant litigation is preclud by the act of state doctrine . The traditional definition of that doctrine is found in Underhill v. Hernandez, 168 U.S. 250 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the

[2] In National American Corp. v. Fed. Rep. of Nigeria, 448 F.Supp 622 (S.D.N.Y. 1978), another case resulting from the Nigerian cement purchase program, Judge Goettel found these contacts sufficient to sustain jurisdiction under the rule of Shaffer v. Heitner, 97 S.Ct. 2569 (1977), upon quasi in rem grounds.

> government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Two policy considerations have been articulated as the basis for the act of state doctrine. Some courts have emphasized that the doctrine rests on concern for international comity and respect for sovereignty, Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918), while others have emphasized that the doctrine is fundamental to our principles of separation of powers, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Although the disparate rationales have made consistent application of the doctrine difficult, it has been generally agreed that the question of whether to invoke the doctrine in a given case is matter of judicial discretion. Id.; Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 714 (1976) (Powell, J., concurring).

Since both the act of state doctrine and sovereign immunity can effectively destroy a litigant's claim, the two principles have often been confused. It is, therefore, important to note the distinction between the two. Sovereign immunity accords a defendant exemption from suit by virtue of its status as a foreign sovereign. Alfred Dunhill, supra, at 726 (Marshall, J., dissenting). The act of state doctrine, on the other hand, applies whether a sovereign nation is a

party or not and precludes a suit from going forward when a court determines that the litigation will require inquiry into the validity of the public acts of a foreign sovereign. Id. A decision on whether to apply the act of state doctrine is made after considering the potential embarassment to the executive branch, and the general consensus on the issue in international law, Banco Nacional de Cuba, supra, at 428.

The instant suit requires scrutiny of two recent cases, Alfred Dunhill, supra, and Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977). When the Immunities Act was passed, Congress expressly declined to address the act of state doctrine, stating that it was confident that Alfred Dunhill provided the courts with adequate guidance for dealing with improper assertions of the doctrine. House Report 6619 n.1. That confidence may have been ill-founded.

In Alfred Dunhill, at 425 U.S. 682 (Part III), four members of the Court supported what has been termed the "commercial exception" to the act of state doctrine, the justices emphasizing that the doctrine applied only to governmental public acts and should not be extended to allow

repudiation of a commercial debt, Id, at 705, That case arose after the Cuban government confiscated the business and assets of certain Cuban manufacturers of cigars and named "interventors" to take possession of and operate the seized businesses. Following the intervention, a number of United States importers paid the interventors for shipments which had been made by the original owners. When the District Court held that the Cuban interventors had to refund those payments to the American importers, the Cuban interventors indicated that they had no intention of doing so and that the court could not question their decision because it was an act of state. While accepting the premise that the confiscation was an act of state, the Supreme Court held, 5-4, that no second act of state had been proven, Id. at 690, stating that even if Cuba had repudiated the debt, the act of state doctrine did not apply to purely commercial acts.

The four dissenting justices refused to recognize any inflexible commercial/non-commercial distinction between acts of state, Id. at 716, and maintained that the interventors refusal to recognize that they owed any debt was legally indistinguishable from the original intervention. Id. The dissent noted that the act of state doctrine rested upon different considerations than sovereign immunity and warned that the broad commercial exception to sovereign immunity should

not be automatically transferred to the act of state doctrine emphasizing that act of state determinations should be made on a flexible case-by-case basis with all of the appropriate considerations being taken into account, Id, at 728,

Prior to Alfred Dunhill, courts interpreting the act of state doctrine made a preliminary determination as to, first, whether an act was vested with sovereign authority, and, second, whether adjudication of the claim would entail inquiry in the validity of the act such that there was potential for embarassment to the executive branch, Banco Nacional de Cuba, supr Under the Alfred Dunhill approach urged by Congress, courts must now additionally make a preliminary characterization as to the commercial or non-commercial nature of the act. The appropriate extent of this preliminary inquiry remains unsettled,

Hunt v. Mobil Oil Co., supra, the most recent Second Circuit opinion construing the act of state doctrine, suggests that this inquiry should be limited in scope, and, in fact, the decision is contrary to a recent trend limiting application of the doctrine. Hunt was an anti-trust suit against seven major oil companies working in the Persian Gulf and Libyan oil fields, with plaintiff, an independent oil producer operating in Libya, alleging that the oil companies had manipulated plaintiff's transactions with Libya in such a manner as to provoke nationalization of plaintiff's oil assets. The

court held that plaintiff could not prove his claim without inquiring into Libya's motivation for nationalizing the oil fields and that the act of state doctrine precluded such inquiry, 550 F.2d at 77. Although the doctrine had traditionally precluded inquiry into the validity of sovereign acts, the Second Circuit determined that Libya's motivation and the validity of the seizure were logically inseparable, reasoning that examination of the motivation required assessment of the validity of the act, Id. at 77-78. Thus, the court held that the act of state doctrine precludes judicial inquiry into either motivation for or the validi of the acts of a foreign sovereign committed within its own territory.

Judge Van Graafeiland's dissenting opinion in Hunt argued that Alfred Dunhill illustrated that the act of state doctrin required, rather than precluded, inquiry into the nature of the act and its relationship to the foreign sovereign. Id. at 79.

It is apparent that after Hunt an inquiry into the commercial nature of conduct alleged to be an act of state should not include scrutiny of the sovereign's motivation for the act, but rather should be limited to those facts presented by the pleadings and affidavits.

Defendant Nigeria has alleged two acts of state: (1) the embargo of its ports and (2) the amendment of the letters of credit to require evidence of two months' notice and prior approval of shipment before payment.

The embargo should be accepted as a legitimate governmental act of state, for the inquiry necessary to characterize it a commercial act would require review of Nigeria's motivation for the embargo. Recognition of the embargo as an act of state does not, however render plaintiffs' claims nonjusticiable, becau this action can proceed without a review of the validity of the embargo. There is no direct causal link between the embargo and the alleged damages, for plaintiffs have alleged that their damag resulted not from the embargo, but rather from the amendment of t irrevocable letters of credit.

Defendants argue that the amendment of the letters of credit was merely an implementaion of the embargo. Although the embargo and the amendment of the letters of credit may have been part of an overall scheme to alleviate the confusion surroun the overcrowded port, the acts are not inseparable, for Nigeria did a number of things to rectify the cement debacle, all of which cannot be lumped into one "act of state." For example, tha government formed the Cement Contracts Negotiating Committee to settle claims arising from the situation. It would be logically inconsistent to find that the effort to settle the disputes and the amendment resulting in more disputes were both a single act of state. Furthermore, the embargo would not itself have rendere the letters of credit uncollectable. Thus, since the embargo and the amendment of the letters of credit are severable acts, the instant litigation may proceed despite recognition of the

embargo as a public act of state.

Nigeria contends that the amendment of the letters of credit is also an act of state, but it may not properly be so characterized, for the amendment lies within the Alfred Dunhill "purely commercial" exception to the act of state doctrine. The letters of credit arise out of a specific commercial contract for goods and the attempted amendment or modification of the letters was specifically directed at the cement suppliers. It is clear that Nigeria sought to alter the terms of a commercial agreement and this modification, like the repudiation of the commercial debt in Alfred Dunhill, was a purely commercial act. Defendants' instant motion is precisely of the type which Congress hoped Alfred Dunhill would prevent.

For the above reasons, it is recommended that defendants' motion to dismiss be denied. The cross-motions for summary judgment should also be denied for there are numerous factual disputes.

Respectfully submitted,

SOL SCHREIBER
UNITED STATES MAGISTRATE

New York, New York
September 19, 1978

Amendments noted on p. 17 of R&R on 9/25/78

ORDER OF JUDGE PIERCE ADOPTING MAGISTRATE SCHREIBER'S RECOMMENDATION DENYING DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT, DATED NOVEMBER 6, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

v. 77 Civ. 2809

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

CHENAX MAJESTY, INC.,

Plaintiff,

v. 77 Civ. 3045

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

DECOR BY NIKKEI INTERNATIONAL, INC.,

Plaintiff,

v. 77 Civ. 2348

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

ORDER

No timely objections having been filed and the Court having reviewed the Magistrate's report and recommendations, the Court hereby denies defendants' motion to dismiss and the cross-motions for summary judgment for the reasons stated in the Magistrate's report.

SO ORDERED.

Dated: New York, New York
November 6, 1978

LAWRENCE W. PIERCE
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRE-TRIAL SCHEDULE ORDER DATED NOVEMBER 14, 1978

East Europe, et al.

- v -

Republic of Nigeria

PRETRIAL SCHEDULE ORDER

77-2348
77-2809
77-3045

This action having ~~come on for a pretrial conference on the day of 197 before the undersigned, and having~~ been heard, it is

ORDERED that all document discovery is to be completed by Dec. 31 1978, and it is further

ORDERED that all depositions, and all other forms of discovery are to be completed by Dec. 31 1978; and it is further

~~ORDERED~~ that this matter is hereby referred to Magistrate ~~for all pre-trial purposes;~~ the Magistrate is requested to contact the parties; and it is ~~further~~

ORDERED that counsel are to submit on or before Jan. 31 1979, (1) an agreed form of pretrial order or (2) failing agreement, their respective versions of such an order, and it is further

ORDERED that the case will be marked ready for trial to begin on 48 hours' notice on or after Jan. 31 1978, and it is further

ORDERED that a ~~further pre-trial~~ Settlement conference before the undersigned is hereby set down for Feb. 1, 1978 at ~~4:30 p.m.~~ 4:30 p.m. in Room 2002, and it is further

ORDERED that this order will become final 10 days from this date and will thereafter govern the course of proceedings herein unless before 10 days have expired application is made to this Court for review and revision.

Dated: New York, New York
Nov. 14 1978

LAWRENCE W. PIERCE
U. S. D. J.

N-14

ORDER OF JUDGE PIERCE RESTORING ACTION TO THE ACTIVE CASE CALENDAR, DATED JANUARY 23, 1979

OFFICE COPY

SERVED

FILED

DOCKET 2/7/79

DIARY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Decor by Nieki International

- v -

Federal Republic of Nigeria

77 Civ. 2348 (LW)

ORDER

The parties having indicated that this case is now ready to proceed to trial, it is

ORDERED that the above-entitled action is hereby restored to the active case calendar of this Court and the order of suspense heretofore entered is hereby vacated; and it is further

ORDERED that this case is hereby marked "ready for trial" as of January 31, 1979 and all pre-trial papers (requests to charge/proposed findings of fact and conclusions of law and memoranda) are to be submitted to the Court on or before that date.

SO ORDERED.

Dated: New York, New York
January 23, 1979

LAWRENCE W. PIERCE
U. S. D. J.

NIKKEI NOTICE OF INTENTION TO AMEND DATED FEBRUARY 12, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DECOR BY NIKKEI INTERNATIONAL, INC.,
d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

77 Civ. 2348 (LWP)

- against -

NOTICE OF INTENTION TO AMEND

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

----------x

S I R S :

PLEASE TAKE NOTICE that, pursuant to F.R.Civ.P. 12(b) and 54(c), plaintiff will move at the trial to amend its first amended complaint as follows:

¶14. - Add a new paragraph designated "14(b)" which will state as follows:

"With respect to the ships that plaintiff chartered directly, plaintiff would receive a commission equal to 3 1/2% of the cost of chartering the vessels. The cost of chartering the vessels would have been $14 per ton, of which 3 1/2% would have been $70,650."

¶16.(b) Change amount from $3,000,000 to $4,158,000.

PRAYER FOR RELIFF Change $6,102,000 to "$7,330,560" and after the word "thereon" add "plus punitive damages of $5,000,000".

This notice, although not required under F.R.Civ.P.12(b) and 54(c), is given to you now, three months in advance of trial, to avoid any possible claim of surprise or prejudice on your part.

The bases for and computations involved in these revised figures are set out in detail in plaintiff's proposed Findings of Fact, which will be furnished to you on or before February 16, 1979.

Dated: New York, New York
February 12, 1979

Yours, etc.,

LEWIS S. SANDLER
Attorney for Plaintiff
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(212) 765-1010

TO:
KISSAM, HALPIN & GENOVESE
(Attn: James G. Simms, Esq.)
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120 Broadway
New York, New York 10005

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Rec'd 4/20/79 [illegible] 4/19/79

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FILED

DOCKET 4/20/79

DIARY

EAST EUROPE SUPPLEMENTAL NOTICE OF INTENTION TO AMEND, DATED APRIL 19, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC., Plaintiff,	77 Civ. 2809 (LWP)
-against-	SUPPLEMENTAL NOTICE OF INTENTION TO AMEND
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	

S I R S:

PLEASE TAKE NOTICE that, pursuant to F. R. Civ. P. 12(b) and 54(c), plaintiff will move at the trial to amend its complaint as follows:

¶10.(a) - add after "said contract," "and which would not have been incurred but for defendants' breach,"; and change amount from $250,000 to $36,000.

As to ¶10(a) of the complaint, this notice supersedes the notice dated January 31, 1979.

Dated: New York, New York
April 19, 1979.

Yours, etc.

BAILEY, MARSHALL, HOENIGER & FREITAG
Attorneys for Plaintiff

By Berthold H. Hoeniger
Berthold H. Hoeniger
345 Park Avenue
New York, New York 10022
(212) 826-2305

TO: James G. Simms, Esq.
KISSAM, HALPIN & GENOVESE
120 Broadway
New York, New York 10005

ORDER OF JUDGE PIERCE DENYING, WITHOUT PREJUDICE TO RENEW, DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS FOR LOST PROFITS ON DEMURRAGE AND GRANTING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES WITH RESPECT TO JURISDICTION, DATED JUNE 18, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR BY NIKKEI INTERNATIONAL, INC.	:	
-v-	:	77 Civ. 2348 77 Civ. 2809
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA	:	77 Civ. 3045

ORDER

Defendants' motion for an order dismissing plaintiffs' claims for lost profits on demurrage is hereby denied without prejudice to renewal at the time of trial.

Plaintiffs' request for an order striking defendants' affirmative defenses of lack of subject matter and personal jurisdiction, sovereign immunity and act of state doctrine (which were previously asserted in defendants' motion to dismiss which was denied) is hereby granted.

SO ORDERED.

LAWRENCE W. PIERCE
U. S. D. J.

Dated: New York, New York
June 18, 1979

SCHEDULE E: PLAINTIFFS' LIST OF WITNESSES ANNEXED TO THE JOINT PRE-TRIAL ORDER OF JUDGE PIERCE, FILED ON SEPTEMBER 17, 1979

SCHEDULE E

Plaintiffs' List of Witnesses

1. Tetsuo Ozawa
2. Robert Ross
3. Dr. Uche Akuba
4. Thomas Dana
5. William Stewart
6. Elliott Bruce Heath
7. Dresdner Bank A.G., by an appropriate officer, agent or employee selected by Dresdner Bank
8. Antonio Reale
9. William Koebel
10. Arthur J. Brown
11. Paul Winston Fitzpatrick
12. Rebuttal witnesses, if and as required

ORDER OF JUDGE PIERCE GRANTING MOTION BY PLAINTIFFS NIKKEI AND CHENAX FOR AN ORDER STRIKING DEFENDANTS' AFFIRMATIVE DEFENSES WITH RESPECT TO JURISDICTION, FILED ON AUGUST 14, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED AUG 14 1979 S.D. OF N.Y.

43

DECOR BY NIKKEI INTERNATIONAL, INC.

Plaintiff,

77 Civ. 2348 (LWP)

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

CHENAX MAJESTY, INC.,

Plaintiff,

77 Civ. 3045 (LWP)

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

The request of plaintiffs DECOR BY NIKKEI INTERNATIONAL, INC. and CHENAX MAJESTY, INC. for an order striking defendants' affirmative defenses of lack of subject matter and personal jurisdiction, sovereign immunity and act of state doctrine (which were previously asserted in defendants' motion to dismiss which was denied) is hereby granted.

SO ORDERED.

LAWRENCE W. PIERCE
U.S.D.J.

Dated: New York, New York
August 13, 1978

OPINION AND ORDER OF JUDGE PIERCE IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS, FILED ON AUGUST 19, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC.,	:	
Plaintiff,	:	
v.	:	77 Civ. 2348 (LWP)
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,	:	
Defendants.	:	
CHENAX MAJESTY, INC.,	:	
Plaintiff,	:	
v.	:	77 Civ. 3045 (LWP)
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,	:	
Defendants.	:	
EAST EUROPE IMPORT-EXPORT, INC.,	:	
Plaintiff,	:	
v.	:	77 Civ. 2809 (LWP)
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,	:	
Defendants.	:	

APPEARANCES:

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New York, New York 10005

Attorneys for Defendants

LAWRENCE W. PIERCE, D. J.

OPINION AND ORDER

These are diversity actions for alleged breaches of contract. Plaintiffs are three independent corporate entities. In early 1975, they each separately contracted to provide the Federal Military Government of the Federal Republic of Nigeria with quantities of bagged cement. They each contend that thereafter in the fall of 1975 their contracts were anticipatorily

breached. Each plaintiff seeks to recover the profits it contends it would have earned in the performance of its contract had the alleged breach not occurred. Each plaintiff also seeks to recover its alleged lost profits on the ground that three separate letters of credit issued by defendant Central Bank of Nigeria for their respective individual benefits was unilaterally modified without the consent of the plaintiffs. The letters of credit were issued by Central Bank of Nigeria pursuant to the terms of the contracts in controversy. Finally, plaintiffs seek to recover the profits they contend each would have earned as demurrage payments, and they also seek to obtain incidental damages, punitive damages, and interest.

These claims of the plaintiffs were tried to this Court commencing on September 10, 1979. The following discussion shall constitute the findings of fact and conclusions of law of the Court in this matter.

FINDINGS OF FACT

In 1975, the government of Nigeria, through the Nigerian Federal Ministry of Defence, entered into more than 70 contracts with foreign cement suppliers as part of its program to purchase 16 to 18 million metric tons of cement. See Defendants' Proposed Findings of Fact and Conclusions of Law ¶¶ 147, 205. All of the cement purchased by the Nigerian government through these contracts was to be

delivered to Nigeria over an eighteen month period during the years 1975 and 1976. Id. ¶¶ 147, 165. Pursuant to these contracts, the Central Bank of Nigeria ("CBN") established individual letters of credit in favor of at least some of the cement suppliers, including the plaintiffs herein. The bank is an agency of the Nigerian government.

In mid-1975, the Nigerian ports became severely congested with ships seeking to discharge their cargos. Threatened with a national economic disaster because of this congestion, the Nigerian government placed an embargo on all shipping into the port of Lagos. National American Corp. v. Federal Republic of Nigeria, 597 F.2d 314, 316 (2d Cir. 1979). Thereafter, the national government established a negotiating committee which was responsible for renegotiating the foreign cement contracts and related letters of credit on behalf of the government and CBN. Id. More than 70 of the cement suppliers met with the negotiating committee, and at least 43 accepted the terms of a proposed settlement agreement, thereby releasing the government from its obligations under the cement contracts. See Defendants' Proposed Findings of Fact and Conclusions of Law ¶ 205 at p. 53. Plaintiffs in the present action were among the cement suppliers who declined to renegotiate their contracts.

Individual Contracts

Plaintiff Decor by Nikkei International, Inc. ("Nikkei") is a New York corporation. On April 21, 1975, it entered into a contract with the Federal Military Government of the Federal Republic of Nigeria ("Nigeria") under which it agreed to supply Nigeria with 240,000 metric tons of cement (B.S.S. 12/1958), plus or minus 10% at Nikkei's option. The purchase price was $60 per metric ton, C.I.F. Lagos/Apapa, for a total price of $14.4 million, plus or minus 10%. The cement was to be delivered in 6-ply Kraft paper bags (50 kgs G/N).

Upon the filing of a perfromance bond by Nikkei in the amount of $18,000 (one twenty-fourth of 3% of the total purchase price), which apparently had already been secured before the execution of the contract, Nigeria was in turn required to establish an irrevocable, transferable, divisible and confirmed letter of credit in favor of Nikkei for the total purchase price. The letter of credit was to be established through First National City Bank in New York City and was to be payable on sight upon presentation of invoices, clean on board bills of lading, and insurance certificates.

Pursuant to the contract, Nikkei was to commence shipment of cement to Nigeria within 45 days of its receipt of the letter of credit in New York. Delivery was to be made at the rate of 20,000 metric tons per month, plus or minus 10% or plus such additional quantity as Nikkei elected to deliver.

All shipments were to be insured by Nikkei out of Barcelona, Spain or Piraeus, Greece. Therefore, all shipments had to originate from those ports to be in conformance with the contract. 1/

The contract also provided that Nikkei would receive demurrage payments in an amount "not exceeding" $4,100 per diem, in the event that the cement could not be unloaded in Nigeria within a specified period of time provided that Nigeria was given due notice by cable of the departure from the port of loading of each consignment. Such demurrage was to be payable under the terms of the letter of credit, in addition to the full purchase price, upon presentation of time sheets and statements of facts duly certified as correct by the ship's master and by the ship's agent in Lagos, Nigeria.

The terms of the contract were to be governed by the laws of the United States, and all disputes arising thereunder were to be submitted to arbitration by the International Chamber of Commerce, Paris, France. 2/

On January 28, 1975, plaintiff East Europe Import Export, Inc. ("East Europe"), a New York corporation, entered into a cement contract with Nigeria. The terms of this contract were identical to those of the contract entered into by Nigeria and Nikkei except for the following: First, East Europe contracted to provide a fixed amount of bagged cement to Nigeria, 240,000 metric tons, without a 10% option. Second, the price of cement was to be $59.50 per metric ton, and East Europe was to provide Nigeria with a performance bond in the amount of 3% of the purchase price -- $428,400. Third, Nigeria was to establish

a letter of credit in favor of East Europe with First National City Bank in New York City. If East Europe determined that the letter of credit was not acceptable, it was to request appropriate amendments. If Nigeria refused to amend the letter or credit, the performance bond was to be returned to East Europe, and the contract was to be cancelled. Fourth, East Europe was to commence shipment of cement to Nigeria in amounts not less than 20,000 metric tons per month within six weeks of its receipt of Nigeria's letter of credit in New York. Fifth, the contract provided that East Europe was to insure each shipment from Constanza, Rumania, thereby requiring that all shipments originate from that port. Nigeria, upon request from East Europe, later amended the letter of credit to provide that shipments could be made from any port.

Plaintiff Chenax Majesty, Inc. ("Chenax"), a New York corporation, entered into a contract to supply Nigeria with cement on March 20, 1975. Its contract is similar to the contract entered into by Nikkei and Nigeria. The principal differences are that the Chenax contract required that Chenax provide Nigeria with cement conforming to Spanish specification P. 350; that Chenax was to provide Nigeria with a revolving performance bond in the amount of $36,000 (one-twelfth of 3% of the total purchase price of $14.4 million); that Nigeria's letter of credit was to be established in Chenax's favor with Schroeder, Muenchmeyer, Hengst & Co. in Hamburg, West Germany; that demurrage be accumulated at the unqualified rate of $4,100 per diem; and that the law of Switzerland was to govern the terms

of the contract. Chenax's contract originally required that all shipments of cement be insured by Chenax from Barcelona and/or Tarragona, Spain to Lagos/Apapa Quay. Therefore, all shipments of cement were to originate from those ports. However, Nigeria later accepted Chenax's request that it be permitted to ship cement from other ports. It was agreed that shipment could be from any European or American port, and the terms of the letter of credit were amended accordingly.

Letters of Credit

Contrary to the terms of these contracts, no letters of credit were ever established by Nigeria at any of the banks listed in the three cement contracts. Instead, Nigeria unilaterally established individual letters of credit in favor of each of the plaintiffs with defendant CBN and advised plaintiffs thereof through Morgan Guaranty Trust Company of New York ("Morgan"). These letters of credit could only be drawn upon at Morgan. Nikkei's letter of credit was issued by CBN on July 14, 1975, and Nikkei was advised of this through Morgan and First National City Bank in New York. East Europe's letter of credit was issued on August 4, 1975, and Morgan advised East Europe of that by letter dated August 13, 1975. Chenax's letter of credit was issued on April 25, 1975, and Chenax was notified by Morgan by letter dated May 8, 1975.

These letters of credit further deviated from the terms of the cement contracts since none of the letters of credit were

confirmed by Morgan or any of the banks specified in the contracts. In spite of this nonconformity, each plaintiff accepted its respective letters of credit. CBN had indicated to Chenax and East Europe that it was "irrevocably" committed to honoring its engagements under the letters of credit. See letter dated July 14, 1975 from Bills Manager of CBN to East Europe and letter dated May 27, 1975 from CBN's Bills Manager to Chenax. Based on these representations, Chenax and East Europe accepted CBN's irrevocable letters of credit without confirmation.

Under these letters of credit, each plaintiff was to receive both the contract price of the cement and any demurrage for which Nigeria became liable under the contract. As indicated above, Nikkei and East Europe were entitled to receive demurrage in an amount not exceeding $4,100 per diem, while Chenax's contract provided that it would receive demurrage at the flat rate of $4,100 per diem. It appears the qualifying words "not exceeding" had been originally included in Chenax's contract but were intentionally stricken therefrom with the consent of Nigeria and Chenax.

Finally, the Court notes that each of the three letters of credit specifically stated that it would be subject to the Uniform Customs and Practice Documentary Credits (1962 Revision) as set forth in Brochure No. 222 issued by the International Chamber of Commerce.

Nikkei's Performance Under the Contract

On July 29, 1975, Nikkei received notice that Nigeria had established a letter of credit in Nikkei's favor at Morgan in New York. Thereafter, on August 22, 1975, Nikkei authorized the transfer of part of its letter of credit, in the amount of $1,032,000, through Morgan to Transfina, N.V. of Curacao, Netherlands Antilles, from whom Nikkei had expected to purchase 20,000 metric tons of cement at a price of $51.60 per metric ton. The expiration date of the transfer was January 15, 1976. Transfina allegedly had sources of cement in the Caribbean. However, Nikkei's contract with Nigeria required that cement be shipped from and insured from either Barcelona, Spain or Piraeus, Greece. Since the contract was not modified to permit shipments out of the Caribbean,[3/] Nikkei could not fulfill its contractual obligations through its subcontract with Transfina. On January 15, 1976, Nikkei's transfer of part of the letter of credit to Transfina lapsed pursuant to the terms of said transfer, and Nikkei reacquired its full interest in the letter of credit.

Thereafter, in August, 1975, Nikkei informally entered into an agreement with Productos Fontanet, S.A. of Palma de Malorca, Spain, under which Productos Fontanet was to provide Nikkei with cement for shipment to Nigeria. On August 28, 1975, Nikkei requested that Morgan transfer a portion of its letter of credit in the amount of $1.2 million to Productos Fontanet. Its written instructions to Morgan regarding this transfer

directed that the partial transfer was to be made upon the same terms and conditions as the original letter of credit established by Nigeria. The transfer was the means by which Productos Fontanet was to be paid for providing 20,000 metric tons of cement to Nigeria on behalf of Nikkei at the rate of $51 per metric ton. It appears that Productos Fontanet owned an interest in a cement factory. Also, Productos Fontanet had a wholly owned subsidiary which was a shipping company and which would provide the means of transporting the cement to Nigeria. Under this arrangement, Nikkei would have fulfilled its contractual obligations to Nigeria with respect to the first 20,000 metric tons of cement.

On or about August 29, 1975, Nikkei received a cable from Nigeria indicating that the Nigerian government had suspended the importation of cement for three months as of August 18, 1975 because of congestion at Lagos and other ports. Nikkei was directed to defer all further chartering and loading of ships. A "new agreement" was to be negotiated for the rescheduling of delivery of the balance of the cement.

Nikkei then cabled Productos Fontanet informing them of the cable from Nigeria and requesting that shipments be deferred for three months. Nikkei received a telegram on September 3, 1975 from Productos Fontanet indicating that a penalty would be assessed against Nikkei if shipments were delayed.

Thereafter, on September 11, 1975, Nikkei and Productos Fontanet entered into a written contract whereby Productos Fontanet agreed to provide Nikkei with 120,000 metric tons of

BSS 12/1958 cement, plus or minus 10% at the option of Productos Fontanet. The contract further provided that Nikkei would have an option to purchase an additional 120,000 metric tons. It was agreed that the price of the cement would be $54 per metric ton for the first 8,500 metric tons and $52 for the balance. Shipment was to be made "C.I.F.F.P.A. from any Mediterranean and/or European port(s) to Lagos, Apapa." Payment was to be made by transfer of the irrevocable letter of credit issued by CBN through Morgan. Also, Productos Fontanet was to receive demurrage not exceeding $4,100 per diem from Nikkei.

On September 12, 1975, bills of lading and other documents were issued by Productos Fontanet for a shipment of 8,500 tons of cement from Barcelona, Spain to Lagos/Apapa. These documents were presented to Morgan in New York on September 29, 1975, and Morgan paid $510,000 to Nikkei and Productos Fontanet. However, no ships ever sailed for Nigeria because clearances for shipment were never issued by Nigeria.

The day following this payment to Nikkei and Productos Fontanet or soon thereafter, Morgan in New York notified Nikkei by letter that the irrevocable letter of credit issued by Nigeria had been amended to provide that "[a]ll commercial invoices presented must be certified invoices and must be certified by the beneficiaries or their agents." CBN had also informed Morgan that it should not make payments for demurrage under any letter of credit which had been issued regarding any cement

contract unless the documents submitted to Morgan were certified by CBN. CBN also required that Morgan not "pay against documents presented in respect of letters of credit . . . unless such documents are accompanied by certificates confirming that clearance [for shipping] has been obtained for the ships to sail to Nigeria." See letters dated September 30, 1975 from Morgan to Nikkei.[4/] Nikkei had not agreed to the addition of these conditions for payment under the letter of credit.

On or about October 8, 1975, Nikkei's president and principal shareholder, Tetsuo Ozawa, traveled from New York City to Lagos, Nigeria to meet with the Cement Negotiating Committee of the Nigerian government at the Committee's request. The meeting took place at CBN's offices. The purpose of this visit was to discuss the rescheduling of cement deliveries. At that meeting, Ozawa, as Nikkei's representative, was asked to cancel the cement contract and letter of credit without compensation. Ozawa declined. Ozawa again traveled to Nigeria in February, 1976 to meet with various government officials. He was again asked to discharge the contract and the letter of credit, and again he declined.

The evidence submitted at trial indicates that Nigeria did not intend to provide Nikkei or any of the other plaintiffs herein with the certificates they would need to obtain payment due from Morgan under the letters of credit as amended unless they agreed to cancel their cement contracts.

East Europe's Performance Under its Contract

Pursuant to the terms of its contract, East Europe was required to post a performance bond in the amount of $428,400. The contract expressly states that such a performance bond was "already deposited by [East Europe] with the Central Bank of Nigeria" as of the date of the execution of the contract -- January 28, 1975. It appears, however, that no performance bond had yet been established as of that date. Indeed, East Europe did not provide Nigeria with a performance bond of any amount until July 25, 1975 when a bond was issued through First National City Bank in the amount of only $248,400. CBN issued a letter of credit in favor of East Europe on August 13, 1975, although a performance bond in the amount of $428,400 was never established by East Europe.[5/]

However, the letter of credit established by Nigeria in favor of East Europe did not contain a requisite appendix which set forth the acceptable ports from which shipment of cement might originate, the demurrage rate, and other contract terms. Therefore, it was not acceptable to East Europe. On August 18, 1975, East Europe requested that amendments be made to the letter of credit which set forth these contract terms. By letter dated September 8, 1975, Morgan in New York informed East Europe that these amendments had been made.

Because of these delays by East Europe in obtaining a performance bond and by CBN in issuing an amended letter of credit, a prior subcontract which East Europe had entered into with a

Romanian cement supplier -- Vitrocim -- lapsed. East Europe had entered into this contract with Vitrocim on December 13, 1974 in anticipation of the Nigerian cement contract. Having lost its subcontractor, East Europe sought to find an alternate source of cement.

On September 24, 1975, East Europe entered into a subcontract with International Trade & Finance Espanola S.A. ("Intrafinsa") under which Intrafinsa would supply and deliver to Nigeria 120,000 metric tons of cement at a price of $51.25 per metric ton, CIF Lagos/Apapa. Payment of this subcontract was to be effected by a transfer of a portion of CBN's letter of credit in favor of East Europe to Intrafinsa. Also, Intrafinsa was to receive demurrage in an amount not exceeding $4,100 per diem.

By letter dated October 3, 1975, Morgan informed Intrafinsa that a transfer of a portion of CBN's letter of credit had been made. However, prior to that date, the Nigerian government had informed East Europe of the suspension of the importation of cement into Lagos and other Nigerian ports. Also, CBN further amended its letter of credit to require certification of all documents "by the beneficiaries or their agents" prior to presentment and payment under the letter of credit.[6/] Morgan's letter to Intrafinsa regarding the partial transfer specifically noted these limitations.

Notwithstanding this amendment to the letter of credit by CBN and the suspension of importation of cement, East Europe apparently elected to perform its obligations under the cement

contract rather than suspend its performance since it had not agreed to the amendment to the letter of credit and had not agreed to any modification of its contract.

On or about October 14, 1975, Morgan was presented with documents which complied with the conditions set forth with the original letter of credit issued by CBN, but which did not bear certifications by the Nigerian Authorities. The documents indicated that 10,500 metric tons of cement had been loaded on the vessel M/V Torenia at Bilboa, Spain and was destined for Lagos/Apapa. Upon inquiry by Morgan, CBN instructed Morgan not to make payment regarding this shipment under the letter of credit.

East Europe had also entered into another cement subcontract, for the purpose of fulfilling its obligation under the Nigerian cement contract,with Bergbau-Handel G.m.b.H. of Berlin, East Germany. That subcontract, dated April 11, 1975, provided that Bergbau-Handel would provide East Europe with 30,000 metric tons of cement, F.O.B. at the price of $27 per metric ton. Apparently, East Europe was required, under that subcontract, to obtain means of transporting the cement to Lagos/Apapa from Rostock, Germany. Payment under this subcontract was to be effected by a transfer of part of the CBN letter of credit. Pursuant to instructions from East Europe, Morgan notified Bergbau-Handel of the partial transfer. However, Bergbau-Handel rejected the transfer because the letter of credit did not comply with the terms of the subcontract.

On or about October 13, 1975, East Europe's principal officer, Irving Ross, traveled to Nigeria on behalf of East Europe pursuant to an invitation from the Nigerian authorities to discuss the problem of congestion in the ports of Nigeria and the suspension of importation of cement. Because there were a number of other cement contractors visiting Nigeria at that time, Ross became aware that Nigeria had contracted to purchase a substantial quantity of cement. He met with the Nigerian cement contract negotiating committee, as had Ozawa on behalf of Nikkei, and was told that Nigeria no longer needed or wanted cement. He was asked to cancel the cement contract, but he did not agree to the proposed cancellation. He later asked for clearances for shipment of cement pursuant to East Europe's cement contract. These requests were never granted.

Chenax's Performance Under its Contract

Prior to entering into its contract with Nigeria, Chenax had entered into an oral agreement with Transcommerce Warenhandels Gmbh & Co. KG of Hamburg, Germany ("Transcommerce") whereby Transcommerce and Chenax agreed to "cooperate" in the fulfillment of Chenax's cement contract. Pursuant to that agreement and in anticipation of the execution of the Nigerian cement contract, a revolving performance bond in the amount of $36,000 was issued by Schroder, Munchmeyer, Hengst & Co. on behalf of Chenax and Transcommerce. Notice of the issuance of the bond was sent to CBN by letter dated March 14, 1975 by Schroeder, Munchmeyer &

Hengst Co. Nigeria subsequently established a letter of credit in favor of Chenax on April 25, 1975 with CBN.

On May 13, 1975, Chenax requested that Morgan transfer the entire letter of credit to Transcommerce, and Morgan complied with that request. However, on or about August 14, 1975, Schroeder, Muenchmeyer, Hengst & Co. notified Morgan that Transcommerce had rejected the transfer. Apparently, Transcommerce had determined that it would not participate in the performance of the cement contract. Chenax's principal officer, director and major shareholder, Dr. Uche Akuba, testified at trial that Chenax and Transcommerce had originally intended to obtain cement from Cementos Especiales, a cement factory in Las Palmas, Canary Islands. When Transcommerce decided to withdraw from this matter, Chenax obtained the services of an agent, Souhail Makareem. Makareem, according to Dr. Akuba's testimony at trial, obtained a separate oral arrangement with Cementos Especiales to supply Chenax with 40,000 metric tons of cement at $34.80 per ton, F.O.B. Las Palmas, with an option by Chenax to purchase the balance of its needs from Cementos Especiales at that price. The cost of insurance was to be $.35 per metric ton. For his services as Chenax's agent, Makareem was to receive $.65 per metric ton for each metric ton of cement purchased by Chenax from Cementos Especiales.

Chenax's shipping agent, M.G. Pamies, procured a contract of affreightment with the shipping firm of Pearl Marin Shipping, Stockholm, Sweden, to carry 240,000 metric

tons of cement in bags, plus or minus 10%, from Las Palmas to Nigeria at the rate of $16.60 F.I.O.S. Demurrage would be paid to Pearl Marin Shipping at the rate of $.40 per metric ton per day or pro rata for any part of a day. Pearl Marin was to pay brokerage fees of 4.5% of the freight and demurrage under that contract. Of this amount, M.G. Pamies was to receive 2.5%. It is unclear from the contract as to who was to receive the remaining 2%. Dr. Akuba testified at trial that he understood that Chenax would receive the remaining 2%. The Court finds that the evidence submitted does not support the conclusion that Chenax was entitled to the remaining 2% in brokerage fees.

Dr. Akuba also testified that either in early July, 1975 or in early August, 1975, he met with agents for an unspecified Italian cement company and had received an oral commitment from it to provide Chenax with cement at the rate of $32 per metric ton, F.O.B. Italian ports. The Court notes that this oral commitment was made either before or at about the time that Chenax entered into an oral agreement with Cementos Especiales to purchase 40,000 metric tons of cement at the price of $35 per metric ton.

On or about August 28, 1975, Chenax received a cable from the Nigerian government informing Chenax that the importation of cement was suspended for at least three months. Chenax thereafter expressly accepted the suspension. Morgan subsequently informed Chenax that CBN had amended its letter of credit; the proposed amendment was similar to those attempted to be made

by CBN with respect to the letters of credit issued in favor of Nikkei and East Europe; it was also undertaken unilaterally.[7/] Chenax did not consent to these amendments.

During October, 1975, Dr. Akuba visited Nigeria pursuant to an invitation to meet with representatives of Nigeria's Ministry of Defense and CBN. He was asked to cancel the Nigerian cement contract and CBN's letter of credit, but he refused to do so.

Discussion - Jurisdiction

Before addressing the merits of plaintiffs' claims, the Court will first resolve defendants' contention that they are both immune from the jurisdiction of this Court pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., under the circumstances set forth above. This defense of sovereign immunity was originally raised by defendants in their answer to the complaints, but it was stricken therefrom by Order of this Court dated June 16, 1979. Magistrate Schreiber, to whom motions regarding this issue had been referred to hear and recommend, previously reported that, in his view, this Court had jurisdiction over defendants pursuant to section 1605(a)(2) of the Act. See Magistrate Schreiber's Amended Recommendation dated September 19, 1978. This Court adopted that recommendation. By arguments raised in their post-trial submissions, defendants seek to renew their contention that this Court lacks in personam jurisdiction over them under the Act.

The Foreign Sovereign Immunities Act of 1976

In adopting the Foreign Sovereign Immunities Act, Congress sought to accomplish four objectives: (1) to codify the "restrictive principle" of sovereign immunities, as it has been generally recognized in international law, under which a foreign state is immune from suits in the courts of another country which are founded upon its "public acts" (jure imperii), while acknowledging the jurisdiction of said courts regarding actions based on the commercial or "private acts" (jure gestionis) of the foreign state; (2) to insure that this restrictive principle is applied in actions in the courts of the United States, thereby dispensing with the authority of the Department of State to make final determinations regarding foreign immunity; (3) to provide a statutory procedure for service of process and obtaining in personam jurisdiction over a foreign state; and (4) to provide a means by which a judgment creditor may secure a remedy if a foreign state fails to satisfy a final judgment. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7-8, reprinted in [1976] U.S. Code Cong. & Admin. News 6605-606 (hereinafter cited as "House Report"). A principal purpose of the Act was to provide a remedy for American citizens, businessmen, and property owners who increasingly come into contact with foreign states and commercial entities owned by foreign states. Verlinden B. V. v. Central Bank of Nigeria, 79 Civ. 1150, slip op. at 13 (S.D.N.Y., April 21, 1980).

Section 1604 of the Act expressly sets forth the

grant of immunity afforded foreign sovereigns. It provides that except for the limitations enumerated in sections 1605 and 1607 thereof and subject to existing international agreements entered into by the United States at the time the Act became effective, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . ." 28 U.S.C. § 1604. The grant of immunity therefore is limited, and the Court must look to other provisions of the Act, particularly section 1605, to determine the bounds of the grant of immunity.

The subject matter and personal jurisdiction of this Court in civil actions involving foreign states is defined in section 1330 of Title 28, United States Code. It states:

> "(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) [of the Foreign Sovereign Immunities Act] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of [the Act] or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of [the Act.]"

This Court accordingly has subject matter jurisdiction pursuant to section 1330(a) over civil actions in which the defendant foreign state is not entitled to immunity under the Foreign Sovereign Immunities Act. Also, it has personal jurisdiction pursuant to section 1330(b) over a foreign state in actions in which the claim asserted by the plaintiff is "one over which the

district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity." House Report at p. 6612. Therefore, the focal issue with respect to both the Court's subject matter and personal jurisdiction is whether the defendant foreign state is entitled to immunity under the alleged facts.

Section 1605(a) of the Foreign Sovereign Immunities Act sets forth several instances in which a foreign state will not be immune from the jurisdiction of American courts. In particular, section 1605(a)(2) describes three instances in which immunity will not be afforded the foreign state. These are: (1) when the action is based upon a commercial activity carried on within the United States by the foreign state; (2) when the action is based upon an act performed in this country which relates to a commercial activity of the foreign state elsewhere; and (3) when the action is based upon an "act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The first two exceptions to the grant of immunity under this provision involve activities of the foreign state within the United States. The third exception involves the foreign activities of the foreign sovereign which cause some direct injury or result in the United States.

The "direct effect" requirement of the third exception under section 1605(a)(2) is apparently intended, in part, to ensure

that there is "some connection between the lawsuit and the United States" thereby assuring that the exercise of the court's personal jurisdiction over the foreign state under section 1330(b) comports with the minimum contacts standard set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945) and McGee v. International Life Insurance Co., 355 U.S. 220 (1957). House Report at p. 6612. Therefore, the "direct effect" exception under section 1605(a)(2) requires not only that there be an immediate causal effect within the United States, Carey v. National Oil Corporation, 592 F.2d 673, 676 (2d Cir. 1979), but also that there be sufficient minimum contacts between the matter in controversy and the United States to support the court's exercise of in personam jurisdiction.

The Court also notes that the third exception under section 1605(a)(2) was also intended to subject a foreign state to the jurisdiction of the courts of the United States with respect to the foreign state's commercial conduct elsewhere in a manner "consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." House Report at p. 6618. Section 18 of the Restatement states:

> "A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> > (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

> (b)(i) the conduct and its effects are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems." (emphasis added).

Section 18(b) of the Restatement is similar in substance to the "direct effect" clause of section 1605(a)(2) of the Foreign Sovereign Immunities Act. Both section 18(b) of the Restatement and section 1605(a)(2) of the Foreign Sovereign Immunities Act provide for in personam jurisdiction over a defendant who has caused a direct effect within the forum state. Comment "f" following section 18 of the Restatement indicates that under subsection (b), "the effect within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside the territory." Restatement (Second) Foreign Relations Law of the United States § 18 at p. 50 (1965). (emphasis added). Therefore, it appears that under the "direct effect" exception of section 1605(a)(2) of the Foreign Sovereign Immunities Act the determinative issues are whether the injury allegedly suffered by the plaintiff was a substantial, foreseeable, and immediate causal result of an act of the defendant outside the United States in connection with defendant's commercial activity elsewhere and whether the minimum contacts standard set forth in International Shoe Co. and McGee has been satisfied.

In the present actions, it is undisputed that each defendant would be immune from the personal jurisdiction of

this Court pursuant to section 1604 of the Foreign Sovereign Immunities Act if none of the exceptions set forth in section 1605 applied. Defendant Nigeria is a foreign state, and defendant CBN, as an agency or instrumentality of defendant Nigeria, is also entitled to immunity. 28 U.S.C. §§ 1603(b), 1604. The questions presented to this Court by defendants' renewal of their contention that this Court lacks personal jurisdiction under sections 1330(b) and 1605(a)(2) of the Act are: (1) whether each defendant has committed an act outside the territory of the United States in connection with commercial activity elsewhere; (2) whether that act caused a substantial, foreseeable, and immediate effect in the United States; and (3) whether the minimum contacts standard has been satisfied with respect to each defendant.

The acts of defendant Nigeria which plaintiffs allege constitute anticipatory breaches of their individual contracts took place outside the United States and relate to Nigeria's commercial transactions with plaintiffs. The suspension of the importation of cement and the refusal to issue documents to plaintiffs allowing them to commence shipment of cement into Nigeria took place in that county. Similarly, the conduct of defendant CBN which is in dispute relates to its commercial banking activities in Nigeria. The unilateral amendments of the three letters of credit occurred in Nigeria. See Verlinden B.V. v. Central Bank of Nigeria, supra, at 32 ("the 'repudiation' was issued in Nigeria (an act outside the United States)"). Therefore, the requirement under the "direct

effect" exception under section 1605(a)(2) that each defendant commit an act outside the United States in connection with their commercial activities elsewhere, is satisfied. The remaining issues to be resolved are whether those acts had a substantial, foreseeable, and immediate causal effect within the United States and whether the minimum contact test has been satisfied.

Judicial Interpretations of the Act

The courts which have been presented with the issue of whether the "direct effect" exception renders a particular foreign state amendable to the jurisdiction of American courts have followed divergent modes of analysis. Some courts have held that the "locus of the injury is dispositive of jurisdiction," implying thereby that both the minimum contacts standard and the requirement of a substantial, foreseeable, and immediate causal effect are satisfied when the locus of the injury is in the United States. Verlinden B.V. v. Central Bank of Nigeria, supra, at 32 and cases cited therein. Other decisions have held that the "direct effect" exception is fulfilled "only where there are significant contacts between the transaction underlying the cause of action and the United States." Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 78 Civ. 2395, slip op. at 12 (S.D.N.Y. July 16, 1980); East Europe Domestic International Sales Corp. v. Terra, 467 F. Supp. 383, 388 (S.D.N.Y. 1979). Each of these approaches addresses only one of the issues which must be resolved here. The locus-of-injury approach is primarily concerned with whether the alleged injury was a substantial, foreseeable, and immediate causal result of

the act of the defendant foreign state. On the other hand, an analysis of the contacts between the underlying transaction and the forum country only addresses the issue of whether the minimum contacts standard has been satisfied.

While the determination of the locus of the alleged injury may indeed determine whether there has been a substantial, foreseeable, and immediate causal effect within the United States, it does not necessarily determine whether the minimum contacts standard has been met. A separate determination of this second issue must be made. Cf. Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979).

In determining whether sufficient minimum contacts are present between the defendant foreign state and the United States, the court must consider not merely whether there are sufficient contacts with respect to the contract in dispute, but more broadly whether maintenance of the suit offends "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1940). The contacts between the defendant and the forum must be such that it is reasonable to require the defendant to litigate the dispute in that forum. Id. at 317. The factors to be considered by the court are: (1) the burden placed on the defendant in litigating in that forum; (2) the interest of the forum in adjudicating the dispute, and (3) the plaintiff's interest in obtaining convenient and effective relief. World-Wide Volkswagen Corp. v. Woodson, 100 S.Ct. 559 (1980).

In the present actions, the findings of fact of this Court as set forth herein support the conclusion that this Court has personal jurisdiction over each of the defendants under section 1330(b) and the "direct effect" exception of section 1605(a)(2) of the Foreign Sovereign Immunities Act. The alleged breaches of each of the three cement contracts and three letters of credit by the defendants caused substantial, foreseeable, and immediate injury to plaintiffs in New York. Each plaintiff is a New York corporation and payment was to be made to each plaintiff in New York through Morgan Guaranty Trust Company under the letters of credit. Similarly, the three cement contracts were effectively amended to provide for payment thereunder in New York by Nigeria's unilateral establishment of the letters of credit with CBN, all of which were payable in New York. Under these circumstances, the locus of injury was in New York. Cf. Verlinden B.V. v. Central Bank of Nigeria, supra at 34; National American Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 639 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979). The necessary minimum contacts are also present. Again, payment under each of these contracts and under each letter of credit was to be made in New York. Although the cement which was to be delivered to Nigeria under the cement contracts did not originate in or pass through the United States, payment therefor was to occur in New York at the instance of defendant Nigeria. Since ~~plaintiffs~~ defendant chose New York as the place of payment, the burden of litigating in this forum should not be overly burdensome. Moreover, Congress has indicated that in

enacting the Foreign Sovereign Immunities Act it intended to ensure that "our citizens will have access to the courts in order to resolve ordinary legal disputes." House Report at p. 6605. Finally, it is clear that the plaintiffs have a substantial interest in a convenient and effective resolution of their individual claims which they may not, under the circumstances, otherwise obtain elsewhere. In this Court's view, under the guidelines set forth in World-Wide Volkswagen Corp. v. Woodson, supra, there are sufficient minimum contacts to warrant the exercise of this Court's in personam jurisdiction over each of the defendants. Contra, Texas Trading & Milling Corp. v. Federal Republic of Nigeria. supra.

Having determined that this Court has in personam jurisdiction over the defendants, the Court will now address the merits of plaintiffs' claims.

Merits of Plaintiffs Claims

The parties agree that the law of New York governs the claims asserted by Nikkei and East Europe for breach of contract and that the law of Switzerland is determinative of Chenax's claim for breach of contract. It is further agreed that with respect to the claims of all the plaintiffs for breach and repudiation of the individual letters of credit issued by CBN in favor of the plaintiffs, the Uniform Customs and Practice Documentary Credits (1962 Revision) governs. To the extent that the UCP does not indicate what relief may be obtained by a beneficiary of a letter of credit under the circumstances

presented in this action, the parties agree that the law of New York governs the claims asserted by Nikkei and East Europe. Chenax contends that its claim under the letter of credit issued in its favor is also governed by New York law in this regard, but defendants contend that the law of Switzerland is determinative.

Letters of Credit

By the express terms of the individual letters of credit issued by CBN in favor of each of the plaintiffs, these letters of credit were irrevocable. Under Article 3 of the Uniform Customs and Practice for Documentary Credits, an irrevocable credit "can neither be modified nor cancelled without the agreement of all concerned." The UCP is silent, however, as to the remedies available to a beneficiary of a letter of credit where there has been a unilateral amendment of an irrevocable letter of credit by the issuer. Accordingly, this Court must review New York law to determine whether Nikkei and East Europe may recover damages for their claims regarding their individual letters of credit under New York law.

Under present New York law, a beneficiary of an irrevocable letter of credit may usually obtain relief for anticipatory repudiation of the credit pursuant to Article 5 of the New York Commercial Code. N.Y. U.C.C. § 5-115 (McKinney 1964). However, section 5-102(4) of the New York Uniform Commercial Code provides:

> "Unless otherwise agreed, this Article 5 does not apply to a letter of credit . . . if by its terms or by agreement, course

> of dealings or usage of trade such letter of credit . . . is subject in whole or in part to the Uniform Customs and Practice for Commercial Documentary Credits . . . ."
> N.Y. U.C.C. § 5-102(4) (McKinney 1964).

The Court notes that this provision of the New York U.C.C. is not contained in the model Uniform Commercial Code as adopted by the American Law Institute and by the National Conference of Commissioners on Uniform State Law. Its enactment reflects the intent of the New York legislature to maintain the pre-Code conduct of international transactions in the State of New York and to preserve the effect of the Uniform Customs and Practice for Commercial Documentary Credits. N. Y. Commission Comment on section 5-102 at p. 650 (McKinney 1964);T. Quinn, Uniform Commercial Code Commentary and Law Digest ¶ 5-101 [A][4] at pp. 5-6 to 5-8 (1978).

Therefore, since the letters of credit issued by CBN in favor of Nikkei and East Europe expressly state that the UCP was to govern the terms thereof, Article 5 of the New York U.C.C. and the remedies contained therein do not apply to these actions. Marine Midland Grace Trust Company of New York v. Banco del Pais, 261 F. Supp. 884, 886 n.1 (S.D.N.Y. 1966). Nevertheless, plaintiffs are not without a remedy under New York law. A letter of credit is a contract between the beneficiary of the credit and the issuing bank wholly separate from the underlaying sales contract. Shanghai Commercial Bank, Ltd. v. Bank of Boston Int'l, 53 App. Div. 2d 830, 385 N.Y.S.2d 548 (1st Dep't 1976). It appears that these plaintiffs may seek relief for the anticipatory repudiation of the credits under applicable pre-Code state law. Cf. United

Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 392 N.Y.S.2d 265 n.2 (1976). As indicated in the discussion that follows, under pre-Code law, a complainant who asserts a claim for anticipatory repudiation of a contract must demonstrate that he would have been ready, willing, and able to fulfill his obligations under the contract. Scholle v. Cuban-Venezuelan Oil Voting Trust, 285 F.2 318 (2d Cir. 1960). Therefore, Nikkei and East Europe each have the burden of demonstrating that it would have been ready, willing, and able to tender the requisite documents to CBN. In effect, this requires that they each demonstrate that they would have been ready, willing, and able to perform the underlying cement contracts. This the same burden plaintiffs bear with respect to their claims of anticipatory breach of the cement contracts, as discussed below. If plaintiffs prevail on their claims of anticipatory breach of the cement contracts, they shall also prevail on their claims of anticipatory repudiations of the letters of credit.

Chenax's letter of credit is silent as to what law governs its terms. It appears, however, that since Swiss law governs the terms of the underlying cement contract, it should also govern the terms of the letter of credit. Assuming arguendo that Chenax's letter of credit is governed by Swiss law rather than by New York law, the parties have nevertheless failed to definitively establish the applicable Swiss law. Therefore, this Court must assume that Swiss law regarding anticipatory repudiation of irrevocable letters of credit is the same as that of New York. Ogden Development Corp. v. Federal Insurance Co., 508 F.2d 583 (2d Cir. 1974). Accordingly, Chenax must demonstrate that it would have been ready, willing, and able to perform its obligations under the letters of credit and produce the documents required for payment thereunder to prevail on its claim against CBN.

Its ability to perform the underlying cement contract will be determinative of the issue.

Anticipatory Breach of Contract -- New York Law

Under section 2-610 of the New York Uniform Commercial Code, N.Y. U.C.C. § 2-610 (McKinney 1964), when a buyer repudiates a contract with his seller with respect to a performance not yet due, the aggrieved seller may, inter alia, "resort to any remedy for breach provided in the Code." Defendants do not dispute that the suspension of the importatinn of cement and the failure to issue certificates to plaintiffs which authorized the commencement of shipping of cement into Nigeria pursuant to these contracts are sufficient to constitute anticipatory breaches of the three contracts under section 2-610. Indeed, these acts clearly demonstrate Nigeria's intent to terminate its performance under these contracts. Defendants contend, however, that plaintiffs must not only demonstrate that there was an anticipatory breach, but also that they were each ready, willing, and able to fulfill their individual obligations under the contracts.

Under New York law prior to the enactment of the U.C.C., a seller whose contract was anticipatorily breached was required to demonstrate that he would have been ready, willing, and able to complete performance under the contract. Scholle v. Cuban-Venezuelan Oil Voting Trust, supra. Although the express provisions of the Code, as adopted by New York, are ambiguous as to whether this requirement has been retained, the New York

courts appear to have continued to require proof of readiness, willingness, and ability to perform. E.g., UFITEC, S.A. v. Trade Bank & Trust Co., 21 App.Div. 2d 187, 249 N.Y.S.2d 557 (1st Dep't 1964, aff'd, 16 N.Y.2d 698, 261 N.Y.S.2d 893 (1965); see also, Tensvision, Inc. v. Neuman, 45 N.Y.2d 145, 480 N.Y.S.2d 36 (1978). Accordingly, this Court finds that plaintiffs Nikkei and East Europe individually have the burden of proving that they would have been ready, willing, and able to perform under the contracts in dispute.

The evidence submitted to the Court indicates that Nikkei had subcontracted with Productos Fontanet to obtain 120,000 metric tons of cement and that it had an option to purchase an additional 120,000 metric tons. Therefore, if Nikkei has exercised its option, it would have obtained its entire commitment under the cement contract with Nigeria from Productos Fontanet. As indicated by the bills of lading in evidence, it appears that Productos Fontanet was performing under its subcontract at the time importation of cement into Nigeria was suspended. N.Y. U.C.C. § 1-202 (McKinney 1964) (a bill of lading is prima facie evidence of the facts stated therein). Defendants have offered no credible evidence to the contrary.

Nikkei contends not only that it would have been able to fully perform under its cement contract through its subcontract with Productos Fontanet, but also that even if it had not exercised its option with Productos Fontanet, it would have been able to obtain an additional 144,000metric tons of cement (the remaining 120,000 metric tons plus 10% of the 240,000

metric ton total under its contract with Nigeria) from other Spanish cement factories at a lower price than it was paying Productos Fontanet.

The evidence submitted at trial supports the conclusion that the cement factories in Spain and other European countries had sufficient un-utilized capacity in 1975 and 1976 to provide Nikkei, and the other plaintiffs, with sufficient cement to fulfill their contracts with Nigeria. In 1975, Spain produced more than 23.9 million metric tons of cement and had a capacity to produce more than 26.9 million metric tons of cement. Memoria del Cemento at p. 4. In 1976, Spanish cement factories produced more than 25.3 million metric tons of cement and had a capacity to produce more than 32.8 million metric tons of cement. World Cement Directory 1977 at p. 246. Therefore, it appears that Spanish cement factories had sufficient capacity to produce more than 10 million additional metric tons of cement than was in fact produced during the period 1975 through 1976. In the aggregate, Nigeria's contracts with plaintiffs required the delivery of only 720,000 metric tons of cement.[8/]

Therefore, since the evidence indicates that Productos Fontanet was performing its subcontract with Nikkei and that other factories in Spain had sufficient un-utilized capacity to provide Nikkei with enough cement to enable Nikkei to fulfill its obligations under its contract, the Court finds that Nikkei was ready, willing, and able to complete performance and provide Nigeria with 240,000 metric tons of cement. There is insufficient

evidence to support Nikkei's contentions that it could have obtained a lower subcontract price than the price it had negotiated with Productos Fontanet or that it would have exercised its option to provide Nigeria with an additional 24,000 metric tons of cement. Therefore, Nikkei may not recover lost profits for the additional 24,000 metric tons of cement for which it had an option to supply Nigeria.

The Court also finds that East Europe could have provided Nigeria with 120,000 metric tons of cement through its subcontract with Intrafinsa. Intrafinsa had provided Nigeria with at least 37,630 tons of cement pursuant to Intrafinsa's subcontract with another cement supplier who is not a party to this action. National American Corporation v. Federal Republic of Nigeria, supra. Since sufficient cement was available in Spain and elsewhere in Europe in 1975 and 1976, see World Cement Directory 1977, it is reasonable to conclude that Intrafinsa could have fulfilled its obligations to East Europe under the subcontract, and East Europe, in turn, could have also fulfilled its contractual obligations to Nigeria.[9/] Based on the evidence submitted at trial, it is apparent to the Court that East Europe had in fact negotiated other purchases of cement during 1976 to fulfill its contractual obligations under other cement contracts with other parties. See Plaintiffs' Exhibits EE-25 and EE-26 regarding East Europe's purchase of 50,000 metric tons of cement from a Romanian source in April, 1976.

Defendants have sought to demonstrate that Irving Ross, East Europe's principal officer, had a questionable financial

background and that East Europe could not, therefore, have been able to secure subcontracts to fulfill its obligations. However, since Nigeria had established an irrevocable, transferrable letter of credit in East Europe's favor with CBN, and in view of the availability of cement, it is clear that East Europe could have secured subcontracts for cement by transferring part of its letter of credit to such subcontractor, regardless of Ross' financial reputation in the industry. This in fact was the means by which East Europe was to effect payment under its subcontract with Intrafinsa.

Anticipatory Breach of Contract -- Swiss Law

Since the cement contract between Nigeria and Chenax expressly states that the law of Switzerland should govern the terms of the contract, it is clear that Chenax's claim for breach of contract must be resolved under thelaws of that country. Actions for anticipatory breach of a contract brought in Switzerland are governed by the Swiss Code of Obligations. Article 107 of that Code provides:

> "If the obligor is in default in the case of a bilateral contract, the obligee shall be entitled to fix an appropriate time limit . . . for subsequent performance, or to have it fixed by the competent authority.
>
> "If, at the expiration of this time limit, there is no performance, the obligee may still sue for performance plus damages due to delay . . . . Alternatively, if he so declares without delay, he may waive future performance and ask for compensation for damages arising out of the nonperformance,

or he may withdraw from the contract." Swiss-American Chamber of Commerce, Swiss Contract Law, English Translation of Selected Official Texts ¶ 107 at p. 35 (1977) (emphasis supplied).

The parties do not dispute that Chenax has elected to waive future performance and to seek damages for anticipatory breach of contract as provided in Article 107. Defendants also do not dispute, and this Court expressly finds, that the acts complained of by Chenax constitute an anticipatory breach by defendants of the Chenax cement contract under Swiss law for the reasons set forth previously. See discussion regarding anticipatory breach of contract under New York law. Defendants do contend, however, that Chenax must prove that it was able to perform the contract and that it must prove damages as provided in the Swiss Code of Olbigations. The Court notes that with respect to the issue of liability, defendants' expert witness testified during the trial of this action that "[i]t would be sufficient to prove that [Chenax] had the possibility to have [the cement] delivered." Trial Transcript at p. 1232. Chenax has not disputed this testimony. Therefore, it appears that under Swiss law, Chenax must prove that it could have performed its obligations under the cement contract in dispute. This burden of proof is apparently equivalent to the burden of proof required under New York law in actions for anticipatory breach of contract.

The Court finds the evidence submitted at trial insufficient to support the conclusion that Chenax was ready,

willing, and able to fulfill its contractual obligations. Chenax has failed to produce sufficient credible evidence which demonstrates that it had entered into a subcontract with Cementos Especiales under which Cementos Especiales was obligated to provide Chenax with the cement it required or that Cementos Especiales had the capacity to produce the requisite quantity of cement. None of the documents submitted at trial regarding the capacity and production of cement in Europe indicates the amount of unused capacity of Cementos Especiales to produce cement in 1975 and 1976. Furthermore, although Chenax contends that it could also have obtained 200,000 metric tons of cement from an Italian factory at a price which was lower than the price allegedly offered by Cementos Especiales, the evidence submitted in this regard is insufficient to support the allegation that such an offer was in fact extended to Chenax. The Court notes that Chenax's representative who testified at trial concerning this alleged offer, Dr. Akuba, could not identify the Italian cement factory involved. Accordingly, the Court finds that Chenax has failed to demonstrate that it was able to perform its obligations under the terms of the contract in controversy. 10/

Demurrage

Each plaintiff has also claimed damages for lost profits on demurrage. They each contend that their respective contracts were bargained for with an explicit expectation of

profit on demurrage. However, since Nikkei's subcontract with Productos Fontanet provided that Productos Fontanet would receive demurrage not exceeding $4,100 per diem, the same demurrage rate provided in the underlying contract with Nigeria, it appears that Nikkei could not have obtained any profit from demurrage. Any demurrage which would have accrued would have been paid in total to Productos Fontanet rather than retained by Nikkei as profit.

Similarly, East Europe's subcontract with Intrafinsa provided that Intrafinsa would receive demurrage at a rate not exceeding $4,000 per diem. East Europe, therefore, could not have obtained a profit from demurrage for the same reason.

Moreover, even if these plaintiffs could have earned a profit because of a differential between the demurrage rates in their individual contracts with Nigeria and the demurrage rates in their respective subcontracts, estimating lost profits on demurrage for each of these plaintiffs could only be predicated upon unfounded speculation. If Nigeria had breached its cement contracts with all other suppliers except these plaintiffs and if all other suppliers accordingly ceased shipment of cement to Lagos immediately upon being notified, thereby relieving the port's congestion, plaintiffs would very likely have accumulated no demurrage. At the other extreme, if the congestion in the Nigerian ports continued indefinitely, plaintiffs could possibly have earned a significant amount of demurrage. Since estimation of demurrage herein involves unreasonable speculation, plaintiffs' claims regarding demurrage must be denied.

Incidental Damages

East Europe and Nikkei seek to recover incidental damages incurred as a result of defendant Nigeria's breaches of their respective contracts. Nikkei contends that it incurred a total of $5,000 in expenses in sending Ozawa to Nigeria to meet with the Nigerian negotiating committee. East Europe seeks to obtain costs it incurred as a result of the trip taken by Ross to meet with the Nigerian negotiating committee. East Europe also seeks to recover attorney's fees it incurred in connection with its claims for breach of contract.

Section 2-708 of the New York Uniform Commercial Code provides that in addition to lost profits a seller may recover incidental damages incurred as a result of the anticipatory breach of the contract by the buyer. Included in such recoverable incidental damages are "commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." N.Y. U.C.C. § 2-710 (McKinney 1964). The New York courts have given broad meaning to the phrase "reasonable charges, expenses or commissions" with the intent of putting the seller in as good a position as he would have been if performance would have been done. Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017, 1024 (2d Cir. 1978). However, attorney's fees which were incurred as a result of or in connection with the prosecution of the seller 's claim are not recoverable as incidental damages. Neri v. Retail Marine Corp., 30 N.Y. 2d 393, 334 N.Y.S.2d 165 (1972).

It appears that the expenses incurred by East Europe and Nikkei in sending their respective representatives to meet with the Nigerian negotiating committee in October, 1975 and in February, 1976 were incurred as a result of Nigeria' suspension of importation of cement, and its refusal to accept delivery of cement, and CBN's unilateral amendment of the letters of credit. Accordingl these expenses may be recovered by East Europe and Nikkei as incidental damages. East Europe's claims for attorney's fees must be denied.

Punitive Damages and Interest

Finally, plaintiffs seek to recover punitive damages from Nigeria and CBN and to obtain interest under New York law. Under section 1-106 of the New York Uniform Commercial Code, "penal damage may not be awarded "except as specifically provided in [the Code] or by other rule of law." Plaintiffs contend that they are entitled to punitive damages since defendants maliciously breached their respective contracts. Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir. 1975) cert. denied, 423 U.S. 892 (1975). Even assuming that this Court ma assess punitive damages for malicious breach of contract generally, plaintiffs have failed to demonstrate that defendants acted maliciously. Accordingly, the plaintiffs claims for punitive damages are dismissed.

Interest on an award for breach of contract may be recovered under New York law, N.Y. C.P.L.R. § 5001(a) (McKinney 1963), and is to be computed "from the earliest ascertainable date the Cause of action existed," id. § 5001(b). Accordingly, this Court finds that Nikkei shall recover interest on its award of compensatory and incidental damages as of March 1, 1976, the median date of the twelve-month period during which

Nikkei would have received payment for performance but for defendants' breach of contract. Similarly, East Europe shall recover interest on its award of damages as of April 1, 1976, the median date of the period during which it would have received payment.

Conclusions

1. Nikkei shall recover compensatory damages from Nigeria for lost profits on the sale of 231,500 metric tons of cement. The measure of lost profit per metric ton shall be the difference between the contract purchase price of $60 per metric ton and the subcontract supply price set forth in Nikkei's subcontract with Productos Fontanet. Alternatively, Nikkei may recover such sum from defendant CBN for anticipatory repudiation of an irrevocable letter of credit. 11/

2. East Europe shall recover compensatory damages from Nigeria for lost profits on the sale of 240,000 metric tons of cement. Lost profits shall be assessed per metric ton at a rate equivalent to the difference between the contract purchase price of $59.50 and the subcontract supply price of $51.25 as set forth in its subscontract with Intrafinsa. Alternatively, East Europe, Nikkei may recover such sum from defendant CBN for anticipatory repudiation of an irrevocable letter of credit.

3. Chenax's claims for anticipatory breach of contract and anticipatory repudiation of the letter of credit is dismissed.

4. East Europe and Nikkei shall recover the expenses they each incurred in sending their representatives to meet with the Nigerian negotiating committee.

5. East Europe's claim for attorney's fees is denied.

6. Plaintiffs' claims for punitive damages are denied. Plaintiffs' claims for demurrage are dismissed.

7. Plaintiffs East Europe and Nikkei shall recover interest on their respective awards as provided herein.

Submit Judgments.

SO ORDERED.

Dated: New York, New York
August 1980

LAWRENCE W. PIERCE
U. S. D. J.

FOOTNOTES

1/ Nikkei requested that it be permitted to ship cement out of other ports as well, but that request was never approved by Nigeria.

2/ No arbitration of the claims asserted in these actions has been attempted, and defendants have waived any right to such arbitration.

3/ See Footnote 1 and accompanying text.

4/ Plaintiffs East Europe and Chenax also received notification from Morgan of the amendments to their letters of credit by CBN and of the suspension of importation of cement into Nigeria.

5/ Evidence of a second performance bond in the amount of $180,000 issued by Chase Manhattan Bank, Piraeus, Greece, on behalf of East Europe was submitted to the Court.

6/ See Footnote 4 and accompanying text.

7/ See Footnote 4 and accompanying text.

8/ Defendants argue that none of the plaintiffs would have been able to fulfill its obligations if the Nigerian government had not suspended importation of cement into Lagos and had not renegotiated many of the outstanding cement contracts because the total volume of cement that Nigeria had contracted to purchase exeeeded the amount of cement available during the relevant time period. This argument is meritless. Nigeria did suspend the importation of cement into Lagos and did renegotiate at least 43 of the cement contracts. Regardless of what may have occurred if no embargo had been imposed, the issue before this Court is whether plaintiffs could have fulfilled their individual obligations under the circumstances that actually existed during the relevant time period.

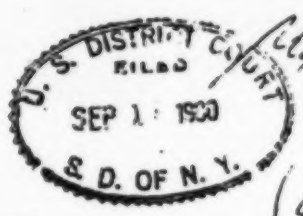
9/ It appears from the evidence submitted at trial that sufficient shipping resources were available to transport the cement to Nigeria, particularly since Nigeria had cancelled several of its cement contracts thereby increasing the number of ships available.

10/ The Court has already determined that sufficient cement cement was in fact available in Spain and other European countries during the period 1975-1976 to enable all three plaintiffs, including Chenax, to fulfill their contractual obligations to Nigeria. Nevertheless, the credible evidence does not demonstrate that Chenax intended to and was otherwise capable of performing under its contract. Whereas Nikkei and East Europe had obtained subcontracts with cement suppliers,

Chenax has failed to demonstrate that it intended to and was able to provide Nigeria with cement or that it had entered into a binding subcontract with a capable cement supplier. The only evidence which tends to support Chenax's contention that Chenax had an oral subcontract with Cementos Especiales is the hearsay evidence of Uche Akuba, Chenax's principal officer, director, and major shareholder. See Findings of Fact regarding Chenax's Performance Under Its Contract, supra. Having observed the demeanor of this witness and having reviewed the evidence submitted, this Court finds that Chenax has failed to demonstrate that it was ready, willing, and able to perform its contractual obligations.

11/ Plaintiffs may not recover their lost profits twice, once under the cement contracts and again under the letters of credit. The letters of credit were merely the means by which plaintiffs were to be paid by Nigeria under the cement contracts.

NIKKEI JUDGMENT



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR by NIKKEI INTERNATIONAL, INC. d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

Index No. 77 Civ. 2348 (LWP)

JUDGMENT

#80 1055

This action came on for trial before the Court, Honorable Lawrence W. Pierce, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that:

1. Plaintiff Decor by Nikkei International, Inc. d/b/a Nikkei International, Inc. recover of defendant Federal Republic of Nigeria the sum of One Million Eight Hundred Fifty-Seven Thousand Dollars ($1,857,000), with interest thereon at the rate of six percent (6%) as provided by law from March 1, 1976, and its costs of action;

2. alternatively, plaintiff may recover such sum from defendant Central Bank of Nigeria; ~~and that~~

3. plaintiff have execution therefor pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Sections ~~1609-1611~~.

Dated at New York, New York, this 10 day of ~~Sept~~, 1980.

JUDGMENT ENTERED 9/11/80
Raymond F. Burghardt
CLERK

USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEP 11 1980
S.D. OF N.Y.

E17

EAST EUROPE JUDGMENT

JUDGMENT

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

Index No.
77 Civ. 2809 (LWP)

JUDGMENT

80,1054

This action came on for trial before the Court, Honorable Lawrence W. Pierce, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that:

1. Plaintiff East Europe Import-Export, Inc. recover of defendant Federal Republic of Nigeria the sum of One Million Nine Hundred Eighty-Six Thousand Dollars ($1,986,000), with interest thereon at the rate of six percent (6%) as provided by law from April 1, 1976, and its costs of action;

2. alternatively, plaintiff may recover such sum from defendant Central Bank of Nigeria; ~~and that~~

3. plaintiff have execution therefor pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Sections 1609-1611.

Dated at New York, New York, this 10 day of Sept, 1980.

USDJ

JUDGMENT ENTERED 9/11/80
Raymond F. Burghardt
CLERK

A - p.2

CHENAX JUDGMENT

U.S. DISTRICT COURT
FILED
SEP 2 1980
S.D. OF N.Y.

50

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHENAX MAJESTY, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

Index No.
77 Civ. 3045 (LWP)

JUDGMENT

This action came on for trial before the Court, Honorable Lawrence W. Pierce, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

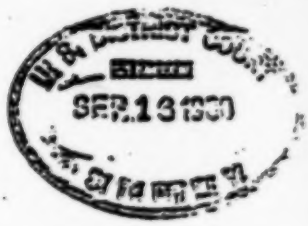
It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants Federal Republic of Nigeria and Central Bank of Nigeria recover of the plaintiff Chenax Majesty, Inc. their costs of action.

Dated at New York, New York, this 28 day of August, 1980.

USDJ

JUDGMENT ENTERED 9/2/80

NIKKEI NOTICE OF APPEAL



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC., Plaintiff,	77 Civ. 2348
- against -	
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	NOTICE OF APPEAL

Notice is hereby given that defendants FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 11th day of September 1980, with respect to this Court's determination of subject matter and personal jurisdiction pursuant to the Foreign Sovereign Immunities Act of 1976 and the granting to plaintiff of part of the relief sought by it on the merits.

Dated: New York, New York
September 15, 1980

KISSAM, HALPIN & GENOVESE

By James G. Simms

James G. Simms
Attorney for Defendants
120 Broadway
New York, New York 10005
(212) 962-2000

TO: Lewis S. Sandler, Esq.
Attorney for Plaintiff
620 Fifth Avenue
New York, New York 10020

E18

EAST EUROPE NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC., Plaintiff,	:	77 Civ. 2809
- against -	:	
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	:	NOTICE OF APPEAL

Notice is hereby given that defendants FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 11th day of September 1980, with respect to this Court's determination of subject matter and personal jurisdiction pursuant to the Foreign Sovereign Immunities Act of 1979 and the grant to plaintiff of part of the relief sought by it on the merits.

Dated: New York, New York
September 15, 1980

KISSAM, HALPIN & GENOVESE

By James G. Simms

James G. Simms
Attorney for Defendants
120 Broadway
New York, New York 10005
(212) 962-2000

TO: Berthold H. Hoeniger
Attorney for Plaintiff
505 Park Avenue
New York, New York 10022

CHENAX NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHENAX MAJESTY, INC.,	:	
Plaintiff,	:	77 Civ. 3045
- against -	:	
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,	:	NOTICE OF APPEAL
Defendants.	:	

Notice is hereby given that defendants FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the second day of September 1980, with respect to this Court's determination of subject matter and personal jurisdiction pursuant to the Foreign Sovereign Immunities Act of 1976.

Dated: New York, New York
September 15, 1980

KISSAM, HALPIN & GENOVESE

By James G. Simms

James G. Simms
Attorney for Defendants
120 Broadway
New York, New York 10005
(212) 962-2000

TO: Lewis S. Sandler, Esq.
Attorney for Plaintiff
620 Fifth Avenue
New York, New York 10020

NIKKEI NOTICE OF CROSS-APPEAL

OFFICE COPY

Rec'd by mail 10-6-80
SERVED

FILED 10-2-80

DOCKET 10-6-80

DIARY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 2348 (LWP)

NOTICE OF CROSS-APPEAL

filed 10-2-80

Notice is hereby given that plaintiff DECOR BY NIKKEI INTERNATIONAL, INC. d/b/a NIKKEI INTERNATIONAL, INC., hereby cross-appeals to the United States Court of Appeals for the Second Circuit from so much of the final judgment entered in this action on the 11th day of September, 1980, as denied certain damages to plaintiff, including lost profits on cement with respect to an additional 24,000 tons of cement and lost profits on demurrage, and from so much of said judgment as limited damages to plaintiff with respect to lost profits on all cement to $8.00 per ton.

A notice of appeal from the aforesaid judgment was filed by defendants on September 16, 1980.

DATED: New York, New York
October 2, 1980

LEWIS S. SANDLER
Attorney for Plaintiff
620 Fifth Avenue
New York, New York 10020
(212) 765-1010

TO:

KISSAM, HALPIN & GENOVESE
Attorneys for Defendants
120 Broadway
New York, New York 10005

EAST EUROPE NOTICE OF CROSS-APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC., Plaintiff, -against- FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 2809 (LWP) Second Circuit Docket No. 80-7773 NOTICE OF CROSS-APPEAL

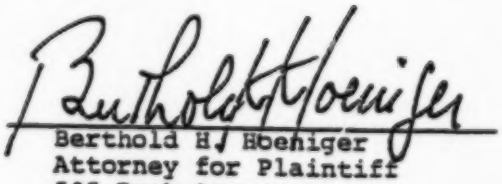
S I R S :

PLEASE TAKE NOTICE that plaintiff-appellant, East Europe Import-Export, Inc., hereby cross-appeals to the United States Court of Appeals for the Second Circuit from so much of the final judgment entered in this action on the 11th day of September, 1980 as (1) allowed plaintiff compensatory damages of only $8.25 per ton with respect to the second 120,000 tons of cement under the cement contract and letter of credit, and (2) denied plaintiff recovery of lost profits equal to the differential between demurrage receivable and demurrage payable by plaintiff with respect to said second 120,000 tons.

A notice of appeal from the aforesaid judgment was filed by defendants on September 16, 1980.

Dated: New York, N.Y.
September 25, 1980

Yours, etc.



Berthold H. Hoeniger
Attorney for Plaintiff
505 Park Avenue
New York, N.Y. 10022
(212) 838-5324

To:

Kissam, Halpin & Genovese
Attorneys for Defendants
120 Broadway
New York, N.Y. 10005

Clerk, United States District Court
Southern District of New York
Foley Square
New York, N.Y. 10007

CHENAX NOTICE OF APPEAL

OFFICE COPY

filed 9-25-80

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHENAX MAJESTY, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 3045 (LWP)

NOTICE OF APPEAL

SERVED 9-24-80

FILED 9-25-80

DOCKET 9-30-80

DIARY

Notice is hereby given that plaintiff CHENAX MAJESTY, INC. hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the second day of September, 1980 dismissing plaintiff's claims.

DATED: New York, New York
September 23, 1980

LEWIS S. SANDLER
Attorney for Plaintiff
620 Fifth Avenue
New York, New York 10020
(212) 765-1010

TO:

KISSAM, HALPIN & GENOVESE
Attorneys for Defendants
120 Broadway
New York, New York 10005

PLAINTIFFS' JOINT EXHIBIT 56: OCTOBER 30, 1975
OFFICE MEMORANDUM OF MORGAN GUARANTY

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

PX 56 - EXCLUDED

OFFICE MEMORANDUM

To: The Files

Date October 30, 1975

From: Arthur J. Brown

Subject: Vazman S.A./Central Bank of Nigeria, Lagos

MG 81

Carlos Fabe, General Manager of Vazman visited us today.

Vazman S.A. is a transferee under a Central Bank of Nigeria letter of credit in favor Sure Petroleum Corp.

At this time Vazman has been paid for all of the cement which they have shipped to Nigeria. However, there are 15 ships carrying cement under contract to Vazman waiting to unload in the port of Lagos. This represents a total of 410 days demurrage equivalent to approximately $12MM.

At the invitation of the Central Bank of Nigeria to all cement suppliers, Carlos Fabe attended a meeting at the Central Bank. The meeting lasted 7 minutes. He was told that his contract was cut in half and that demurrage would be paid upon his obtaining certain approvals from the Nigerian Port Authority. At the Port Authority, Fabe could not find anyone to handle his documents and was referred back to the Central Bank.

Fabe is under the impression that all of the new requirements of the Central Bank of Nigeria for additional documentation substantiating demurrage payments, are intended to be obstacles to prevent payment. The purpose being to force the ship owners to leave port without unloading. This move would violate the contracts and excuse the Central Bank from all liabilities for payment of demurrage.

Fabe told us that the ship owners will only wait another 1 or 2 weeks before at least one of them will leave Lagos. Fabe explained that the ship owners will give more time before leaving Lagos if he can arrange to make a partial payment of demurrage to them. He wants us to consider the following options:

1) That we make an advance payment of $500,000 for demurrage under which we would receive an assignment of proceeds against amounts eventually paid by the Central Bank for demurrage; or

2) That we give Vazman short term financing (secured?) to enable him to pay $500,000 to the ship owners in partial payment of outstanding demurrage.

Vazman asks that we consider his proposal based on the facts that we did giv favorable credit reports on the Central Bank of Nigeria, that Morgan Guaranty has confidence in Central Banks and that Morgan Guaranty holds large deposits from the Central Bank.

Vazman said that Fidelity National Bank issued their irrevocable credit in his favor based on an irrevocable credit of the Central Bank of Nigeria's advised by us! Vazman is cooperating with Fidelity and has stopped making cement shipments despite the fact that if he continues to ship he can draw under his credit from Fidel

Vazman also said that the ship owners, under a protest and indemnity club w:

To: Date

From:

Subject:

form a pool in order to help each other absorb expenses for the time their ships are idle at Lagos.

A.J.B.

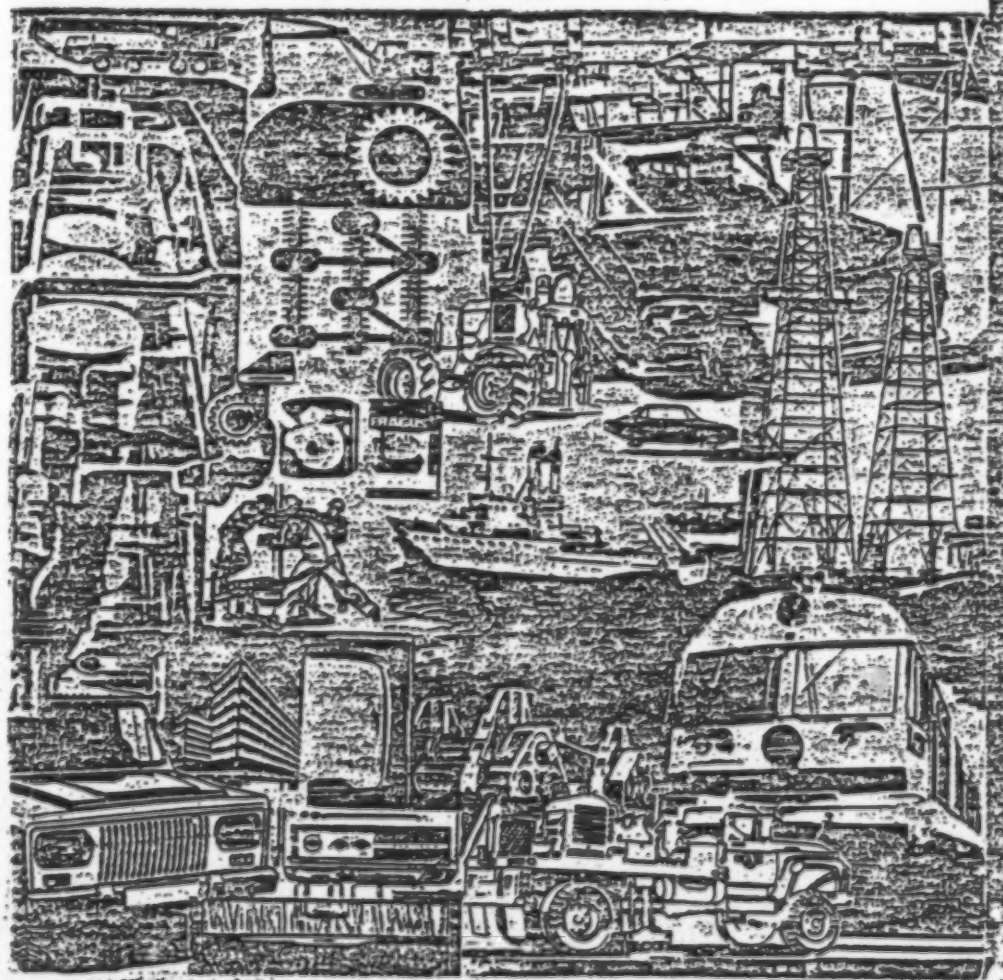
CC: Paul Fitzpatrick, VP
Ralph J. Bunche, Jr., AT
David D. Burrows

MG 82

EAST EUROPE EXHIBIT 68: ECONOMIC AND COMMERCIAL GUIDE TO ROMANIA, EDITED BY THE CHAMBER OF COMMERCE AND INDUSTRY OF THE SOCIALIST REPUBLIC OF ROMANIA, FOREIGN TRADE PUBLICITY AGENCY

EE-68

Economic and Commercial Guide to Romania



Economic and Commercial Guide to Romania

— 1977 —

EDITED BY THE CHAMBER OF COMMERCE AND INDUSTRY
OF THE SOCIALIST REPUBLIC OF ROMANIA

FOREIGN TRADE PUBLICITY AGENCY

PUBLICOM

22, N. BALCESCU BLVD., TELEX 374, BUCHAREST – ROMANIA

CONTENTS

Foreword 5

I. THE ECONOMY OF THE SOCIALIST REPUBLIC OF ROMANIA — PRESENT AND FUTURE 7

1. High Growth Rates — A guarantee of Romania's Economic Growth 7
2. Romanian Economy Investments Over 1976—1980 10
3. Main Indicators of Romania's Economic and Social Development Over the 1976—1980 Period 14

II. ROMANIA — A MORE AND MORE ACTIVE PRESENCE IN WORLD ECONOMIC CIRCUIT 16

1. Romanian Laws Governing and Regulating Foreign Trade 16
2. Economic Relations with More than 140 Countries the World Over 18
3. Collaboration and Cooperation Principles and Forms Promoted by Romania 20
4. Romania's Economic Cooperation with the Socialist Countries 22
5. Romania's Economic Cooperation with the Other Developing Countries 27
6. Romania's Economic Cooperation with the Developed Capitalist Countries 31
7. Joint Companies set up in Romania and Abroad 35
8. Prospects of Romanian Foreign Trade 44
9. Romanian Foreign Trade by Groups of Goods 46
10. Imports of Main Goods 47
11. Exports of Main Goods 48
12. Foreign Trade Carried out with the First 10 countries 50
13. Romanian Products in World Economic Circuit 51
a) Machine-tools & Fine Mechanics..... 51
b) Electronic & Electrical Engineering 53
c) Power Equipment 56
d) Sea- and River-Going Vessels 58
e) Motor Vehicles 59
f) Farming Tractors & Machinery 61
g) Rolling Stock 63
h) Oilfield Equipment 64
i) Romanian Chemical Equipment, Chemicals and Pharmaceuticals 67
j) Mining Equipment 70
k) Construction and Road Building Equipment 71
l) Civil and Industrial Constructions 73
m) The Woodworking Industry 74
n) The Building Materials Industry 76
o) The Light Industry 77

p) Agriculture — A Basic Branch of Romania's Economy 79
r) Brain Exports 81
CENTRAL ECONOMIC INSTITUTIONS 84
INDUSTRIAL CENTRALS 88
ROMANIA and the INTERNATIONAL ECONOMIC ORGANIZATIONS 105
YOUR COMMERCIAL PARTNERS IN ROMANIA 108
— List of Export-Import Goods — 111
ROMANIA'S ECONOMIC AND COMMERCIAL OFFICES ABROAD .. 148
THE CHAMBER OF COMMERCE AND INDUSTRY OF THE SOCIALIST REPUBLIC OF ROMANIA 166
OTHER INFORMATION DESIGNED FOR BUSINESSMEN INTERESTED IN PROMOTING TRADE WITH ROMANIA 176

FOREWORD

This book makes it its aim to provide useful informatin to businessmen who want to keep up or to enlarge their commercial relations with Romanian partners. This Economic and Commercial Guide starts with a brief account of the present potentialities of the Romanian economy and its development prospects, passes on to reviewing a few of the achievements scored in various industrial branches, among which the competitiveness of the Romanian goods in the international market, and also reviews the forms of economic and technico-scientific cooperation ventures practised by Romania up to now with more than 140 countries the world over with which she has been keeping up trade relations.

A chapter apart is devoted to the promotion of Romanian foreign trade, which is the task of the Chamber of Commerce and Industry of the Socialist Republic of Romania under whose sponsorship the present economic and commercial guide is published. The Guide likewise comprises a number of information the editorial staff have considered to be useful to the readers, providing the addresses of Romania's commercial agencies abroad, the addresses of the Romanian Foreign Trade Companies and their object of activity, as well as other useful addresses.

We would kindly ask all the readers to let us know their opinion on this Guide and eventually put forward suggestions as we are eager to know whether it served their interests and provided useful information and thus be able to improve the future editions.

THE EDITORIAL STAFF

perature: 15°C; steam pressure inside the capacitor: 0.038 at (max. permanent load), 0.036 at (economical load); water preheating temperature: 264°C (max. permanent load), 260°C (economical load); turbine length: 20.4 m; turbine width: 11.5 m; sequential controls secure a high degree of automation.

— *the 1035 tons steam/h boiler* designed to supply 330 MW turbines with vapour; this Benson type forced water circulation boiler (1035 t steam/hour, 195/48 kgf/sq.cm, 540/540°C) can run either on lignite or on mazout; its tower structure is the best solution if solid fuel of caloric power ranging between 1400 and 1800 k cal/kg is used. In broad lines this boiler made under a Babcock-Wilcox licence (F.R. of Germany) operates as follows: the water is conveyed by pumps to the economizer and runs down the evaporator; the separation installation separates the steam from the water/steam mixture (starting stage); all information is concentrated on a control panel; the boiler is equipped with a complex automatic measurement and adjustment system which controls: supply water, temperature, fuel, pressure, mazout pre-heating, load distribution; main features: rated output: 1035 t steam/h; rated temp: 540°C; rated pressure: 195 kgf/sq.cm; supply water temp: 260°C; fuel consumption: 470 t lignite/hour or about 73 t mazout/hour; guaranteed efficiency: 87.5 p.c. (when running on coal) or 92 p.c. (when running on mazout).

d) Sea- and River-Going Vessels

Romania is bordering on the Black Sea and the Danube skirts the country along 1,000 odd kilometers. It is a country of long-standing tradition in shipbuilding and this is attested also by XIVth and XVth centuries English chronicles which speak of the Wallachians' and Moldavians' highly rated naval craft. But it was only after the Second World War that Romanian shipyards asserted themselves within the framework of the national economy expansion. Between 1954 and 1959 the Galatz shipyards were endowed with a launching slip for 5000 tdw ships, a 120 m fitting berth, assembly platforms and workshops. It was in those years too that for the first time all-welded hulls were turned out in Romania: 2000 tons river ships and 4500 tdw cargoboats. In 1958 was set up the first installation for cleansing of rolled metal and in 1965 the automatic optical tracing installation equipped with Schichau Monopol machines. All installations are being steadily improved using new methods and up-to-date know-how: A 15,000-ton floating dock has been achieved at the Constantza shipyard, slip berths for 25,000 tdw vessels in Galatz, building berths and slipways for 5,000 tdw motorships at the Oltenița shipyard, etc.

Between 1966 and 1970 were built and launched among others: 12,500 tdw ore carriers, three versions of 4,500 tdw cargoboats, 5000-ton river vessels, 1,640 HP river pushing-boats, etc. The contribution of

the Ship Building Research and Design Institute set up in 1966 has been a significant one. As a consequence of the 1971—1975 special investments programmes the construction of Romanian ships was considerably stepped up, the overall 1975 output being 2.5 times that of 1970 figure.

The Constantza shipyards will be equipped with 2 docks designed for the construction of 150,000 tdw vessels and the Galatz shipyard with a drydock for vessels up to 40,000 tdw, fitting wharfs, assembly platforms etc.

The achievements of Romanian shipbuilders have prompted many foreign users to place orders with UZINEXPORTIMPORT foreign trade company for following types of vessels: passenger river boats, 6,100—7,700 tdw seagoing cargo-boats, 8,250 tdw container boats, general purpose 15,000 tdw vessels, 55,000 tdw bulk carriers and 150,000 tdw vessels.

Here are the main features of some of these ships:

— *54,500 tdw Bulk-Carrier* — designed for transport of bulk cargo (grain, coal, iron, ores, phosphates, etc.) is built in compliance with the prescriptions of Bureau Veritas, class 1/3/3L, alternated holds 1E Glace III and the Romanian Shipping Register class RNR-GC 20; the boat is powered by a MAN K 6 SZ 90/160 A high pressure diesel marine engine (made by Reșița Works) developing 7,400 HP at 122 rpm; length total: 220 m; beam: 32.2 m; loading capacity: ca 75,000 cu.m (69,000 cu.m in the main holds and ca 6,500 cu.m. in the side holds); cruising range: 16,000 sea miles; complement: 49.

6100—8700 tdw cargoboat designed for bulk transport of any type of goods; equipped with a "Cegielski-Sulzer marine engine; the electrohydraulic steering installation allows to put the helm hard right or hard left (350) while the ship is sailing full speed ahead or astern; the ship is equipped with a 1100 kg steam/h boiler and with water and carbon dioxide vapour fire extinguishers; length total: 130.86 m; beam: 17.70 m; moulded depth: 10.20 m; draught (loaded ship): 8.1 m; loading capacity ca 11,900 cu.m; complement: 34.

9877/1277 tdw general merchandise cargoboats built in compliance with Bureau Veritas register, class I 3/3, Glace III, equipped with a single propeller, two decks and aft-located living quarters; the ship powered by a heavy fuel "Sulzer" engine is equipped with two complex Diesel-type generators of 200 KVA, 600 rpm each (300 V 50 cps) and another 125 KVA diesel generator; length total: 105.6 m; beam: 14.8 m; loading capacity: ca 6310 cu.m; complement: 36.

e) Motor Vehicles

Set up more than twenty years ago the Romanian automobile industry is now in a position to meet almost entirely the domestic requirements, a good part of its production being exported.

681a

The "Forest Economy and Research Institute" of Bucharest set up in 933, is the only one in Romania to conduct research work in following omains:

— a department which includes several key sectors: forestry stations, ology and phytocenology, forest radiophysiology, nurseries and afforeation, torrent correction, dendrometry and forest management etc.

— a study and design department which works out forest manageent projects, forestry constructions, complex organization of river sins, pulp output forestry, forestry stock taking etc.

— several provincial branches sited in the countries of Bacău, Ilfov, ulcea, Argeş, Caraş Severin, Braşov, Bistriţa-Năsăud study: the ways of pgrading various forest cultures, afforestation of sandy sea shore areas, anagement of forests in industrial pollution-threatened areas, produceon and preservation of genetically-improved forestry seeds etc.

In the scientific research domain the Institute has been studying: e key factors (climate and soil); the distribution of forest species; the assification and zoning of forestry ecosystems; the improvement of fre espees; the production of genetically-improved forestry seeds. The Institute as been conducting physiology, eco-physiology and radiophysiology rveys; it has also worked out methods of modernizing forest nurseries sing suntraps and chemical means and of improving the fast growing ecies, new methods of afforestation and torrent correction, of pesticide ontrol. Other specialists are studying the biology of game and salmonae.

The expertise and up-to-date know-how gained by Romanian specialts in Romania's forest economy have induced other countries to resort it. We are mentioning here some of the successful works carried out by omanian experts abroad: sylvicultural studies and forest management in an; application of FAO methods regarding afforestation of quick sands North Africa (Egypt); development of fast-growing species and rganization of forestry survey and research in Pakistan; forestry stock aking and feasibility studies in Zaire and Nigeria.

The Institute provides its services through the agency of FOREXIM oreign trade company.

n) The Building Materials Industry

The multi-sided development of Romania's economy, the creation f new production capacities as well as the wide housing programme ave called for parallel production of a wide range of top quality buildng materials and sub-assemblies of various types and sizes.

The numerous, large building-materials factories and plants are in position to supply the domestic and foreign users with various proucts such as: precast concrete parts (house panels, pre-stressed concrete tubes, autoclaved cell-expanded concrete strips), reinforced concrete, autoclaved cell-expanded concrete, fine ceramics products (various types of sanitary china, wall tiles, sandstone plates), mineral glass products, bitumen glass fulling etc. highly rated in the foreign market.

The ever increasing demand of the domestic and foreign market for these products will be met by the new modernly equipped industrial units which are to be commissioned according to the investments plan in this domain. Thus the rise in cement production (8—9 million tons from year 1975 output) will be entirely covered by the new industrial plants equipped with 3000 tons clinker/day lines which will turn out a wide range of top quality cement types (white cement, hydrotechnical cement, high resistance cement types etc.). A significant output rise will be recorded also by the industry of plastic materials and construction elements: the 1980 production will be almost the double of the 1975 figure. In pursuance of the diversification programme, in addition to the turned out vinyl polychloride joinery components the domestic and foreign market will be supplied with new glass fibre-reinforced polyester products, polypropylene and polyamide fibre flooring (electrically laid on heat- and sound-insulating expanded pvc support), flat and corrugated plates for roofs and skylights etc. Besides the conventional products (large panels for civil and industrial constructions, roofing components, autoclaved cell-expanded concrete parts), new items will contribute to step up building industrialization.

Romanian installations and process lines are increasingly sought after and appreciated in various foreign markets. These last years Romanian producers have supplied abroad through the agency of specialist foreign trade companies process installations and lines for precast concrete plants turning out large panels for housing programmes, process installations and lines for prestressed concrete tubes (400 to 1000 mm in diameter), installations for production of various industrial components and electric line pillars etc.

In this wide field of building materials, the Romanian specialist institutes carry out, at the request of foreign users, technical documentation (complete projects or only stage projects) feasibility studies, technical-economic surveys, raw materials studies, granting relevant technical assistance. For technical documentation and installations apply to FOREXIM and for building materials to VITROCIM, both companies well known at present in more than 25 countries the world over.

o) The Light Industry

This branch of the swiftly developing Romanian economy, the light industry — one of the basic components of the consumer goods industry — is increasingly meeting the needs of the Romanian market, this being

6822

N

NAVLOMAR

Bucharest — Romania
28, Carmelici St.
Sector 5
Telephones: 23 06 00; 31 79 72
Telex: 11781; 11783 a, b, c, d
POB: 1302

Chartering, shipping agency, ship chandler services; sale of goods and services payable in currency for foreign ships in Romanian ports.

P

PETROLEXPORT

Bucharest — Romania
130, Calea Plevnei
Telephones: 49 40 80; Telex: 11308; 11310

EXPORTS

Petroleum products, aromatic hydrocarbons, natural gas etc.

IMPORTS

Crude oil, bitumen, mineral oils, special greases, additives, fluid ethyl and other petroleum products which are not included in the import lists of specialist foreign trade companies.

UZINEXPORTIMPORT

Bucharest – Romania
133, Calea Victoriei
Telephone: 50 35 35; POB: 2993; Telex: 11814

XPORTS

Plants and complex installations for the production of equipment
d installations in the field of mechanical engineering, electrical en-
neering and electronics, licences, invention patents and manufacturing
chnologies, the relevant CKD; ships, boats, naval equipment, ship
pair; thermoelectric power plants, thermal power stations, district
ating plants, hydroelectric power plants, hydromechanical equipment,
esel electric stations, spare parts; metallurgical and iron and steel
stallations, the related individual equipment and outfits, relevant
are parts; food industry installations: refrigerating warehouses, ice
ctories, milling installations, silos, meat, milk and fruit preparing
es, bread manufacturing factories, the relevant spare parts; cement
es, various individual equipment and outfits, spare parts; studies,
signs, know-how, engineering, production lines, technologies for the
ovementioned factories, erection, technical assistance, training.

IPORTS

Plants and complete installations for the mechanical engineering
dustry; equipment for boilers and turbines; equipment for metal sur-
ce protection; complex installations for the food industry, for the
ientific institutes and the local industry units; ships, boats, naval
uipment and outfits, completion outfits for naval industry included;
rts of installations and equipment for cement factories; designs,
ences, technical assistance, training for the imported installations.

V

VINEXPORT

Bucharest – Romania
6–7, Smirdan St.
Telephone: 14 31 84; 13 26 10
Telex: 11132

6

EXPORTS

Natural bottled and bulk wines; wine brandy; vermouth, sparkling wines; fruit brandies; wine distillates; liqueurs; beer; starch; glucose; concentrated must; grapes.

VITROCIM

Bucharest – Romania
18, Blănari St.
Telephone: 16 30 78; Telex: 11320

EXPORTS

BINDERS: BSS 12/58 Portland cement, antisulphatic cements, white cement, building plaster, hydrated plaster, burnt limestone; ASBESTOS CEMENT: asbestos cement corrugated boards, asbestos cement tubes; HYDROINSULATING MATERIALS: bituminized cardboard, bituminized felting, bituminized cloth; MINERAL WADDING THERMAL AND SOUND INSULATING MATERIALS: cushions, boards, felts, shells, cord, dialit bricks; MARBLE AND MARBLE PRODUCTS: blocks, plates, marmoroc, marble granules, mosaic slabs; CERAMIC MATERIALS: glazed ceramic slabs, glazed and nonglazed sandstone slabs, faience tiles, ceramic sandstone tubes, tiles, bricks, granulite; WALLPAPERS: PVC wall-paper on paper support; FLOORINGS: PVC flooring on textile support; Tufted and Mokotex type thermal and sound-insulating carpet, synthetic moquette; CONCRETE PREFABS: autoclaved cellular concrete reinforced components; SANITARY AND HEATING INSTALLATION MATERIALS: bath tubs, radiators, brass sanitary fixtures, cast iron draining pipes, porcelain and enamelled cast iron sanitary articles.

IMPORTS

ASBESTOS AND ASBESTOS PRODUCTS: threads, yarns, boards, fabrics, belts, asbestos protection materials, gaskets, cord; CORK AND CORK PRODUCTS: boards, waste, rounds, granules, gaskets, corks; SPECIAL CEMENTS; DYES: for the ceramic industry.

197
mm 2

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	1971	1972	1973	1974	1975	1976
Cotton and cotton-type fabrics, thous.sq.m.	21218	22343	28815	41982	37297	26701
Silk and silk-type fabrics, synthetic fibres included, thous.sq.m.	3712	4858	5702	6493	3706	1801
Rice, thous. tons	61.1	20.4	70.2	40.1	62.3	3.1
Cocoa, thous. tons	7.4	8.4	9.8	9.8	12.7	13.8
Citric fruit thous. tons	43.0	50.4	62.7	69.3	71.0	81.0
Olives, thous. tons	6.1	5.6	5.7	5.8	4.9	9.6

11. EXPORTS OF MAIN GOODS

		1971	1972	1973	1974	1975	1976
Power and electrical engineering equipment	million lei foreign currency	231.2	283.2	371.3	438.2	648.7	814.1
Machinery, equipment and drilling and extraction-equipment out of which:	million lei foreign currency	373.5	410.4	400.7	502.9	712.9	848.6
complete drilling equipment (also for geological and structural drilling)	pcs.	59	79	72	127	198	103
Chemical equipment	million lei foreign currency	60.9	69.7	60.8	80.6	195.7	279.8
Tractors, farming machinery and equipment out of which: tractors	million lei foreign currency	345.8	502.8	681.2	692.3	940.6	1199.4
ships and naval equipment	pcs.	11317	20247	27428	20683	35714	37212
	million lei foreign currency	217.2	224.8	185.9	181.5	494.7	392.0
Excavators	pcs.	44	55	347	481	422	427
Metal-cutting machine tools	pcs.	4599	4612	6353	5136	6451	6779

	U/M	1971	1972	1973	1974	1975	1976
Bearings	thous. pcs.	6860	7098	7273	13683	21755	22990
Diesel locomotives	pcs.	91	96	121	203	220	201
Freight and tank cars	pcs.	5533	4446	6335	8027	9126	6885
Lorries, tip lorries, tractors	pcs.	7657	8676	7902	5097	7118	6036
Ferrous metal rolled goods	thous. tons	1122.1	1076.4	1103.5	930.6	1003.1	966.7
Non-ferrous metal rolled goods	thous. tons	4.4	3.9	7.8	15.7	35.7	31.4
Oil products	thous. tons	5368.2	5095.8	4936.1	6501.9	6175.7	7842.2
Caustic soda	thous. tons	83.9	115.2	78.9	111.2	222.7	279.9
Soda ash	thous. tons	300.4	371.9	374.0	438.5	350.5	441.7
Lacquers and paints	thous. tons	19.2	19.6	23.3	34.9	57.6	50.3
Carbide	thous. tons	90.8	145.2	164.3	160.1	173.6	151.2
Chemical fertilizers	thous. tons	824.6	1027.7	1007.2	1284.7	1414.1	1932.7
Synthetic rubber	thous. tons	28.7	32.2	33.4	31.9	39.0	41.3
Synthetic fibres	thous. tons	13.9	14.8	15.5	19.8	23.6	47.2
Medical drugs for human, veterinary use and biostimulators	million lei foreign currency	61.4	70.3	73.9	97.2	98.9	104.4
Cement	thous. tons	934.6	1084.3	1786.1	1799.0	2834.7	2712.6
Blockboards	thous. sq.m.	6228.3	7912.0	9631.9	10836.1	16876.0	18554.3
Furniture	mil. lei foreign currency	638.7	815.4	826.2	958.6	1121.6	1224.1
Carpets	thous. sq.m.	1121.2	1605.8	1453.6	1358.7	2025.2	2239.7
Household electric washing machines	pcs.	10665	14214	15011	19200	16355	6032
Refrigerators	thous. pcs.	3.0	4.1	9.3	49.3	57.6	17.6
Radio sets	thous. pcs.	87.2	133.9	212.5	194.8	240.3	272.9
TV sets	thous. pcs.	5.0	19.8	23.5	16.5	29.2	35.4

6858

CHENAX EXHIBIT 23:
HANDWRITTEN NOTATIONS

$ 34.80

$ 16.60

$ 51.40

65

52.05

CIF

53.50

51.40

2.10

65

1.45

1/5 7/12

bank
carried
himself

$ 52.05 + charges

ins + → 35

53

52.40

60
−7

53

00

+ transfer charge
insurance

75

50

1.25

1/8

1/500 + at [illegible] $15,000

USA 33s-475
(ED. 4-23-71)

PLAINTIFF

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

PLAINTIFF

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
C-7 id

687a

CHENAX EXHIBIT 7: MAY 13, 1975 LETTER FROM MORGAN GUARANTY TO CHENAX

FORM 11-

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

May 13, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A 08740

Chenax Majesty Inc. of
1 Union Square West
New York, New York 10003

Dear Sirs:

We are informed by Central Bank of Nigeria, Tinubu Square Lagos, Nigeria

that they have amended their credit No. CBN/BO/75/79

established in your favor ~~xxxxxxxxxxxx~~

as follows:

Since letter of credit requires shipment to commence within 45 days after receipt by you of letter of credit in Hamburg and we are informed by Schroder Munchmeyer, Hengst and Co., Hamburg, they delivered original credit to you May 12, 1975, therefore the first shipment to be made between May 12, 1975 and June 26, 1975.

All others terms and conditions remain unchanged.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

ALFRED KORBEL

NIKKEI EXHIBIT 8: CONTRACT C-702

N-8

CONTRACT C 702

THIS AGREEMENT made this day August 6, 1975 between NIKKEI INTERNATIONAL INC., 110 East 23rd Street, New York, New York, hereinafter referred to as "BUYER", and GOODSONS AND COMPANY, INC., 91 East Atteridge Road, Lake Forest, Illinois, PRODUCTOS FONTANET, S. A., Palma de Mallorca, Spain, hereinafter jointly and severally referred to as "SELLER".

W I T N E S S E T H:

Subject to the conditions hereinafter set forth:

1. BUYER agrees to buy from SELLER, and SELLER agrees to sell to BUYER, cement on the terms and conditions hereinafter expressed.

A. DESCRIPTION. The cement shall be Portland Cement conforming to BSS 12/1958 of European origin. The SELLER shall provide with the necessary documents a Superintendent confirmation (preferrably Lloyds of London) of the quality and quantity of cement.

B. QUANTITY. 120,000 Metric Tons net. BUYER shall have an option to purchase another 120,000 metric tons from SELLER until August 15, 1975 at $51.00 U. S. per metric ton.

C. PRICE. $51.00 U. S. per metric ton C. I. F. F. P. A from any Mediterranean and/or European port (s) to Lagos, Apapa making total sum of Six Million One Hundred Twenty Thousand U. S. Dollars ($6,120,000).

D. PACKING. Packing in six (6) ply Kraft paper bags

to be supplied free of cost equal to three percent (3%) of total number of filled bags comprising each consignment.

E. TERMS OF PAYMENT. As a condition to this agreement and to the transfer of any credit hereunder, Buyer shall be reasonably satisfied after a visit to Productos Frontenet, S. A. in Palma de Malorco, Spain, its offices, its officers and representatives of its banks, as well as a review of other relevant documentary evidence, that SELLER can and shall make full and timely performances of this Agreement. As a further condition to this agreement and to the transfer of any credit hereunder, BUYER shall be reasonably satisfied that the August 5, 1975 guarantee of this contract by Banca March (or any subsequent guarantee acceptible by BUYER) is payable to and callable by BUYER at a New York City bank designated by BUYER promptly upon Seller's default. Such bond shall provide for payment of sum of 3% of the total CIF invoice and shall further conform to the terms set forth in the August 6, 1975 letter from Goodsons and Co., Inc., a copy of which is annexed hereto and marked Exhibit "A". Upon such satisfaction of BUYER, BUYER will transfer an established irrevocable Letter of Credit (CBN/BO/75/169) from the Central Bank of Nigeria advised through the Morgan Guaranty Trust, New York, New York, U.S.A. for the total purchase price in favor of the SELLER. Drafts drawn under said Letter of Credit shall be payable at sight at the Morgan Guaranty Trust. The bond of Banca March, or any other bank mutually acceptible to BUYER and SELLER will become effective only upon transferring of the letter

of credit by BUYER. Said performance Bond for supply of cement to be supplied by SELLER for the benefit of BUYER shall also be callable by BUYER (See EXHIBIT B) at a prime bank existing under a U. S. Federal or State Charter, or a prime European bank. Bank and transfer charges incurred in transferring said Letter of Credit to the SELLER'S bank shall be borne by BUYER (See EXHIBIT C).

F. SHIPMENT. Shipment to begin within twenty-five (25) days after transfer of letter of credit to SELLER. (See EXHIBIT D, Shipping Schedule). Delivery shall be at the rate of not less than 20,000 metric tons per month plus or minus 10% (ten percent) at SELLER'S option.

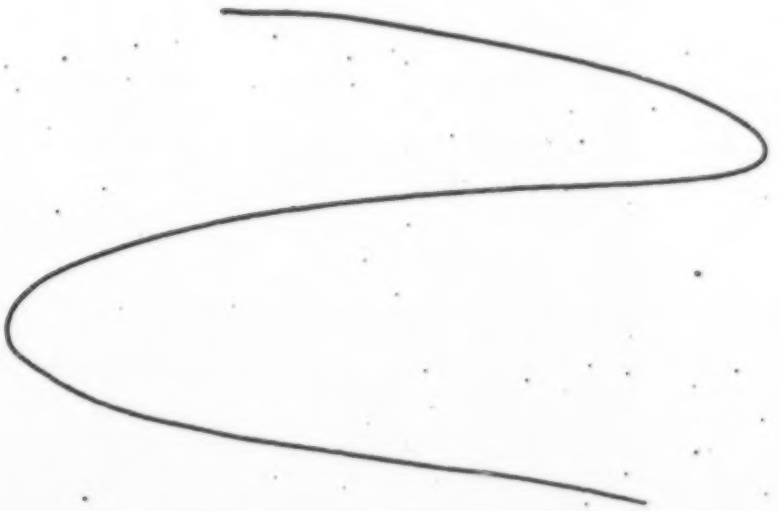
G. INSURANCE. Insurance to be provided by SELLER from port of loading to Lagos Quay. Type of insurance shall be F.P.A. from any ports of loanding described herein for full original invoice value (contract price) plus ten percent (10%).

H. UNLOADING. Unloading of each consignment of cement shall be completed within 10 days where such consignment is of 10,000 metric tons or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour Master whether the vessel is berthed or not) demurrage shall commence.

I. DEMURRAGE. Demurrage not exceeding USD 4100.00 per diem shall be for the account of the BUYER, provided that the SELLER shall have given due notice to the BUYER by cable of the departure from the port of loading of each such consignment.

Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit on presentation at the beneficiary's bankers of time sheets and statements of facts duly certified as correct by the ship's master and by the ships agents in Lagos. Cost and responsibility of discharge of each consignment shall be for the buyer's account.

J. RETURN OF CREDIT. Seller hereby agrees that in the event of Seller's default under this Agreement, GOODSONS AND COMPANY shall immediately upon the request of NIKKEI INTERNATIONAL, return the advice of the Letter of Credit to Morgan Guaranty Company of New York for cancellation and shall promptly execute all documents necessary for such return. This portion of this Agreement is binding upon GOODSONS AND COMPANY, INC. without the signature of PRODUCTOS FONTANET, S.A.



Ok

K. Buyer shall procure from the Morgan Guaranty Trust an advice that Seller ship owners shall in fact be paid demurrage in accordance with the terms of the Letter of Credit from the Central Bank of Nigeria and that said demurrage payments shall be payable to said ship owner(s) without any time limitation (as to the number of days which must first elapse prior to any such payment) and without any limitation to the number of times said ship owner(s) may present documents for payment during any time period.

L. SUPPLIER'S EVIDENCE OF PERFORMANCE: At the BUYER's option, the BUYER may visit the SELLER's privy in Spain, Productos Fontanet S.A. in Palma de Mallorca, to include visitations to Fontanet's offices, conference(s) with Fontanet's bank officer and Fontanet's officer and to review other evidence of Fontanet's ability to perform said cement contract to include all or part of the shipping thereof.

2. The construction, validity and performance of this Contract shall be governed by the Laws of the State of New York and those of the United States of America, and all non-litigated disputes between the parties hereto

which may arise under, out of, in connection with, this contract shall be submitted to the American Arbitration Association and in the event that the State of Nigeria shall be a third party to any such non-litigated dispute, then this Contract shall be submitted by Arbitration to the International Chamber of Commerce, Paris, France, in accordance with its rules at the date of submission. The parties hereby agree that service of any notices in connection with any such arbitration at their addresses as was recited in this contract shall constitute valid and sufficient notice.

NIKKEI INTERNATIONAL, ~~LTD.~~ INC.

WITNESS: _____

By: _____
Testsuo Ozawa, President

GOODSONS AND COMPANY, INC.

WITNESS: _____

By: _____
Paul L. Khanton, Vice-Presider

PRODUCTOS FONTANET, S.A.

By: _____

GOODSONS AND COMPANY
INTERNATIONAL TRADE

August 8, 1975

To Whom It May Concern:

The presentation of this letter constitutes the request for payment of guarantee of Banca March of contract between Goodsons & Co., Inc. and Productos Fontenet, S. A. with Nikkei International Ltd. Nikkei International, Ltd. is the assignee of Goodsons & Co., Inc. pursuant to the guarantee.

Upon presentation of this letter with a letter from Morgan Guaranty Trust Co. of New York indicating or confirming that Goodsons & Co., Inc. and/or Productos Fontenet has failed to make timely shipment of the entire initial monthly consignment of 20,000 metric tons (which is to be made within 25 days CIF Lagos, Apapa after the transfer of the letter of credit referred to in the aforesaid contract) the entire amount of the guarantee is immediately payable to the assignee of Goodsons & Co., Inc. Thereafter, with regard to any subsequent breach, the total amount of the guarantee shall be paid on a pro rata basis for each failure. Except, if any said entire monthly consignment is made within 15 days after the date it was due to have been shipped, in such event the entire amount of the bond shall be immediately payable to Nikkei International Ltd.

Very truly yours,

91 EAST ATTERIDGE ROAD, LAKE FOREST, ILLINOIS 60045 312—295-2083

Joint Appendix

3

No. 81-920

Office - Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1981

VERLINDEN B.V.,

Petitioner,

— v. —

CENTRAL BANK OF NIGERIA,

Respondent.

JOINT APPENDICES
Vol. III

BERTHOLD H. HOENIGER, P.C.
Attorney for Petitioner
505 Park Avenue
New York, New York 10022
(212) 838-5324

ABRAM CHAYES
3 Hubbard Park Road
Cambridge, Mass. 02138

and

MITCHELL M. BAILEY
415 Madison Avenue
New York, New York 10017

Counsel for Petitioner

JAMES G. SIMMS
Kissam, Halpin & Genovese
Attorney for Respondent
120 Broadway
New York, New York 10271
(212) 962-2000

Petition for Certiorari Filed November 13, 1981.
Certiorari Granted January 11, 1982.

Motion to Dispense with Printing of New Appendix, and Permitting This Case to be Heard on the Appendices Used in the Court Below, Granted February 22, 1982.

INDEX

	Page
Docket Entries	A1
Complaint	A3
Defendants' Notice of Motion to Dismiss Complaint	A9
Affidavit of James G. Simms in Support of Defendants' Motion to Dismiss Complaint	A11
Exhibit 1 - Supplemental Summons	A32
Exhibit 1 (Continued) - Complaint	A33
Exhibit 2 - Texas Cement Contract	A39
Exhibit 3 - Texas Letter of Credit	A43
Exhibit 4 - Morgan Guaranty's Advice to Texas	A47
Exhibit 5 - Foreign Sovereign Immunities Act of 1976	A49
Exhibit 6 - Legislative History of the Immunities Act	A60
Exhibit 7 - Letter dated September 30, 1975	A92
Exhibit 8 - Cable dated September, 1975	A94
Exhibit 9 - Uniform Customs and Practice for Documentary Credits, 1962 Review	A95
Exhibit 10 - Affidavit of Olujimi Jolaoso	A99
Exhibit 11 - Nigerian Ports Decree No. 40, 1975	A103
Exhibit 12 - Recommendation of Magistrate Schreiber	A106
Exhibit 13 - Certification of Negotiating Committee	A124

Index

Page

Exhibit 14 - Form of Agreement of Discharge..... A126

Exhibit 15 - Form of Agreement of Discharge..... A128

Affidavit of Richard H. Webber in Opposition to Defendants' Motion to Dismiss Complaint..... A130

Exhibit 1 - Letter dated May 25, 1978..... A133

Exhibit 2 - Letter dated May 23, 1978..... A134

Exhibit 3 - Letter dated August 29, 1978..... A135

Exhibit 4 - Affidavit of Richard L. Trotman.... A136

Exhibit A - Contract..... A140

Exhibit B - Letter of Credit..... A144

Exhibit C - Contract with Vazman, S.A..... A146

Exhibit D - Certificate of Negotiating Committee..... A153

Memorandum and Order Granting Motion to Dismiss... A155

Judgment Dismissing Complaint..... A177

Letter from Kissam, Halpin & Genovese..... A178

Letter from Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy..... A181

Notice of Appeal..... A186

Memorandum and Order Amending Statement of Facts..... A187

A 1

DOCKET ENTRIES

CANNELLA, J

5-22-78	1	Filed complaint and issued summons.
5-25-78	2	Filed Clerks Certificate of Mailing of Summons & Complt. by registered mail- return receipt requested to : CENTRAL BANK OF NIGERIA, TINUBU SQUARE, LAGOS, NIGERIA. Registered Rec. #223367 Dated 5-24-78. Registered Rec. Received Dated _____
5-26-78	3	Filed Clerks Certificate of Mailing of Summons & Complaint by registered mail- return receipt requested to: Federal Republic of Nigeria, The Minister for Foreign Affairs, The Ministry for Foreign Affairs, Lagos, Nigeria. Registered Rec. #224135 Dated 5-26-78 Registered Rec. Received Dated _____
8-30-78	4	Filed Clerks Certificate of Mailing of Summons & Complt. by registered mail- return receipt requested to: Permanent Secretary, Ministry of External Affairs, P.O. Box 12600, Lagos, Nigeria. Registered Rec.#222087 Dated 8-30-78 Registered Rec. Received Dated _____
9-30-78	5	Filed ORDER, transferring this action to the suspense docket. Pierce, J. m/n
10-24-78	6	Fld reassignment...m/n
04-02-79	- -	PRE TRIAL CONFERENCE HELD BEFORE CANNELLA,J
04-11-79	(7)	Filed stip and order extending time for defts Federal Republic and Central to answer complaint to: April 16, 1979. So Ordered. CANNELLA,J
04-19-79	(8)	Filed stip and order extending time for defts' to answer to 4-19-79. So Ordered. CANNELLA,J
12-20-79	(9)	Filed Defts' affidavit and notice of motion pursuant to Rule 12(b) FRCP to dismiss complaint. RET: Jan. 29, 1980
12-20-79	(10)	Filed defts' Memorandum in support of motion to dismiss.
01-21-80	(11)	Filed NOTICE OF CHANGE OF FIRM NAME of attys for pltff
01-30-80	(12)	Filed stip and order adjourning deft's motion to dismiss to 2-19-80 So Ordered. CANNELLA,J
02-25-80	(13)	Filed stip and order adjourning deft's motion to dismiss to March 19,1980 So Ordered. CANNELLA,J
3-17-80	14	Fld Stip & Order adjourning defts' motion to dismiss to 4-22-80; and as further in cated. Cannella,J. dtd. 3-12-80.
4-21-80	15	Fld pltff's AFFDVT. in opposition to defts' motion for an order dismissing complt. by Richard H. Webber.
4-21-80	16	Fld pltff's Memorandum of Law in support of #15.
4-23-80	17	Fld defts' REPLY Memorandum in support of #9.
7-21-80	18	Fld Memorandum & Order granting defts' motion to dismiss complt for lack of subjec matter & personal jurisdiction. FRCP 12(b)(1) & (2). Clk of Ct. is directed to prepare & enter a judgmt dismissing complt. m/n CSC Cannella,J.
7-23-80	9	Fld judgmt & order that complt. is dismissed. Clk m/n [illegible]
8-15-80	10	Fld. letter from Hill,Rivkins,Carey dtd.8-1-80
8-15-80	11	Fld. letter from Kissam,Halpin & Genovese dtd. 7-22-80

B

CONT. ON PAGE #3

Docket Entries

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 78-2395
[illegible] TRADING & MILLING CORP.	CENTRAL BANK OF NIGERIA, et ano.	PAGE 3 OF ___ PAGE

DATE	NR.	PROCEEDINGS CANNELLA,J.
8-14-80	12	Fld pltf's NOTICE OF APPEAL to USCA-2nd Cir. from Memorandum & Order dtd 7-16-8 granting defs motion to dismiss complt. Mailed copies of notice to: Kissam, Ha pin & Genovese, NYC on 8-21-80.
8-18-80	13	Fld Memorandum & Order --- Defts' motion to amend the statement of facts contained in the Ct's Memorandum & Order of 7-16-80, is GRANTED, ... as indicated. Cannella,J. m/n CSC

[illegible] Clerk

[illegible]

Deputy Clerk

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXAS TRADING & MILLING CORP.,

Plaintiff,

-against-

CENTRAL BANK OF NIGERIA and FEDERAL REPUBLIC OF NIGERIA,

Defendants.

'80 CIV 2395
JUDGE PIERCE
FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
MAY 23 3 52 PM '80

COMPLAINT

The plaintiff herein, by its attorneys, Hill, Rivkins, Carey, Loesberg & O'Brien, complaining of the above-named defendants, alleges as follows:

FIRST: This is a controversy within the meaning of Title 28, Section 1330(a) of the United States Code in that it involves a claim against a foreign state and against an instrumentality of a foreign state as defined in Title 28, Section 1603(b) of the United States Code.

SECOND: Venue is properly in this District by reasons of the provisions of Title 28, Section 1391(f) of the United States Code by reason of facts more fully set forth below.

THIRD: At and during all the times hereinafter mentioned, the plaintiff TEXAS TRADING & MILLING COMPANY (hereinafter TRADING & MILLING) was and still is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal office and place of business within this District, to wit: 11 Greenwich Street, New York, New York, 10004.

FOURTH: At and during all the times hereinafter mentioned the defendant CENTRAL BANK OF NIGERIA (hereinafter CENTRAL BANK) was and still is a foreign banking institution

organized and existing under and by virtue of the laws of the FEDERAL REPUBLIC OF NIGERIA with its principal office and place of business at Tinubu Square, Lagos, Nigeria. Upon information and belief, CENTRAL BANK during all the times hereinafter mentioned was and still is doing business within the State of New York and has maintained and continues to maintain substantial assets within the United States of America and within this District.

FIFTH: At and during all the times hereinafter mentioned the defendant FEDERAL REPUBLIC OF NIGERIA (hereinafter FEDERAL REPUBLIC) was and still is a sovereign foreign state on the African continent with its capital in the city of Lagos.

SIXTH: On or about March 8, 1975, the FEDERAL REPUBLIC agreed to purchase "...240,000 metric tons, plus or minus 10% at seller's option" of "...Portland Cement...." at a price of $60.00 per metric ton, basis C.I.F. Lagos/Apapa. The total contract price was, therefore, $14,400,000. A true copy of the written contract is annexed hereto as Exhibit "A".

SEVENTH: In accordance with Paragraph 1(b) of the contract, FEDERAL REPUBLIC agreed to establish an "...Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit...." in favor of TRADING & MILLING for the total purchase price. Paragraph 1(v) further provided that the aforedescribed letter of credit was to be established through Fidelity International Bank of 99 William Street, New York, New York. In due course, a letter of credit, No. CBN/BO/75/86, in the amount of $14,400,000 was established by CENTRAL BANK at the request of the FEDERAL REPUBLIC. Thereafter, on May 8, 1975, Morgan Guaranty Trust Company (hereinafter Morgan) of New York, New York, advised TRADING & MILLING that the letter of credit had been established.

A true copy of the advice of Morgan is annexed hereto as Exhibit "B".

EIGHTH: The contract between the FEDERAL REPUBLIC and TRADING & MILLING also provided, in Paragraph (ix) thereof, that demurrage would be payable by the FEDERAL REPUBLIC under the terms of the governing letter of credit in the event the discharge of cargo was not completed within ten(10) days per each 10,000 metric ton lot or pro rata in the case of any greater or lesser quantity. The letter of credit established by CENTRAL BANK and advised by Morgan provided for payment of demurrage at a rate not exceeding $4,000 per diem upon presentation of "...time-sheets and statements of facts duly certified as correct by the ship's master and by the ship's agent in Lagos."

NINTH: TRADING & MILLING thereafter entered into a contract with Spanish suppliers for the purchase of 240,000 metric tons of Portland Cement conforming in all respects with the specifications set forth in Paragraph 1(i) of the written contract between the FEDERAL REPUBLIC and TRADING & MILLING. The price to TRADING & MILLING was $53.10 per metric ton, basis C.I.F. Lagos/Apapa, with TRADING & MILLING to be responsible for demurrage to its supplier.

TENTH: In due course, TRADING & MILLING shipped a total of 39,590 metric tons of Portland Cement on board the vessels COSMARIA, ALFONSO, JO-WOOD, BANGLAN-POLYXENI, PICOVERDE, MARICHU and PROSPERITAS. Notices of readiness to discharge at the appropriate port in the FEDERAL REPUBLIC were given in accordance with Paragraph 1(ix) of the written contract between the FEDERAL REPUBLIC and TRADING & MILLING on June 20, July 26, August 1, August 13, August 12, September 4 and September 10, 1975 respectively. The aforementioned vessels were delayed in discharging by reason of port

congestion. As a result, substantial demurrage was incurred in the amount of $4484,476.87. The FEDERAL REPUBLIC has caused to be paid $2,102,305.20 of the foregoing sum, leaving a balance of $2,382,171.67 unpaid and owing to TRADING & MILLING.

ELEVENTH: Plaintiff TRADING & MILLING duly performed all the terms and conditions of the contract between itself and the FEDERAL REPUBLIC until the anticipatory breach of said contract by the FEDERAL REPUBLIC in or about the latter part of September 1975 when TRADING & MILLING was advised that no further shipments of cement would be accepted by the FEDERAL REPUBLIC under its written agreement with TRADING & MILLING and that demurrage would not be paid in accordance with said agreement. Said breach of contract prevented and excused further performance by TRADING & MILLING.

TWELFTH: In consequence of the FEDERAL REPUBLIC's anticipatory breach of contract and wrongful refusal to accept the balance of the Portland Cement sold to it by TRADING & MILLING, the latter sustained a loss in the amount of $1,382,829.00, said loss representing TRADING & MILLING's profit on the 200,410 metric tons of Portland Cement remaining to be shipped under the written agreement between the FEDERAL REPUBLIC and TRADING & MILLING at the time of the FEDERAL REPUBLIC's anticipatory breach.

THIRTEENTH: Upon information and belief, in or about the end of September 1975 the FEDERAL REPUBLIC directed CENTRAL BANK to amend the terms and conditions of the confirmed, irrevocable letter of credit issued by CENTRAL BANK in favor of TRADING & MILLING. Notwithstanding the fact that TRADING & MILLING, as beneficiary of the letter of credit, failed to agree to any of the proposed amendments, which

amendments, in effect, operated to strip TRADING & MILLING of its right to collect demurrage under the letter of credit and to payment for further deliveries of Portland Cement the letter of credit was amended by CENTRAL BANK to the detriment of TRADING & MILLING. As a result, TRADING & MILLING has, to date, been unable to collect the balance of demurrage due and owing, despite TRADING & MILLING's demand for such payment by the FEDERAL REPUBLIC and CENTRAL BANK.

FOURTEENTH: Upon information and belief, Morgan was at all material times and still is the agent of CENTRAL BANK in the United States of America and in this District, performing substantial banking and investment activities on behalf of CENTRAL BANK. Upon information and belief, the written agreement between TRADING & MILLING and the FEDERAL REPUBLIC was one of approximately seventy(70) substantially similar contracts entered into by the FEDERAL REPUBLIC in late 1974 and early 1975 with other American and foreign firms for the purchase of over 20,000,000 metric tons of Portland Cement. The making of the aforedescribed written agreement between TRADING & MILLING and the FEDERAL REPUBLIC, and the establishment of the confirmed, irrevocable letter of credit by CENTRAL BANK in the amount of $14,400,000, advised through Morgan, both constituted commercial transactions or acts. Indeed, the conclusion of the aforedescribed seventy(70) substantially similar contracts by the FEDERAL REPUBLIC and the establishment of approximately seventy(70) similar confirmed, irrevocable letters of credit by CENTRAL BANK, all constituted a regular course of commercial activities within the State of New York and this District within the meaning of Title 28, Section 1603(d) of the United States Code, at least as respects contracts with American firms and letters of credit advised by Morgan.

FIFTEENTH: By reason of the FEDERAL REPUBLIC's breach of its written agreement with TRADING & MILLING and by reason of CENTRAL BANK's wrongful amendment and, in effect, cancellation of the confirmed, irrevocable letter of credit, TRADING & MILLING has been and will be damaged in the following respects, among others: a) Loss of profits on the sale of 200,410 metric tons of Portland Cement in the amount of $1,382,829.00 and b) unpaid demurrage in the amount of $2,382,171.67.

SIXTEENTH: The wrongful conduct by defendants herein was intentional, willful and deliberate. Plaintiff TRADING & MILLING is therefore entitled to recover, in addition to the damages above specified, reasonable attorney's fees and other costs and expenses necessarily incurred and to be incurred by plaintiff in consequence of defendants' conduct.

WHEREFORE, plaintiff demands judgment against defendants jointly and severally for $3,765,000.67 together with interest as and from October 1, 1975, the costs and disbursements of this action and reasonable attorney's fees.

Dated: New York, New York
May 12, 1978

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Plaintiff

By: _____
A Member of the Firm
Office & P.O. Address
72 Wall Street
New York, New York 10005
(212) 825-1000

DEFENDANTS' NOTICE OF MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Refer to Judge Cannella after Docketing

TEXAS TRADING & MILLING CORP.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

Index No. 78 Civ. 2395 (JMC)

DEFENDANTS' NOTICE OF MOTION TO DISMISS THE COMPLAINT

S I R S :

PLEASE TAKE NOTICE that upon the affidavit of James G. Simms, sworn to December 19, 1979, the exhibits appended thereto, and upon all pleadings, papers and proceedings had heretofore herein, defendants Federal Republic of Nigeria and Central Bank of Nigeria, will move this Court at a hearing before the Hon. J. Cannella, United States District Judge, in Room 1106 of the United States Courthouse, Foley Square, New York, New York, on the 29th day of January, 1980, at 10:00 A.M. or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint herein on the grounds that this Court is without jurisdiction of the subject matter of the claim or of the defendants, on the grounds that the act of state doctrine precludes an adjudication of plaintiff's claim, and on the grounds that plaintiff has failed to state a claim upon which relief can be granted; and for such other and further relief as the Court may deem appropriate.

New York, New York
December 19, 1979

KISSAM, HALPIN & GENOVESE

By _____
A Member of the Firm
Attorneys for Defendants
Federal Republic of Nigeria
and Central Bank of Nigeria
120 Broadway
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TO: R. H. Webber, Esq.
Hill, Rivkins, Carey, Loesberg
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AFFIDAVIT OF JAMES G. SIMMS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXAS TRADING & MILLING CORP., Plaintiff, - against -	Index No. 78 Civ. 2395 (JMC)
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES G. SIMMS, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court, and of Kissam, Halpin & Genovese, attorneys for defendants, Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank). I make this affidavit in support of defendants' motion to dismiss the complaint of plaintiff, Texas Trading & Milling Corp. (Texas), pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the grounds that this Court is without jurisdiction of the subject matter of the claim or of the defendants, on the grounds that, even if such jurisdiction existed, the act of state doctrine renders the Texas claim non-justiciable, and on the grounds that Texas has failed to state a claim upon which relief can be granted.

Claim alleged by Texas

2. A copy of the Texas complaint, dated May 12, 1978, is Exhibit 1 hereto. This action relates to an agreement between Texas and Nigeria dated March 8, 1975, for the sale by

Texas to Nigeria of 240,000 metric tons of cement (the Texas cement contract); a copy of the Texas cement contract is Exhibit 2 hereto - a copy is also appended as Exhibit A to the Texas complaint. In addition, this action relates to Central Bank's documentary letter of credit number CBN/BO/75/86 established in late April 1975 in favor of Texas (the Texas letter of credit); a copy of the Texas letter of credit is Exhibit 3 hereto. The Texas letter of credit, by its terms, was the means of payment for cement to be delivered to Nigeria by Texas; the Texas letter of credit was advised and made payable through Morgan Guaranty Trust Company of New York (Morgan Guaranty), and a copy of Morgan Guaranty's advice to Texas, dated May 8, 1975, which sets forth the terms of the letter of credit, is Exhibit 4 hereto, and is also Exhibit B to the Texas complaint. The Texas cement contract and letter of credit also provided for payment by Nigeria of demurrage with respect to vessels carrying cement to and detained in Nigerian ports.

3. Texas alleges that Nigeria and Central Bank breached the Texas cement contract and letter of credit anticipatorily, and Texas seeks to recover as compensatory damages herein alleged lost profits, unpaid demurrage, and costs resulting from the anticipatory breach. Texas alleges that it had entered into a subcontract with Spanish suppliers to fulfill its entire obligation to deliver cement to Nigeria reserving to itself what amounted to a commission of $6.90 for each ton of cement delivered to Nigeria (Texas complaint, paragraph NINTH); that in late September 1975, after seven shipments of cement, totalling 39,590 metric tons, were made, Nigeria and Central Bank performed acts which constituted an anticipatory breach of the Texas cement contract and letter of credit (Texas complaint, paragraphs ELEVENTH and THIRTEENTH). The Texas claim herein is

solely with respect to the alleged anticipatory breach of its cement contract and letter of credit.

Basis of Jurisdiction Herein

4. Texas alleges jurisdiction pursuant to the Foreign Sovereign Immunities Act of 1976, Public Law 94-583, 90 Stat. 2891, 28 U.S.C. Sections 1330, 1391(f), 1441(d), and 1602-1611 (Immunities Act); a copy of which is Exhibit 5 hereto.

5. The Immunities Act became effective in January 1977; the Legislative History of the Immunities Act appears in 1976 U.S. Code Congressional and Administrative News, page 6604, et seq. (Legislative History); a copy of which is Exhibit 6 hereto.

6. It is respectfully submitted that Central Bank is "an agency or instrumentality" of Nigeria as that term is defined in the Immunities Act, 28 U.S.C., Section 1603(b).

7. The memorandum submitted herewith by Nigeria and Central Bank in support of this motion discusses the jurisdictional provisions of the Immunities Act in detaid. By virtue of the jurisdictional allegations in the Texas complaint, the provision of the Immunities Act relevant to the issue of whether this Court has jurisdiction of the subject matter of the Texas claim, is 28 U.S.C., Section 1605(a)(2), which provides:

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> "(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a

commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

8. Jurisdictional allegations are contained in paragraphs FOURTH and FOURTEENTH of the Texas complaint. Texas alleges that Central Bank is "doing business within the State of New York and has maintained and continues to maintain substantial assets within the United States of America and within this District"; paragraph FOURTH. Texas alleges that Morgan Guaranty is an "agent of Central Bank in the United States of America and in this District, performing substantial banking and investment activities on behalf of Central Bank"; and that the fact that Central Bank had the Texas letter of credit "advised through Morgan" constituted "commercial transactions or acts" by Central Bank in this District; Texas complaint, paragraph FOURTEENTH. Texas also alleges that its cement contract with Nigeria "was one of approximately seventy (70) substantially similar contracts entered into by [Nigeria] in late 1974 and early 1975 with other American and foreign firms for the purchase of over 20,000,000 metric tons of Portland Cement", and that the "establishment of approximately seventy (70) similar confirmed, irrevocable letters of credit by Central Bank" relating to these cement contracts "all constituted a regular course of commercial activities within the State of New York and this District . . . at least as respects contracts with American firms and letters of credit advised by Morgan"; Texas complaint, paragraph FOURTEENTH.

9. It is clear, however, that the particular acts by Nigeria and Central Bank which Texas contends constituted an anticipatory breach of its cement contract and letter of credit were the transmitting of notices to Texas in late September 1975 advising "that no further shipments of cement would be accepted

. . . and that demurrage would not be paid in accordance with [the cement contract]; and amending "the terms and conditions of the [Texas letter of credit]"; paragraphs ELEVENTH and THIRTEENTH of the Texas complaint.

10. It is respectfully submitted that the notices from Nigeria and Central Bank which Texas alleges constituted acts of anticipatory breach with respect to its cement contract and letter of credit are the following:

a. The letter of Morgan Guaranty to Texas, dated September 30, 1975, which quotes instructions received by Morgan from Central Bank advising that because of the port situation in Nigeria, all ships sailing to Nigeria were thenceforth required to obtain from the Nigerian Ports Authority two months advance permission for sailing, and advising that documents with respect to demurrage were required to be certified by Central Bank. A copy of Morgan Guaranty's letter to Texas is Exhibit 7 hereto.

b. Cable from Central Bank to Texas, in late September 1975, advising Texas of the ports congestion in Nigeria and inviting Texas to meet with Nigeria's renegotiating committee in early October 1975. A copy of Central Bank's cable to Texas is Exhibit 8 hereto.

11. The allegations in the Texas complaint concerning jurisdiction and those concerning the acts of anticipatory breach by Nigeria and Central Bank require this Court to review the issue of jurisdiction of the subject matter of the Texas claim pursuant to each of the three situations defined in Section 1605(a)(2) of the Immunities Act.

a. The Texas action is not based upon a commercial activity carried on by Nigeria or Central Bank in the United States

12. The Texas letter of credit was the means of fulfilling Nigeria's payment obligations pursuant to the Texas cement contract; (see, paragraphs 1(v) and 1(ix) of the Texas cement contract, Exhibit 2 hereto.) The Texas letter of credit (Exhibit 3 hereto) makes reference to the Texas cement contract, and the specifications in the letter of credit as to cement, shipment, time of performance, ports of loading, etc. are the same as those defined in the Texas cement contract.

13. The Texas cement contract was negotiated and executed in Nigeria and was to be performed outside the United States: at the request of Texas the following European ports of loading were designated in the cement contract, in paragraph 1(vii), as the ports from which Texas was to insure the cement cargoes to Lagos, Nigeria - Bremen (West Germany) and Seville (Spain). Texas originally intended to obtain the required cement from West Germany and/or Spain. Eventually, however, Texas "entered into a contract with Spanish suppliers for the purchase of 240,000 metric tons of Portland cement conforming in all respects with the specifications set forth in paragraph 1(i) of [the Texas cement contract]"; paragraph NINTH, Texas complaint. In addition, the Texas cement contract, at paragraph 2, designates the laws of Nigeria as governing construction, validity and performance of the agreement.

14. The Texas letter of credit (Exhibit 3 hereto) required documents to be presented evidencing shipments of cement to Nigeria from "any Spanish Mediterranean Ports" (page 2, first sentence). The Texas letter of credit was advised and made payable at Morgan Guaranty; it was also advised through Texas'

own bank - Fidelity International Bank, 99 William Street, New York, New York (see, "Additional Instructions" at page 2 of the letter of credit and paragraph 1(v) of the Texas cement contract). The Texas letter of credit by its terms was made subject to the Uniform Customs and Practice for Documentary Credits, 1962 Revision, International Chamber of Commerce, Brochure No. 222 (UCP, 1962 Revision), a copy of which is Exhibit 9 hereto.

15. At paragraph FOURTH of its complaint, Texas alleges that Central Bank is "doing business" in this District, but Texas does not allege facts to support this conclusion apart from alleging that Central Bank maintains assets in this District. At paragraph FOURTEENTH of its complaint, Texas alleges that both Nigeria and Central Bank have conducted a regular course of commercial activities within the State of New York by virtue of having entered into similar cement contracts with American entities and having advised similar letters of credit through Morgan Guaranty. However, Texas does not identify any of these other American cement contractors nor does it allege facts to demonstrate that any of these other cement contracts were made or to be performed at all in the United States.

16. For the reasons set forth more fully below and in the memorandum submitted in support of this motion, it is respectfully submitted that neither Nigeria nor Central Bank are "present" or "doing business" within this District or elsewhere in the United States; and that a finding to the contrary would not confer jurisdiction as to the Texas claim or as to the defendants pursuant to the Immunities Act unless it were found that the particular commercial activity upon which the Texas claim is based (i.e., the Texas cement contract and letter of

credit) were conducted in the United States in accordance with Section 1605(a)(2) of the Immunities Act. This is so because the Immunities Act has not incorporated the traditional long-arm jurisdictional standard based on "presence" or "doing business".

17. Texas also alleges, at paragraph FOURTEENTH of its complaint, that Morgan Guaranty is an "agent" of Central Bank and performs banking and investment activities on behalf of Central Bank. It is respectfully submitted that Morgan Guaranty is not and never was an agent of Central Bank. Morgan Guaranty is an independent entity; it acts as a New York correspondent bank for Central Bank, for the central banks of other foreign states and for other banks; and it performs the same types of activities as a correspondent bank for Central Bank as it does for each of its other customers for which it is a correspondent bank.

18. Morgan Guaranty did not confirm the Texas letter of credit; it acted solely as an advising and paying bank; and with respect to the Texas letter of credit, Morgan Guaranty owed to Central Bank and to Texas only those duties and responsibilities defined in U.C.P., 1962 Revision, for advising and paying banks as owing to the issuing bank and the beneficiary. In the first sentence of the Texas letter of credit (Exhibit 3 hereto), Central Bank requested Morgan Guaranty only "to advise" the terms of the letter of credit. U.C.P., 1962 Revision (Exhibit 9 hereto), defines the obligations of an advising bank in Articles 3 and 12.

19. The relationship between Central Bank and Morgan Guaranty during the time period relevant to the Texas claim has been explored in detail in other litigation in this Court brought by cement contractors against Nigeria and Central Bank

with respect to cement contracts and letters of credit similar to those of Texas. The Court herein is respectfully referred to the opinions in National American Corp. v. Federal Republic of Nigeria, et al.: at 425 F.Supp. 1365, 1369-1372 (S.D.N.Y. 1977), wherein Judge Goettel found that "[Central Bank] does not have an office here nor are its employees present within the state. The isolated act of maintaining bank accounts here has been held not to constitute doing business. The applicants denominate Morgan Guaranty as [Central Bank's] agent . . . Clearly, Morgan Guaranty is an entity independent of [Central Bank]" (At page 1369). Judge Goettel noted that the letters of credit before him were advised and made payable at Morgan Guaranty, but that the letters of credit had also been advised through the beneficiaries' banks as they had requested, just as the Texas letter of credit was advised through its bank, Fidelity International Bank, New York. At pages 1371-1372, Judge Goettel found that: "The correspondence among the banks and the beneficiaries is replete with references that Morgan Guaranty did not independently undertake to pay the letters of credit . . . In light of the limited nature of [Morgan Guaranty's] participation, i.e., advising the beneficiary of the issuance of the credit and its authorization to pay upon the presentation of appropriate documents, its transactions in this state on behalf of [Central Bank] cannot form a basis for long-arm jurisdiction . . . As an advising bank, Morgan Guaranty had no obligation, beyond transmitting accurate information, to the beneficiaries of the letters of credit. U.C.P., art. 12."

20. The relationship between Central Bank and Morgan Guaranty was reviewed again at the trial of the National American action. In his opinion, rendering judgment in favor of Nigeria and Central Bank, Judge Goettel discussed the correspondent

banking relationship between the two banks and concluded that Central Bank was not "doing business" in New York; 448 F.Supp. 622, 637 (S.D.N.Y. 1978) aff'd 597 F.2d 314 (2d Cir. 1979).

21. Actions were commenced in this Court against Nigeria and Central Bank by East Europe Import-Export, Inc. (East Europe), Nikkei International, Inc. (Nikkei) and Chenax Majesty, Inc. (Chenax) with respect to their cement contracts and letters of credit. These were the first such actions brought against Nigeria or Central Bank after the effective date of the Immunities Act. The actions were consolidated before Judge Pierce. Nigeria and Central Bank moved to dismiss these actions for lack of jurisdiction. Judge Pierce referred the matter to U.S. Magistrate S. Schreiber for hearing and recommendation. Plaintiffs therein requested and obtained extensive discovery of Morgan Guaranty prior to submission on the motion, to explore Morgan Guaranty's relationship with Central Bank. It is respectfully submitted that this discovery confirmed the previous findings made by Judge Goettel in the National American action with respect to the relationship. The motion to dismiss was before Magistrate Schreiber for many months. Significantly, Magistrate Schreiber's recommendation, which was adopted by Judge Pierce, did not sustain jurisdiction on the grounds that Nigeria or Central Bank were conducting a commercial activity in the United States. Magistrate Schreiber's recommendation is discussed further below and in detail in defendants' accompanying memorandum.

22. The East Europe, Nikkei and Chenax actions were tried before Judge Pierce in September 1979; no decision has been rendered therein as yet; and the jurisdictional issues have been renewed by the parties in their post-trial submissions to

Judge Pierce. Judge Pierce's pretrial adoption of Magistrate Schreiber's recommendation on jurisdiction pursuant to the Immunities Act is the only such ruling made to date in the many actions commenced in this Court against Nigeria and Central Bank relating to cement contracts and letters of credit similar to those of Texas herein. There is presently pending before Judge Weinfeld in this Court a motion by Central Bank to dismiss the complaint of a Netherlands corporation, Verlinden B.V., the beneficiary of a cement letter of credit similar to that of Texas; the motion in Verlinden, which is returnable before Judge Weinfeld on January 22, 1980, is substantially identical to the instant motion. The only other action against Nigeria and Central Bank litigated through trial in the United States was National American, and the jurisdictional basis in National American was quasi-in-rem; the result of an attachment of property of Nigeria and Central Bank. Judge Goettel so held (448 F.Supp. at page 639) after expressing a dictum with respect to the Immunities Act.

23. The Texas cement contract was negotiated and executed in Nigeria; the cement in question was to be purchased in and shipped from Spain to Nigeria. No act with respect to the making or performance of the Texas cement contract took place in the United States. The Texas letter of credit was established in Nigeria and was advised through Morgan Guaranty in New York solely as an accommodation to Texas: Texas alleges it is a New York corporation doing business in New York; Texas had designated Fidelity International Bank in New York as its bank through which its letter of credit should be advised; payments for cement or demurrage under the Texas letter of credit were to be made against the presentment of appropriate documents evidencing shipment of cement or detentions of vessels in Nigerian ports;

since Central Bank did not maintain an account at Fidelity International Bank, Central Bank made the Texas letter of credit payable at Morgan Guaranty, its correspondent bank, to facilitate presentment of documents and payment. It is respectfully submitted that the Texas claim is not based on a commercial activity carried on in the United States by Nigeria or Central Bank within the meaning of the Immunities Act.

b. The Texas claim is not based upon an act performed by Nigeria or Central Bank in the United States in connection with a commercial activity of Nigeria or Central Bank elsewhere.

24. The acts of breach of which Texas complains are the issuance by Nigeria and Central Bank of instructions and advices with respect to the Texas cement contract and letter of credit; paragraphs ELEVENTH and THIRTEENTH, Texas complaint.

25. These instructions were issued by Nigeria and Central Bank in Nigeria, not the United States. The instructions related to the Texas letter of credit and therefore were advised through Morgan Guaranty as were all other advices and instructions concerning the Texas letter of credit.

c. The Texas claim is not based upon an act by Nigeria or Central Bank outside the United States in connection with a commercial activity of Nigeria or Central Bank elsewhere, which act caused a direct effect in the United States.

26. The Legislative History of the Immunities Act (Exhibit 6 hereto), at page 6618, discusses this basis for jurisdiction and is explicit that the situations to which it applies "would embrace commercial conduct abroad having direct effects within the United States . . ." (emphasis added). Pursuant to

the Immunities Act, the courts of the United States and of the States have no jurisdiction with respect to actions arising out of governmental activity of a foreign state or agency thereof.

27. It is respectfully submitted that the Texas action is based upon the governmental activity of Nigeria and Central Bank with respect to the imposition of a ports embargo in August 1975 and the implementation of the embargo thereafter.

28. Nigeria and Central Bank submit the affidavit of the Honorable O. Jolaoso, Ambassador to the United States from Nigeria, sworn to on October 25, 1977, (Jolaoso's affidavit); Exhibit 10 hereto. The Jolaoso affidavit asserts the defense of sovereign immunity with respect to any claim brought against Nigeria or Central Bank relating to cement contracts with Nigeria or letters of credit established by Central Bank pursuant thereto. The Jolaoso affidavit confirms the status of Central Bank as the financial arm of the Government of Nigeria. With respect to the ports embargo imposed by Nigeria in August 1975, the Jolaoso affidavit explains that the announcement of the embargo was one of the first acts of the new Government of Nigeria which took office on July 29, 1975. The Government enacted and published Government Notice No. 1434, dated August 9, 1975, a copy of which is appended to the Jolaoso affidavit. Government Notice No. 1434 regulated the sailing and arrival of all vessels into Nigerian ports and granted authority to the Nigerian Ports Authority to coordinate sailings, to allocate berths, etc. so as to alleviate and resolve the congestion. Ambassador Jolaoso explains that this action by Nigeria was required because the ports congestion in Lagos Harbor was causing severe and dire disruption of vital commerce in essential consumer goods and had become a threat to the economic and

social survival of Nigeria; the congestion was preventing the importation of goods, such as milk, sugar, salt and flour.

29. Ambassador Jolaoso states that Nigeria notified each cement supplier of the ports congestion and of the provisions of Government Notice No. 1434, and that Nigeria invited each cement supplier to meet with the Cement Contracts Negotiating Committee (Negotiating Committee), which had been established by the Government for the purpose of resolving disputes relating to the cement contracts and letters of credit. The Ambassador notes that the Negotiating Committee was successful in renegotiating many of the cement contracts.

30. In December 1975, the Government of Nigeria found it necessary to enact Ports (Emergency Provisions) Decree 1975, Decree No. 40, dated December 19, 1975 (Decree No. 40); Exhibit 11 hereto. Decree No. 40 repeats substantially the same regulations enacted by Government Notice No. 1434 in August 1975 with respect to advance permission for sailings to Nigeria and the authority of the Nigerian Ports Authority with respect to resolving the ports congestion. Decree No. 40, however, imposed for the first time criminal penalties for the failure by shippers to observe the embargo regulations.

31. At paragraphs ELEVENTH and THIRTEENTH of its complaint, Texas describes generally the communications and advices received in late September 1975, which it alleges constituted the anticipatory breach of its cement contract and letter of credit.

32. It is respectfully submitted that the communications referred to in the Texas complaint are: (1) the message from Central Bank to Texas, sent from Lagos in September 1975

(Exhibit 8 hereto), informing Texas of the ports congestion and the creation of the Negotiating Committee, and inviting Texas to meet with the Negotiating Committee in October 1975; and (2) the letter from Morgan Guaranty to Texas, dated September 30, 1975 (Exhibit 7 hereto), which quotes the text of Central Bank's cables advising of the embargo regulations with respect to the requirement of two months' advance permission for sailings to Nigeria and of certain documentation and approval necessary with respect to payment of demurrage. These communications were a part of Nigeria's implementation of the ports embargo in 1975.

33. The imposition of an embargo by a foreign state is recognized in international law as permissible governmental activity of the foreign state.

34. In the actions commenced by East Europe, Nikkei and Chenax, referred to above, plaintiffs cited as the acts of anticipatory breach by Nigeria and Central Bank the same instructions and notices which Texas cites at paragraphs ELEVENTH and THIRTEENTH of its complaint herein.

35. As noted above, Nigeria and Central Bank's motion to dismiss these actions was referred to U.S. Magistrate S. Schreiber for hearing and recommendation. Magistrate Schreiber rendered his recommendation in the form of a written opinion, dated September 19, 1978, a copy of which is Exhibit 12 hereto. At page 17 of his recommendation, Magistrate Schreiber acknowledged that the embargo by Nigeria in August 1975 was a legitimate governmental act of state. At page 8 of his recommendation, in the last paragraph, Magistrate Schreiber acknowledged that jurisdiction pursuant to the Immunities Act, Section 1605(a)(2), on the basis of an act performed by the foreign state outside the United States and having an effect in the United States,

embraced only commercial conduct of the foreign state or agency thereof, as provided in the Legislative History of the Immunities Act (Exhibit 6 hereto), at page 6618.

36. Magistrate Schreiber recommended that jurisdiction in the East Europe, Nikkei and Chenax actions be sustained pursuant to the third situation defined in Section 1605(a)(2) of the Immunities Act, on the grounds that the instructions from Central Bank, which the plaintiffs complained amended the payment terms of their irrevocable letters of credit, constituted solely commercial activity (pages 9-10 of the Magistrate's recommendation).

37. It is respectfully submitted that Magistrate Schreiber's recommendation, and the order of Judge Pierce adopting the recommendation, are erroneous. The instructions of Central Bank which Texas, East Europe, Nikkei and Chenax all contend constitute acts of anticipatory breach, are clearly implementations of the ports embargo imposed by Nigeria and, as such, are part of the governmental activity of Nigeria with respect to the embargo. The embargo could have had no effect unless those entities dealing with Nigeria were informed of the embargo regulations and instructed to comply therewith. The announcement of the embargo by Nigeria cannot be distinguished from the implementation and enforcement of the embargo; the embargo in its entirety was governmental action.

38. It is respectfully submitted that the Texas claim herein is based solely on governmental acts by Nigeria and Central Bank, and that jurisdiction with respect to the claim does not exist pursuant to the Immunities Act.

The Act of State Doctrine Precludes Adjudication of the Texas Claim

39. Even if jurisdiction of the Texas claim existed pursuant to the Immunities Act, to adjudicate the claim, this Court would be required to review and pass upon the motive for or validity of the governmental action by Nigeria in imposing and implementing the ports embargo in 1975. The act of state doctrine prohibits the courts of the United States and of the States from making such a review or determination with respect to governmental activity of a foreign state; and, therefore, the act of state doctrine precludes an adjudication of the Texas claim herein.

40. The acts of anticipatory breach alleged by Texas were implementations of the embargo regulations and clearly governmental activity. To impose liability against Nigeria or Central Bank pursuant to the Texas claim, this Court of necessity must pass upon the motive for or validity of the activity of Nigeria and Central Bank in implementing the embargo and the embargo regulations.

41. Magistrate Schreiber in his recommendation, referred to above (Exhibit 12 hereto), discussed the act of state doctrine which had been asserted by Nigeria and Central Bank as a bar to the adjudication of the claims alleged by East Europe, Nikkei and Chenax (pages 11-18 of Magistrate Schreiber's recommendation). The Magistrate recognized that the act of state doctrine is separate and distinct from the doctrine of sovereign immunity (pages 12-13 of Magistrate Schreiber's recommendation). It is respectfully submitted that Magistrate Schreiber's conclusion that the act of state doctrine did not apply, was erroneous. The Magistrate, at page 16 of his recommendtion, stated

that: "Defendant Nigeria has alleged two acts of state: (1) the embargo of its ports and (2) the amendment of the letters of credit to require evidence of two months' notice and prior approval of shipment before payment." This statement is incorrect. On the motion before Magistrate Schreiber, Nigeria and Central Bank asserted, as they do herein, that the imposition and implementation of the ports embargo were a part of the same act of state. As noted above, the announcement of the embargo alone would have had no effect unless the embargo regulations were promulgated and enforced.

42. It is respectfully submitted that Magistrate Schreiber's misinterpretation of Nigeria and Central Bank's position enabled him to conclude, at page 17 of his recommendation that: "There is no direct casual link between the embargo and the alleged damages, for plaintiffs have alleged that their damages resulted not from the embargo, but rather from the amendment of the irrevocable letters of credit."

43. Nigeria and Central Bank also dispute the conclusion of Magistrate Schreiber, at page 18 of his recommendation, that the U.S. Supreme Court opinion in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976), announced a commercial acts exception to the act of state doctrine. Defendants' position on this issue is set forth in detail in their memorandum in support of the instant motion.

44. Nigeria and Central Bank respectfully submit that the act of state doctrine is applicable to the claim of anticipatory breach alleged by Texas, and, therefore, renders the claim nonjusticiable.

Texas has failed to state a claim upon which relief can be granted

45. The claim alleged by Texas is solely with respect to the anticipatory breach of its cement contract and letter of credit. In its complaint, Texas omits any reference to the settlement negotiations it had with Nigeria's Cement Contracts Negotiating Committee, which culminated in the execution by Texas of agreements of release and discharge with the Federal Ministry of Defence of Nigeria (with respect to the Texas cement contract) and with Central Bank (with respect to the Texas letter of credit).

46. The affidavit of Ambassador Jolaoso (Exhibit 10 hereto) and the opinion in the National American action, 448 F.Supp. 622 (S.D.N.Y. 1978), aff'd 597 F.2d 314 (2d Cir. 1979) discuss the creation of the Negotiating Committee and the validity of the agreements of release and discharge negotiated by the Negotiating Committee with the vast majority of cement suppliers who had cement contracts and letters of credit similar to that of Texas.

47. Exhibit 8 hereto is the cable from Central Bank of Nigeria to Texas in late September 1975 inviting Texas to meet with the Negotiating Committee in Lagos in early October 1975. Texas accepted this invitation and participated in settlement talks with the Negotiating Committee in Lagos. The successful result of these negotiations was confirmed in a written certification of the Negotiating Committee, dated January 30, 1976, Exhibit 13 hereto.

48. The certificate of the Negotiating Committee identifies the seven vessels which arrived in Nigerian territorial waters pursuant to the Texas cement contract and the tonnage of

of cement carried on each. These same seven vessels, and the respective dates on which notices of readiness to discharge cargo were presented in Lagos, are identified by Texas in paragraph TENTH of its complaint.

49. Prior to their meetings with cement contractors, the Negotiating Committee had prepared two virtually identical agreements of release and discharge - one with respect to the cement contracts entered into by the Federal Ministry of Defence of Nigeria, and the other with respect to the letters of credit established by Central Bank pursuant to these cement contracts. Copies of these two form agreements of discharge are Exhibits 14 and 15 hereto, respectively. These agreements of discharge clearly provide that the parties have each released and discharged the other from all claims or demands of whatever nature with respect to the cement contract and letter of credit between them.

50. After its meetings with the Negotiating Committee, Texas executed agreements of discharge with the Federal Ministry of Defence of Nigeria and with Central Bank in the forms annexed hereto as Exhibits 14 and 15.

51. By virtue of these agreements of discharge, any claim that Texas had with respect to its cement contract and letter of credit was extinguished.

52. The Texas agreements of discharge were made in Nigeria and performed in Nigeria. Pursuant to the Texas agreements of discharge, documents in support of payments for cement and demurrage on the seven vessels accepted by Nigeria were submitted to Government officials in Nigeria. No part of the Texas agreements of discharge were performed or were to be per-

formed in the United States.

53. Pursuant to its agreements of discharge, Texas accepted payments for cement and demurrage made by Nigeria and Central Bank.

54. The Texas agreements of discharge stand as an absolute bar to the claim alleged in the Texas complaint for anticipatory breach of the Texas cement contract and letter of credit.

WHEREFORE, Nigeria and Central Bank respectfully request the Court to grant its motion for an order dismissing the Texas complaint on the grounds that the Court lacks jurisdiction of the claims and of the defendants, that the act of state doctrine precludes an adjudication of the Texas claim, and that Texas has failed to state a claim upon which relief can be granted.

James G. Simms

Sworn to before me this
19th day of December 1979.

Notary Public

PETER J. [illegible]
NOTARY PUBLIC, [illegible]
No. 24-[illegible]
Qualified in Kings [illegible]
Commission Expires March 30, 1980

EXHIBIT 1 - SUPPLEMENTAL SUMMONS ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

SUMMONS IN A CIVIL ACTION — CIV. 1a (3-62) (Formerly D.C. Form No. 1a Rev. (1-61))

45-CIV

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 78 Civ. 2395 (LMP)

TEXAS TRADING & MILLING CORPORATION,

Plaintiff

v.

CENTRAL BANK OF NIGERIA and FEDERAL REPUBLIC OF NIGERIA,

Defendant

SUPPLEMENTAL SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN

plaintiff's attorney , whose address 72 Wall Street, New York, New York 10005

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court.

Deputy Clerk.

Date: New York, New York
August 29, 1978

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

EXHIBIT 1 (CONTINUED) - COMPLAINT ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXAS TRADING & MILLING CORP.,

Plaintiff,

-against-

CENTRAL BANK OF NIGERIA and FEDERAL REPUBLIC OF NIGERIA,

Defendants.

COMPLAINT

The plaintiff herein, by its attorneys, Hill, Rivkins, Carey, Loesberg & O'Brien, complaining of the above-named defendants, alleges as follows:

FIRST: This is a controversy within the meaning of Title 28, Section 1330(a) of the United States Code in that it involves a claim against a foreign state and against an instrumentality of a foreign state as defined in Title 28, Section 1603(b) of the United States Code.

SECOND: Venue is properly in this District by reasons of the provisions of Title 28, Section 1391(f) of the United States Code by reason of facts more fully set forth below.

THIRD: At and during all the times hereinafter mentioned, the plaintiff TEXAS TRADING & MILLING COMPANY (hereinafter TRADING & MILLING) was and still is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal office and place of business within this District, to wit: 11 Greenwich Street, New York, New York, 10004.

FOURTH: At and during all the times hereinafter mentioned the defendant CENTRAL BANK OF NIGERIA (hereinafter CENTRAL BANK) was and still is a foreign banking institution

organized and existing under and by virtue of the laws of the FEDERAL REPUBLIC OF NIGERIA with its principal office and place of business at Tinubu Square, Lagos, Nigeria. Upon information and belief, CENTRAL BANK during all the times hereinafter mentioned was and still is doing business within the State of New York and has maintained and continues to maintain substantial assets within the United States of America and within this District.

FIFTH: At and during all the times hereinafter mentioned the defendant FEDERAL REPUBLIC OF NIGERIA (hereinafter FEDERAL REPUBLIC) was and still is a sovereign foreign state on the African continent with its capital in the city of Lagos.

SIXTH: On or about March 8, 1975, the FEDERAL REPUBLIC agreed to purchase "...240,000 metric tons, plus or minus 10% at seller's option" of "...Portland Cement...." at a price of $60.00 per metric ton, basis C.I.F. Lagos/Apapa. The total contract price was, therefore, $14,400,000. A true copy of the written contract is annexed hereto as Exhibit "A".

SEVENTH: In accordance with Paragraph 1(b) of the contract, FEDERAL REPUBLIC agreed to establish an "...Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit...." in favor of TRADING & MILLING for the total purchase price. Paragraph 1(v) further provided that the aforedescribed letter of credit was to be established through Fidelity International Bank of 99 William Street, New York, New York. In due course, a letter of credit, No. CBN/BO/75/86, in the amount of $14,400,000 was established by CENTRAL BANK at the request of the FEDERAL REPUBLIC. Thereafter, on May 8, 1975, Morgan Guaranty Trust Company (hereinafter Morgan) of New York, New York, advised TRADING & MILLING that the letter of credit had been established.

Exhibit 1 annexed to Affidavit of James G. Simms

A true copy of the advice of Morgan is annexed hereto as Exhibit "B".

EIGHTH: The contract between the FEDERAL REPUBLIC and TRADING & MILLING also provided, in Paragraph (ix) thereof, that demurrage would be payable by the FEDERAL REPUBLIC under the terms of the governing letter of credit in the event the discharge of cargo was not completed within ten(10) days per each 10,000 metric ton lot or pro rata in the case of any greater or lesser quantity. The letter of credit established by CENTRAL BANK and advised by Morgan provided for payment of demurrage at a rate not exceeding $4,000 per diem upon presentation of "...time-sheets and statements of facts duly certified as correct by the ship's master and by the ship's agent in Lagos."

NINTH: TRADING & MILLING thereafter entered into a contract with Spanish suppliers for the purchase of 240,000 metric tons of Portland Cement conforming in all respects with the specifications set forth in Paragraph 1(i) of the written contract between the FEDERAL REPUBLIC and TRADING & MILLING. The price to TRADING & MILLING was $53.10 per metric ton, basis C.I.F. Lagos/Apapa, with TRADING & MILLING to be responsible for demurrage to its supplier.

TENTH: In due course, TRADING & MILLING shipped a total of 39,590 metric tons of Portland Cement on board the vessels COSMARIA, ALFONSO, JO-WOOD, BANGLAN-POLYXENI, PICOVERDE, MARICHU and PROSPERITAS. Notices of readiness to discharge at the appropriate port in the FEDERAL REPUBLIC were given in accordance with Paragraph 1(ix) of the written contract between the FEDERAL REPUBLIC and TRADING & MILLING on June 28, July 26, August 1, August 13, August 12, September 4 and September 10, 1975 respectively. The aforementioned vessels were delayed in discharging by reason of port

con..tion. As a result, substantial demurrage was incurred in the amount of $4,484,476.67. The FEDERAL REPUBLIC has caused to be paid $2,102,305.20 of the foregoing sum, leaving a balance of $2,382,171.67 unpaid and owing to TRADING & MILLING.

ELEVENTH: Plaintiff TRADING & MILLING duly performed all the terms and conditions of the contract between itself and the FEDERAL REPUBLIC until the anticipatory breach of said contract by the FEDERAL REPUBLIC in or about the latter part of September 1975 when TRADING & MILLING was advised that no further shipments of cement would be accepted by the FEDERAL REPUBLIC under its written agreement with TRADING & MILLING and that demurrage would not be paid in accordance with said agreement. Said breach of contract prevented and excused further performance by TRADING & MILLING.

TWELFTH: In consequence of the FEDERAL REPUBLIC's anticipatory breach of contract and wrongful refusal to accept the balance of the Portland Cement sold to it by TRADING & MILLING, the latter sustained a loss in the amount of $1,382,829.00, said loss representing TRADING & MILLING's profit on the 200,410 metric tons of Portland Cement remaining to be shipped under the written agreement between the FEDERAL REPUBLIC and TRADING & MILLING at the time of the FEDERAL REPUBLIC's anticipatory breach.

THIRTEENTH: Upon information and belief, in or about the end of September 1975 the FEDERAL REPUBLIC directed CENTRAL BANK to amend the terms and conditions of the confirmed, irrevocable letter of credit issued by CENTRAL BANK in favor of TRADING & MILLING. Notwithstanding the fact that TRADING & MILLING, as beneficiary of the letter of credit, failed to agree to any of the proposed amendments, which

amendments, in effect, operated to strip TRADING & MILLING of its right to collect demurrage under the letter of credit and to payment for further deliveries of Portland Cement the letter of credit was amended by CENTRAL BANK to the detriment of TRADING & MILLING. As a result, TRADING & MILLING has, to date, been unable to collect the balance of demurrage due and owing, despite TRADING & MILLING's demand for such payment by the FEDERAL REPUBLIC and CENTRAL BANK.

FOURTEENTH: Upon information and belief, Morgan was at all material times and still is the agent of CENTRAL BANK in the United States of America and in this District, performing substantial banking and investment activities on behalf of CENTRAL BANK. Upon information and belief, the written agreement between TRADING & MILLING and the FEDERAL REPUBLIC was one of approximately seventy(70) substantially similar contracts entered into by the FEDERAL REPUBLIC in late 1974 and early 1975 with other American and foreign firms for the purchase of over 20,000,000 metric tons of Portland Cement. The making of the aforedescribed written agreement between TRADING & MILLING and the FEDERAL REPUBLIC, and the establishment of the confirmed, irrevocable letter of credit by CENTRAL BANK in the amount of $14,400,000, advised through Morgan, both constituted commercial transactions or acts. Indeed, the conclusion of the aforedescribed seventy(70) substantially similar contracts by the FEDERAL REPUBLIC and the establishment of approximately seventy(70) similar confirmed, irrevocable letters of credit by CENTRAL BANK, all constituted a regular course of commercial activities within the State of New York and this District within the meaning of Title 28, Section 1603(d) of the United States Code, at least as respects contracts with American firms and letters of credit advised by Morgan.

Exhibit 1 annexed to Affidavit of James G. Simms

FIFTEENTH: By reason of the FEDERAL REPUBLIC's breach of its written agreement with TRADING & MILLING and by reason of CENTRAL BANK's wrongful amendment and, in effect, cancellation of the confirmed, irrevocable letter of credit, TRADING & MILLING has been and will be damaged in the following respects, among others: a) Loss of profits on the sale of 200,410 metric tons of Portland Cement in the amount of $1,382,829.00 and b) unpaid demurrage in the amount of $2,382,171.67.

SIXTEENTH: The wrongful conduct by defendants herein was intentional, willful and deliberate. Plaintiff TRADING & MILLING is therefore entitled to recover, in addition to the damages above specified, reasonable attorney's fees and other costs and expenses necessarily incurred and to be incurred by plaintiff in consequence of defendants' conduct.

WHEREFORE, plaintiff demands judgment against defendants jointly and severally for $3,765,000.67 together with interest as and from October 1, 1975, the costs and disbursements of this action and reasonable attorney's fees.

Dated: New York, New York
May 12, 1978

HILL, RIVKINS, CAREY, LORSBERG & O'BRIEN
Attorneys for Plaintiff

By: RICHARD H. WERBER
A Member of the Firm
Office & P.O. Address
72 Wall Street
New York, New York 10005
(212) 825-1000

EXHIBIT 2 - TEXAS CEMENT CONTRACT ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

THIS AGREEMENT is made the 11th day of MARCH, 5. 197..., BETWEEN IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria (hereinafter called "the buyer") of the one part

Texas Trading and Milling Corporation of 11, Greenwich Street, New York, N.Y. 10004, U.S.A.

represented in Nigeria by Clarkson de Majomi

...whose registered place of business is No. 5, Ado Avenue, Apapa, Nigeria

.....(hereinafter called "the seller") of the other part.

WITNESSETH AS FOLLOWS:

1. The Buyer agrees to buy from the seller and the seller agrees to sell to the buyer cement on the terms and conditions hereinafter expressed.

2(i) DESCRIPTION: The cement shall be Portland Cement conforming to B.S.S.12/1958 or B.S.S. 12/1971.

(ii) QUANTITY: 240,000 metric tons, plus or minus 10% at seller's option.

(iii) PRICE: The price shall be @ U.S. $60.00 per metric ton C.I.F. Lagos/Apapa Free Out (Incoterms 1953), making a total sum of U.S. $14,400,000.00, plus or minus 10%.

(iv) PACKING: In 6-Ply kraft paper bags each containing 50 kgs G/W. Also 6-Ply empty spare bags, to be supplied free of cost, equal to 3 per cent of total number of filled bags comprising each consignment.

...../2

Exhibit 2 annexed to Affidavit of James G. Simms

(v) TERMS OF PAYMENT: By virtue of a revolving Performance Bond, in the sum of $ U.S. 36,000.00 (representing one-twelfth of 3% of the total purchase price) already deposited by the seller with the Central Bank of Nigeria, Lagos, the buyer undertakes to establish, within twenty-one (21) days from the date hereinbefore mentioned, an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Fidelity International Bank of 99, William Street, New York, U.S.A.

Drafts drawn under the Letter of Credit shall be payable at sight, on presentation to the bank designated above of Invoices, Clean on Board Bills of Lading and Insurance Certificates.

(vi) SHIPMENT: Shipment to commence within 30 days after receipt of the Letter of Credit in New York by the seller. Delivery shall be at the rate of 20,000 metric tons per vessel, plus or minus 10% at seller's option. (F.P.A.)

(vii) INSURANCE: Insurance by the seller shall be from Bremen and/or Seville to the Lagos/Apapa Quays. The buyer shall insure the goods against all risks during discharge at the Lagos/Apapa Quays, and therefrom to his warehouse.

(viii) UNLOADING: The buyer shall arrange the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from Customs and complying with all necessary formalities, and shall pay all clearance charges, .../3

Customs duties, and harbour and anchorage dues.

(ix) DEMURRAGE: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbourmaster, whether the vessel is berthed or not), demurrage not exceeding $ U.S. .4,000.00... per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the bank designated in sub-clause (v) above of time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's agents in Lagos.

2. The construction, validity and performance of this contract shall be governed by the Laws of .....Nigeria..... and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient.

A 42

Exhibit 2 annexed to Affidavit of James G. Simms

- 4 -

IN WITNESS WHEREOF IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria has hereunto set his hand and seal, and ...R. L. TROTMAN..... for and on behalf of ..Texas Trading and Milling Corporation has set his hand and seal the day and year first above appearing.

SIGNED SEALED AND DELIVERED by the said IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria.

In the presence of ..C. G. LAKIN-SMITH.....

SIGNED SEALED AND DELIVERED

by ...R. L. TROTMAN.....

for and on behalf of .Texas Trading and Milling Corporation

in the presence of CLARKSON DE MAJOMI.....

A 43

EXHIBIT 3 - TEXAS LETTER OF CREDIT ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

TINUBU SQUARE,
LAGOS.

Private Mail Bag 12194 - CABLES: CENBANK

CBN/BO/75/86

Date:

DOCUMENTARY CREDIT

CONFIRMATION OF TELEX OF: 23 APR 1975

THE PRESIDENT,
MORGAN GUARANTY TRUST CO.,
23, WALL STREET,
NEW YORK.

(Correspondent Bank)

CREDIT NO.
CBN/DO/75/86

Dear Sirs,

We hereby request you to open and advise our confirmed/irrevocable/Divisible transferable/~~irrevocable~~ abroad Documentary Credit in favour of Texas Trading and Milling Corporation of 11, Greenwich ~~Street~~ St. New York, N.Y. 10004, U. S. A.

for an amount of U.S.$14,400,000.00 ± 10%

Fourteen million, four hundred thousand American Dollars plus or minus ten per cent
(Amount in words)

available by their draft(s) at ..... SIGHT ..... for ..... 100 %
(No. of days)

of the CIF/~~FOB~~ Invoice drawn on yourselves accompanied by the following documents (at least in duplicate unless otherwise indicated).

_____ Commercial Invoice in quadruplicate

_____ ~~Consular Invoice in quadruplicate~~

_____ Insurance ~~Policy~~ Certificate covering ALL RISKS as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%.

_____ Full set clean on Board Bills of Lading made out to order and endorsed in blank, marked "Freight Prepaid/~~Collect~~ dated latest 15th June, 1976 Claused "notify The Permanent Secretary, Ministry of Defence, Lagos".

Covering Shipment(s) of:

CIF of 240,000 metric tons of Portland Cement plus or minus 10% at seller's option conforming to B.S.S.12/1958 or 12/1971 at $60.00 per metric ton.

(Continue overleaf)

A 44

Exhibit 3 annexed to Affidavit of James G. Simms

From ....Any Spanish Mediteranean Ports.... to ....Lagos/Apapa Port....

Part Shipment is ~~Prohibited~~/Permitted

Transhipment is Prohibited/~~Permitted~~

This credit is valid in .....United States..... until

.....30th June, 1976..... for presentation for payment in
(date)

accordance with the conditions endorsed hereon.

Draft(s) presented must be drawn under this letter of credit (stating its number and date), and the amount(s) entered thereon must be endorsed by the presenting bank.

We undertake that all drafts drawn in compliance with the terms of this credit will be honoured on receipt of the agreed shipping documents. The correspondent bank is required to send the original documents to us by Express Registered Airmail (duplicate by following airmail).

This letter of credit is confirmed by the Central Bank of Nigeria, Lagos.

Additional Instructions:

Part payments allowed. Payments against presentation of shipping documents.

Credit to be advised through Fidelity International Bank of 99 William Street, New York, U. S. A.

All documents to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos, Nigeria.

Special Instructions:

Please see attached Appendix.

Except otherwise stated this credit is subject to uniform customs and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222.

Yours faithfully,

Bills Manager.

25/4/75

Countersigned:

Asst. Chief of Banking Operations.

A 45

Exhibit 3 annexed to Affidavit of James G. Simms

LAGOS.

Private Mail Bag 12194 - CABLES: CBK

CBN/BO/75/86

Date:

DOCUMENTARY CREDIT

CONFIRMATION OF TELEX OF: 23 APR 1975

THE PRESIDENT,
MORGAN GUARANTY TRUST CO.,
23, WALL STREET,
NEW YORK.

(Correspondent Bank)

CREDIT NO.
CBN/BO/75/86

Dear Sirs,

We hereby request you to open and advise our confirmed/irrevocable/Divisible transferable/abroad Documentary Credit in favour of Texaco Trading and Milling Corporation of 11, Greenwich St. New York, N.Y. 10004, U. S. A.

for an amount of U.S.$14,400,000.00 ± 10%

Fourteen million, four hundred thousand American Dollars plus or minus ten per cent
(Amount in words)

available by their draft(s) at SIGHT for 100%
(No. of days)

of the CIF/~~FOB~~ Invoice drawn on yourselves accompanied by the following documents (at least in duplicate unless otherwise indicated).

_____ Commercial Invoice in quadruplicate

_____ ~~[illegible]~~

_____ Insurance ~~Policy~~ Certificate covering ALL RISKS as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%.

_____ Full set clean on Board Bills of Lading made out to order and endorsed in blank, marked "Freight Prepaid/~~[illegible]~~ dated latest 15th June, 1975 Clauced "notify The Permanent Secretary, Ministry of Defence, Lagos".

Covering Shipment(s) of:

CIF of 240,000 metric tons of Portland Cement plus or minus 10% at seller's option conforming to B.S.3.12/1958 or 12/1971 at $60.00 per metric ton.

(Continue overleaf)

A 46

Exhibit 3 annexed to Affidavit of James G. Simms

CENTRAL BANK OF NIGERIA, LAGOS.

CBN/BO/75/85

A P P E N D I X

In Respect of Letter of Credit No. CBN/BO/75/85

Special Instructions:

(1) Packing is in 6-Ply Kraft paper bags each containing 50 kgs G/W. Also 6-Ply empty spare bags to be supplied free of cost, equal to 3% of total number of filled bags comprising each consignment.

(2) Shipment: Shipment is to commence within 30 days after receipt of the letter of credit in New York by the seller. Delivery shall be at the rate of 20,000 metric tons ~~per month~~ plus or minus 10% at seller's option.

(3) Demurrage: Unloading of each consignment of cement which ~~discharge~~ shall be the sole responsibility of the buyer shall be completed within ten days where such consignment is of 10,000 metric tons or ~~pro rata~~ in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour Master whether the vessel is berthed or not), demurrage not exceeding U.S.$4,000.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the letter of credit, on presentation at the Beneficiary's Banker of time-sheets and statements of facts duly certified as correct by the ship's master and by the ship's agents in Lagos.

CENTRAL BANK OF NIGERIA
BILL REFERENCE

EXHIBIT 4 - MORGAN GUARANTY'S ADVICE TO TEXAS
ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

2

May 8, 1975

Texas Trading and Milling Corporation
11 Greenwich Street
New York, N. Y. 10004

THRU
FIDELITY

On all communications please refer to OUR REFERENCE NUMBER
A-08856 and May 5, 1975.

Dear Sirs:

This refers to our advices of April 25, 1975 thru Fidelity International Bank, 99 William St., New York, N.Y. and our telephone conversation of today.

We are instructed to advise you of the establishment by Central Bank of Nigeria, Lagos, Nigeria of their Irrevocable Credit No. CBN/BO/75/86 in

for U.S.$14,400,000.00 (FOURTEEN MILLION FOUR HUNDRED THOUSAND U.S. DOLLARS)
plus or minus ten per cent,

available upon presentation to us of your drafts at sight on us, for 100% of the C.I.F. invoice value, accompanied by:

+Commercial Invoice in quadruplicate describing the merchandise as indicated below,

Insurance Certificate in duplicate covering All Risks as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%. Insurance (F.P.A.) by the seller shall be from Bremen and/or Seville to the Lagos/Apapa Port.

-Full set (2/2) clean on board bills of lading issued to order blank endorsed marked notify The Permanent Secretary, Ministry of Defence, Lagos, marked freight prepaid dated latest June 15, 1976.

+Evidencing shipment CIF of: 240,000 METRIC TONS OF PORTLAND CEMENT PLUS OR MINUS 10% AT SELLER'S OPTION CONFORMING TO B.S.S.12/1958 OR 12/1971 AT $60.00 PER METRIC TON FROM ANY SPANISH MEDITERRANEAN PORTS TO LAGOS/APAPA PORT. PACKING IS IN 6-PLY KRAFT PAPER BAGS EACH CONTAINING 50 KGS. G/W. ALSO 6-PLY EMPTY SPARE BAGS TO BE SUPPLIED FREE OF COST, EQUAL TO 3% OF TOTAL NUMBER OF FILLED BAGS COMPRISING EACH CONSIGNMENT (and documents must so indicate) SHIPMENT TO COMMENCE WITHIN 30 DAYS AFTER RECEIPT OF THE LETTER OF CREDIT BY THE SELLER (and the latter of credit is subject to our amendment). Delivery shall be at the rate of 20,000 metric tons per month plus or minus 10% at seller's option.

-Our principals state: "Unloading of each consignment shall be the sole responsibility of the buyer and all charges and dues connected with it shall be for the buyers account";

-Partial shipments and payments permitted. -Transhipment prohibited.

-This credit is issued in your favor and/or transferees. This credit is transferable to second beneficiaries including abroad. Should you desire to transfer same, such transfer will be subject to the return to us of this advice together with your written instructions on either of the enclosed forms. Our transfer charges shall be for the account of the Buyer.

-This letter of credit is confirmed by the Central Bank of Nigeria, Lagos.

-All documents to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos, Nigeria.

-CONTINUED ON PAGE 2-

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A 48

Exhibit 4 annexed to Affidavit of James G. Simms

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

2

May 8, 1975

Texas Trading and Milling Corporation
11 Greenwich Street
New York, N. Y. 10004

On all communications please refer to OUR REFERENCE NUMBER
A-08856

-PAGE 2-

Our principals state: "Demurrage: Unloading of each consignment of cement which shall be the sole responsibility of the buyer shall be completed within ten days where such consignment is of 10,000 metric tons or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour Master whether the vessel is berthed or not), demurrage not exceeding U.S.$4,000.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the letter of credit, on presentation at the Beneficiary's Banker of time-sheets and statements of facts duly certified as correct by the ship's master and by the ship's agent in Lagos."

—Except as otherwise expressly stated herein, this advice is subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision) International Chamber of Commerce, Brochure No. 222.

Your drafts must indicate that they are drawn under the aforementioned Irrevocable Credit Number CEN/BO/75/86 of the Central Bank of Nigeria, Lagos, Nigeria and must be presented to our Commercial Credits Department, 15 Broad Stree, New York, N.Y. 10015 with specified documents, not later than June 30, 1976 on which date this advice expires.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

dated April 23, 1975

Yours very truly,

Authorized Signature

P.S. We are contacting our principals for clarification regarding insurance coverage and ports of loading and this advice is subject to an amendment. In the meantime NO DRAWING WILL BE HONORED HEREUNDER.

OFFICE COPY - NOT NEGOTIABLE

state a cause of action or because the plaintiff might be unable to prove his case; such failures call for dismissal on the merits, not on jurisdictional grounds. Spector v. L Q Motor Inns, Inc., C.A.Tex.1975, 517 F.2d 253, rehearing denied 521 F.2d 813, certiorari denied 96 S.Ct. 384, 423 U.S. 1055, 46 L.Ed.2d 644.

Where, in exercise of its discretion, federal district court has determined it proper to withhold federal jurisdiction and abstain, it may dismiss action entirely or retain jurisdiction pending litigation in state courts. Tomlyanu v. Golden, C.A.Nev.1968, 388 F.2d 651.

Where there was no showing of a breakdown in operation of state courts or that state courts were unable to function timely or with propriety, and parties bringing action involving operation of county school system had not exercised invitation of state reviewing court to return if disposition of matter at trial level was not timely made, federal court would dismiss action by such parties seeking to interject federal court into such controversy. Hyden v. Clark, D.C.Ky.1973, 354 F.Supp. 207.

Where court does not have personal jurisdiction over party defendant, action must generally be dismissed against it. Phillip Call and Son v. Garcia Corp., D.C.Ky.1972, 340 F.Supp. 1253.

Federal court on its own motion may dismiss a suit for lack of jurisdiction. Kane v. Cameron, D.C.Pa.1971, 329 F.Supp. 933.

310. Remand

Until the Court of Appeals issues its mandate and remands cases to the district court, the district court lacks jurisdiction of the cases. Reserve Mining Co. v. Environmental Protection Agency, C.A.Minn.1975, 514 F.2d 492.

Where arguments raised to support contentions of want of district court's jurisdiction appeared to be forceful and to have considerable case support, district court on remand should consider explicitly the jurisdictional issues and state specifically on record its conclusions so as to make meaningful appellate review possible. R. R. Adams General Contractors, Inc. v. Department of Housing and Urban Development, C.A.Tex.1974, 501 F.2d 178.

Where cause based on check in amount of about $4,000 and a money order issued upon presentment of check to bank was removed from state court to federal court on petition of United States named as third-party defendant, but federal court had no jurisdiction over the United States, federal court, in exercise of its discretion, would remand case to the state court. Stewart Sand & Material Co. v. Southeast State Bank, D.C.Mo.1970, 318 F.Supp. 870.

On motion to remand to state court, federal court is limited solely to question of jurisdiction, and case will be remanded if jurisdiction is doubtful. Oil Well Service Co. v. Underwriters at Lloyd's London, D.C.Cal.1962, 202 F.Supp. 384.

Federal district court would not remand case to state court on ground that federal district court did not have original jurisdiction of case commenced by attachment and could not thereafter acquire jurisdiction or on ground that federal district court should not intervene where res is in possession of state court officers. Arvin Industries, Inc. v. Hampden Specialty Products Corp., D.C.Tenn. 1968, 298 F.Supp. 13.

A federal district court must remand suits requesting injunctive relief beyond federal court's original jurisdiction. Carroll Const. Co. v. Benson, D.C.Fla. 1943, 219 F.Supp. 715.

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

Added Pub.L. 94–583, § 2(a), Oct. 21, 1976, 90 Stat. 2891.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to

Exhibit 5 annexed to Affidavit of James G. Simms

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE—Continued

CHAPTER 85—DISTRICT COURTS; JURISDICTION—Continued

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

[See main volume for text of (b) to (d)]

As amended Oct. 21, 1976, Pub.L. 94–583, § 3, 90 Stat. 2891.

1976 Amendment. Subsec. (a)(2). Pub. L. 94–583 substituted "and citizens or subjects of a foreign state;" for ", and foreign states or citizens or subjects thereof; and".

Subsec. (a)(3). Pub.L. 94–583 substituted "citizens or subjects of a foreign state are additional parties; and" for "foreign states or citizens or subjects thereof are additional parties".

Subsec. (a)(4). Pub.L. 94–583 added subsec. (a)(4).

Effective Date of 1976 Amendment. Amendment by Pub.L. 94–583 effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

Supplementary Index to Notes

Borrowing statutes, rearrangement of parties 435a
Business trusts 618a
Citizen of two countries 331a
Citizenship
  Associations 219b
  Hospitalized inmates 216b
  Personal representative 218a
  Prisoners 216a
  Refugees or fugitives 216c
  Students 236a
  Union members 249a
Civil rights 535a
Collateral attack 572a
Construction
  1984 Amendment 3b
  With federal rules 3a
Costs 803a
Depositions to determine 560
Discovery 859a
Evidence
  Examination of witnesses 793a
  Privilege 795b
Examination of witnesses 795a
Extras 728
Form of action as determinative 13a
Hospitalized inmates, citizenship 218b
Indians, necessity of diversity between all opposing parties 207a
Joint or several actions 702
Law governing 876
Malicious prosecution 138a
Malpractice 138b
Necessity of diversity between all opposing parties
  Civil rights 203a
  Indians 207a
1984 Amendment
  Construction of 3b
  Purpose of 10a
Nominal or formal parties
  Partnership actions 461a
Partnership actions, nominal or formal parties 461a
Pendent jurisdiction 28a
Personal representative, citizenship 218a
Pleading
  Counterclaims 378a
Power of Congress 533a
Prisoners, citizenship of 216a
Purpose
  1984 Amendment 10a
Question of law 317
Rearrangement of parties
  Borrowing statutes 435a
Refugees or fugitives, citizenship 216c
Students, citizenship 236a
Trade secrets 647a
Transfer of actions 51
Union members, citizenship 249a

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1. Constitutionality

Eldridge v. Richfield Oil Corp., 247 F. Supp. 407, main volume, affirmed 364 F. 2d 909, certiorari denied 87 S.Ct. 750, 385 U.S. 1020, 17 L.Ed.2d 556.

Americana of Puerto Rico, Inc. v. Kaplus, 210 F.Supp. 854, main volume, affirmed 368 F.2d 431, certiorari denied 87 S.Ct. 977, 386 U.S. 943, 17 L.Ed.2d 874.

2. Construction

To same effect as fourth paragraph in main volume, see Wolgin v. Atlas United Financial Corp., D.C.Pa.1975, 397 F.Supp. 1093, affirmed 530 F.2d 963, 966.

To same effect as eighth paragraph in main volume, see, Cielicki v. Presbyterian-University Hospital, D.C.Pa.1974, 383 F.Supp. 415.

Exhibit 5 annexed to Affidavit of James C. Simms

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE—Continued

CHAPTER 87—DISTRICT COURTS; VENUE

§ 1391. Venue generally

[See main volume for text of (a) to (d)]

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

As amended Oct. 21, 1976, Pub.L. 94-574, § 3, 90 Stat. 2721; Oct. 21, 1976, Pub.L. 94-583, § 5, 90 Stat. 2897.

1976 Amendments. Subsec. (e). Pub.L. 94-574 provided that, in actions against the United States, its agencies, or officers or employees in their official capacities, additional persons may be joined in accordance with the Federal Rules of Civil Procedure and with other venue requirements which would be applicable if the United States, its agencies or one of its officers or employees were not a party.

Subsec. (f). Pub.L. 94-583 added subsec. (f).

Effective Date of 1976 Amendment. Amendment by Pub.L. 94-583 effective 60 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94-574, see 1976 U.S.Code Cong. and Adm.News, p. 6121. See also, Pub.L. 94-583, 1976 U.S. Code Cong. and Adm.News, p. 6604.

Supplementary Index to Notes

Property rights 1½

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1. Purpose

Purpose of subsec. (b) of this section is to place venue in the district which, in a normal suit, would be most convenient to the defendant. Jones v. U. S., D.C. Tex.1976, 407 F.Supp. 873.

1½. —— State law

Where claim arises for purposes of venue in diversity action is a question of substantive law requiring federal court to

Exhibit 5 annexed to Affidavit of James G. Simms

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE—Continued

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

[See main volume for text of (a) to (c)]

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

As amended Oct. 21, 1976, Pub.L. 94-583, § 6, 90 Stat. 2898.

1976 Amendment. Subsec. (d). Pub.L. 94-583 added subsec. (d).

Effective Date of 1976 Amendment. Amendment by Pub.L. 94-583 effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94-583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

Supplementary Index to Notes

Banking 728a
Interstate or foreign commerce laws
Employee Retirement Income Security Act of 1974 265a
Petition
Effect of filing 815a

3. Construction—Generally

While this section should be liberally construed to effect its purpose of maintaining the supremacy of federal law, it should be interpreted with the highest regard for the right of the states to make and enforce their own laws in the field belonging to them under the Constitution. Dixon v. Georgia Indigent Legal Services, Inc., D.C.Ga.1975, 388 F.Supp. 1156, affirmed 532 F.2d 1373.

This section must be strictly construed. State Tax Commission v. Union Carbide Corp., D.C.Idaho 1974, 386 F.Supp. 250.

4. —— Strict construction

This chapter should be given strict construction in compliance with congressional policy to limit removal out of regard for rightful independence of state governments. Ashley v. Southwestern Bell Tel. Co., D.C.Tex.1976, 410 F.Supp. 1389.

This section will be strictly construed in favor of state court jurisdiction. Jennings v. Cantrell, D.C.Tenn.1974, 392 F.Supp. 563.

This chapter pertaining to removal of cases from state to federal court must be strictly construed. Perrin v. Walker, D.C.Ill.1974, 385 F.Supp. 945.

This section must be strictly construed since federal courts should not extend their jurisdiction beyond the confines delineated by its provisions. Cabe v. Pennwalt Corp., D.C.S.C.1974, 372 F.Supp. 780.

This chapter is to be strictly construed in light of congressional purpose generally to restrict jurisdiction of federal district courts on removal. Rivera v. Federacion de Musicos de Puerto Rico, Inc., D.C.Puerto Rico 1974, 369 F.Supp. 1189.

8. —— Restriction of federal jurisdiction

This section was aimed at abridging removal. Van Slambrouck v. Employers Mut. Liability Ins. Co. of Wisconsin, D.C.Mich.1973, 354 F.Supp. 366.

9. —— Doubts resolved against removal

If right to remove is doubtful, case should be remanded. Wilhelm v. U. S. Dept. of Air Force Accounting and Finance Center, D.C.Tex.1976, 418 F.Supp. 162.

Burden is on party seeking to remove state action to federal court to establish his right to do so and case should be remanded if there is doubt as to right of removal in first instance. Tasner v. U. S. Industries, Inc., D.C.Ill.1974, 379 F.Supp. 803.

11. Construction with other laws—Generally

Section 1442 of this title governing removal of civil action commenced in a state court against an officer of the United States or any agency thereof creates a jurisdictional right to removal quite separate from that of this section; generally, the limitations on removal under the latter are not applicable to removal under the former. Swan v. Community Relations-Social Development Commission, D.C.Wis.1974, 371 F.Supp. 9.

13. Purpose

Purpose of Congress in changing provision of this section relating to removal of cases so as to use the language "separate and independent claim or cause of action" rather than using the test of "separability" was both to simplify the considerations to be made in determining the propriety of removal and also to help reduce the number of cases actually removed to federal court. Simon v. Gulf Coast Rental Tool Service, Inc., D.C.Tex. 1976, 408 F.Supp. 911.

17. Imported goods, determination
Jurisdiction of the customs court is not limited to questions relating to the rates and amounts of duties chargeable on articles which are conceded to be imported but rather extends to the question of whether the goods are in fact imported. Akins v. Saxbe, D.C.Me.1973, 380 F.Supp. 1210.

Determination whether the Jay treaty exempted from any customs duty goods purchased in Canada and brought into the United States by members of Indian tribe for their personal use and not for resale was within the exclusive jurisdiction of the customs court, as against Indians' contention that customs court's jurisdiction did not extend to question of whether the goods were in fact imported. Id.

18. Protests by importers
This section granting customs court exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to Tariff Act of 1930 has been denied relates to protests filed by importers, not American manufacturers. Timken Co. v. Simon, C.A.D.C.1976, 539 F.2d 221.

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Sec.
1602. Findings and declaration of purpose.
1603. Definitions.
1604. Immunity of a foreign state from jurisdiction.
1605. General exceptions to the jurisdictional immunity of a foreign state.
1606. Extent of liability.
1 Does not conform to section catchline.
1607. Counterclaims.
1608. Service; time to answer default.
1609. Immunity from attachment and execution of property of a foreign state.
1610. Exceptions to the immunity from attachment or execution.
1611. Certain types of property immune from execution.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

Effective Date. Section 8 of Pub.L. 94–583 provided that: "This Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section] shall take effect ninety days after the date of its enactment [Oct. 21, 1976]."

Short Title. Authorization to cite Pub.L. 94–583, which enacted this chapter, as the "Foreign Sovereign Immunities Act of 1976", see section 1 of Pub.L. 94–583, set out as a note under section 1 of this title.

Separability of Provisions. Section 7 of Pub.L. 94–583 provided that: "If any provision of this Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section] or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable."

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

References in Text. The time of enactment of this Act, referred to in text, probably means the time of enactment of Pub.L. 94–583, which was approved on Oct. 21, 1976.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1606. Extent of Liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2895.

References in Text. The time of enactment of this Act, referred to in text, probably means the time of enactment of Pub.L. 94–583, which was approved on Oct. 21, 1976.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or

which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2896.

References in Text. For the effective date of this Act, referred to in subsecs. (a) and (b), see Effective Date note under this section.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94-583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

Exhibit 5 annexed to Affidavit of James G. Simms

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

Added Pub.L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2897.

References in Text. The International Organizations Immunities Act, referred to in subsec. (a), is Act Dec. 29, 1945, c. 652, Title 1, 59 Stat. 669, which is classified to section 288 et seq. of Title 22, Foreign Relations and Intercourse.

Effective Date. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94–583, set out as a note under section 1602 of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–583, see 1976 U.S.Code Cong. and Adm.News, p. 6604.

INDEX

CONSULT GENERAL INDEX

EXHIBIT 6 - LEGISLATIVE HISTORY OF THE IMMUNITIES ACT
ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

LEGISLATIVE HISTORY
P.L. 94-583

HERMAN E. TALMADGE,
GEORGE MCGOVERN,
HUBERT HUMPHREY,
WALTER D. HUDDLESTON,
ROBERT DOLE,
MILTON R. YOUNG,
HENRY BELLMON,
Managers on the Part of the Senate.

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

P.L. 94-583, see page 90 Stat. 2891

House Report (Judiciary Committee) No. 94-1487,
Sept. 9, 1976 [To accompany H.R. 11315]

Senate Report (Judiciary Committee) No. 94-1310,
Sept. 27, 1976 [To accompany S. 3553]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

House September 29, 1976

Senate October 1, 1976

The House bill was passed in lieu of the Senate bill.

The House Report is set out.

HOUSE REPORT NO. 94-1487

[page 1]

The Committee on the Judiciary, to whom was referred the bill (H.R. 11315) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

* * * * * * * * * *

[page 6]

PURPOSE

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.

Exhibit 6 annexed to Affidavit of James G. Simms

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

STATEMENT

The bill H.R. 11315 was introduced in accordance with the recommendations of an executive communication transmitted to the Congress by the Departments of State and Justice, and both Departments recommend its enactment with the amendments recommended in this report. The bill was the subject of hearings on June 2, 1976 and June 4, 1976 before this Committee's Subcommittee on Administrative Law and Governmental Relations. The amendments recommended to the bill are the result of matters discussed at those hearings and further developed in consultation with representatives of the Departments of State and Justice.

At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a

[page 7]

foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity; and, in the event a plaintiff should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the plaintiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

In a modern world where foreign state enterprises are every day participants in commercial activities, H.R. 11315 is urgently needed legislation. The bill, which has been drafted over many years and which has involved extensive consultations within the administration, among bar associations and in the academic community, would accomplish four objectives:

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is

not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

[page 8]

Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

Background

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943)[1] and *Mexico* v. *Hoffman*, 324 U.S. 30 (1945).[2]

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952. 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

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1. 62 S.Ct. 793, 87 L.Ed. 1014.
2. 65 S.Ct. 530, 89 L.Ed. 728.

[page 9]

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

The United States in Foreign Courts

Since World War II, the United States has increasingly become involved in litigation in foreign courts. This litigation has involved such diverse activities as the purchase of goods and services by our embassies, employment of local personnel by our military bases, the construction or lease of buildings for our foreign missions, and traffic accidents involving U.S. Government-owned vehicles.

In the mid-1950's, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the Department of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contacts with the forum were present. Thus, in the 1960's, it became the practice of the Department of Justice to avoid claiming immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the De-

partment would not recognize a foreign state's immunity in this country.

In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts. The United States cannot take recourse to a foreign affairs agency abroad as other states have done in this country when they seek a suggestion of immunity from the Department of State.

History of the Bill

H.R. 11315 is the product of many years of work by the Departments of State and Justice, in consultation with members of the bar and the academic community. Study of possible legislation began in the mid-1960's. In the early 1970's, a number of draft bills were prepared and submitted for comment to many authorities and practitioners in the international law field. On January 31, 1973, a bill (H.R. 3493) was introduced in the 93d Congress, and referred to the Committee on the Judiciary. The bill H.R. 3493 was the subject of a subcommittee hearing on June 7, 1973. Although extensive advice had already been obtained from the private sector, in the course of the subcommittee's consideration it became apparent that a few segments of the private bar had not been fully consulted. It was pointed out that the 93d Congress bill contained some technical deficiencies which could be remedied—particularly with respect to maritime cases and the jurisdictional provisions. The American Bar Association at

the August 1976 meeting of its House of Delegates adopted a resolution urging approval of H.R. 11315. The letter of that association indicating its support is set out at the end of this report.

The current bill, H.R. 11315, contains revised language. It is essentially the same bill as was introduced in 1973, except for the technical improvements that have been made in the interim.

Committee Amendments

The committee, after careful consideration of the bill, made the following amendments:

1. In sections 1604 and 1609 of the bill, the committee has preserved the reference to "existing international agreements" but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement. Moreover, it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement. However, the reference to existing international agreements is essential to make it clear that this bill would not supersede the special procedures provided in existing international agreements, such as the North Atlantic Treaty—Status of Forces Agreement.

2. Section 1606, relating to public debt obligations, has been deleted and the former section 1605(c) has been renumbered as section 1606. The public debt provision was, at best, very limited. It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific government projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would be subject to U.S. regulation, such as that provided by the securities laws. Thus, on reconsideration of all of the factors, the committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.

3. Former section 1605(c), renumbered as section 1606, has also been revised in two other respects. First, it makes clear that the exception for punitive damages applies to political subdivisions of foreign states, as well as to the foreign state itself. This accords with current international practice. Second, it would eliminate the exception for interest prior to judgment. Such an exception is not supported by international practice. If a foreign state is not immune from suit, it should be liable for interest to the same extent as a private party.

[page 11]

4. Section 1608 has been substantially revised, with the principal revisions being in subsection (a). A number of bar association studies which otherwise expressed full support for the bill, pointed out that subsection (a), as previously drafted, created a significant gap in its provisions concerning service upon a foreign state through diplomatic channels. The Departments of Justice and State have reconsidered this provision and have indicated their preference for the revised language in the committee amendment. The committee has revised subsection (a) to fill the prior gap, and, at the same time, to minimize potential irritants to relations with foreign states. Subsection (a), as revised, would provide that service of a summons and complaint also be accompanied by a new document, called a notice of suit. The notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.

The revised paragraphs (a)(2) and (b)(2) of section 1608 give emphasis to service under an "applicable international convention on service of judicial documents." At present, there is such an applicable international convention—the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, 20 UST 361—to which the Senate gave its advice and consent to ratification, and which entered into force for the United States in 1969. At present 18 nations are parties to this convention. In the committee's view, if a country has entered into such an international convention, priority should be given to this method for service.

Exhibit 6 annexed to Affidavit of James G. Simms

Subsection (d) has been revised to delete the references to cross-claims and counterclaims. The existence of a counterclaim against a foreign state indicates that the foreign state has already entered an appearance in the lawsuit; thus, there is no necessity for affording the foreign state with a special time period in which to respond to a counterclaim. When a cross-claim is filed against a foreign state, rules 19 and 20, of the Federal Rules of Civil Procedure, require that original service be made. Under rules the bill, this would mean service under section 1608 (a) or (b).

5. Finally, your committee has made a few perfecting amendments in the bill's provisions involving maritime jurisdiction. These include changes in section 1605(b) to make it clear that the delivery of notice to a master of a vessel under paragraph (1) does not itself constitute "service"; and to make clear, in cases where the plaintiff is unaware that he has arrested a foreign state-owned vessel, that the 10-day period in paragraph (2) does not begin to run until the plaintiff has determined that a foreign state owns the vessel. Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

Conclusion

On the basis of the facts outlined in the executive communication and the testimony at the hearings on the bill, the committee finds that there is a clearly defined need for the enactment of these provisions into law. It is recommended that the amended bill be approved.

[page 12]

Section-by-Section Analysis

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588–589 (1943)[1].)

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

Aside from setting forth comprehensive rules governing sovereign immunity, the bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained

against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.

Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. I, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested * * * in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof, and Foreign States * * *." (art. I, sec. 8, cl. 18; art. III, sec. 2, cl. 1). See *National Bank* v. *Republic of China*, 348 U.S. 356, 370-71 (1955)[4] (Reed J., dissenting); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964)[5].

The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93d Cong., 1st sess.); the prior analysis should not be consulted in interpreting the current bill and its provisions, and no inferences should be drawn from differences between the two.

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330

3. 63 S.Ct. 793, 87 L.Ed. 1014.
4. 75 S.Ct. 423, 99 L.Ed. 339, rehearing denied 75 S.Ct. 593, 349 U.S. 913, 99 L.Ed. 1247.
5. 84 S.Ct. 923, 11 L.Ed.2d 804.

[page 13]

provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) *Subject Matter Jurisdiction.*—Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to

promote a uniformity in decision where foreign governments are involved.

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a) (2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)[6] and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957)[7]. For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605–1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be

6. 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057.
7. 78 S.Ct. 199, 2 L.Ed.2d 223.

made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605–1607 are all carefully interconnected.

(c) *Effect of an Appearance.*—Section 1330(c) states that a mere apperance by a foreign state in an action does not confer personal jurisdiction with respect to claims which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term "transaction or occurrence" includes each basis set forth in sections 1605–1607 for not granting immunity, including waivers.

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

SEC. 3. DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). See analysis to section 1603(b).

SEC. 4. NEW CHAPTER 97: SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

Section 1602. Findings and declaration of purpose

Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform. This restrictive theory has been adhered to by the Department of State since the "Tate Letter" of May 19, 1952. (26 Dept. of State Bull. 984 (1952).)

[page 15]

Section 1603. Definitions

Section 1603 defines five terms that are used in the bill:

(a) *Foreign state.*—Subsection (a) defines the term foreign state as used in all provisions of chapter 97, except section 1608. In section 1608, the term "foreign state" refers only to the sovereign state itself.

As the definition indicates, the term "foreign state" as used in every other section of chapter 97 includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term "political subdivisions" includes all governmental units beneath the central government, including local governments.

(b) *Agency or instrumentality of a foreign state.*—Subsection (b) defines an "agency or instrumentality of a foreign state" as any entity

(1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 1332(c) and (d) nor created under the laws of any third country.

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

The second criterion requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

The third criterion excludes entities which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d)—for example a corporation organized and incorporated under the laws of the State of New York but owned by a foreign state. (See *Amtorg Trading Corp.* v. *United States*, 71 F.2d 524 (C.C.P.A. 1934).) Also excluded are entities which are created under the laws of third countries. The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature.

An entity which does not fall within the definitions of sections 1603 (a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court. On the other hand, the fact that an entity is an "agency or instrumentality of a foreign state" does not in itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions contained in the bill (see sections 1605–1607 and 1610–1611) was applicable.

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms,

including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

(c) *United States.*—Paragraph (c) of section 1603 defines "United States" as including all territory and waters subject to the jurisdiction of the United States.

(d) *Commercial activity.*—Paragraph (c) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral

extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity. By the same token, a foreign state's activities in and "contacts" with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction (see sec. 1330) or to assets which could be subjected to attachment or execution with respect to unrelated commercial transactions (see sec. 1610(b)). However, a transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an AID program. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

[page 17]

(e) *Commercial activity carried on in the United States by a foreign state.*—As paragraph (d) of section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public

lending institution located in the United States—for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Section 1604. Immunity of foreign states from jurisdiction

New chapter 97 of title 28, United States Code, starts from a premise of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605–1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

The immunity from jurisdiction provided in section 1604 applies to proceedings in both Federal and State courts. Section 1604 would be the only basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State court in the United States.

All immunity provisions in sections 1604 through 1607 are made subject to "existing" treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes.

Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity

of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.

Exhibit 6 annexed to Affidavit of James G. Simms

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

(a)(1) *Waivers.*—Section 1605(a)(1) treats explicit and implied waivers by foreign states of sovereign immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a foreign state may waive its immunity in a contract with a private party. Since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities.

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

The language, "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver," is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver. In other words, if the foreign state agrees to a waiver of sovereign immmunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

(a)(2) *Commercial activities having a nexus with the United States.*—Section 1605(a)(2) treats what is probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity. The definition of a "commercial activity" is set forth in section 1603(d) of the bill, and is discussed in the analysis to that section.

Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the "commercial activity [is] carried on in the United States by the for-

[page 19]

eign state." This phrase is defined in section 1603(e) of the bill. See the analysis to that section.

The second situation, an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere," looks to conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere. Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the foreign state who

has been employed in connection with a commercial activity carried on in some third country.

Although some or all of these acts might also be considered to be a "commercial activity carried on in the United States," as broadly defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

The third situation—"an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"—would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

Neither the term "direct effect" nor the concept of "substantial contacts" embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913)[1] or *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F. 2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969)[2].

(a)(3) *Expropriation claims.*—Section 1605(a)(3) would, in two categories of cases, deny immunity where "rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the

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1. 33 S.Ct. 443, 57 L.Ed. 742.
2. 89 S.Ct. 872, 21 L.Ed.2d 784.

prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).[1]

(a)(4) *Immovable, inherited, and gift property.*— Section 1605(a)(4) denies immunity in litigation relating to rights in real estate and in inherited or gift property located in the United States. It is estab-

lished that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted. 26 Department of State Bulletin 984 (1952). It does not matter whether a particular piece of property is used for commercial or public purposes.

It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, 23UST 3227, TIAS 7502 (1972), provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

(a)(5) *Noncommercial torts.*—Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms

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[1] The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be improperly asserted in an effort to block litigation. Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts, committed and effective within their own territory. For example, in the Supreme Court's recent decision in *Dunhill* v. *Republic of Cuba*, 44 U.S.L.W. 4605, No. 73-1238 (May 24, 1976), the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted to assert that a refusal to pay a commercial obligation was not reviewable because it was an "act of state".

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country. The conclusions of the committee are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

"[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." (Amicus Brief of United States, p. 41.)

as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

LEGISLATIVE HISTORY
P.L. 94-583

As used in section 1605(a)(5), the phrase "tortious act or omission" is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680 (a) and (h).

Like other provisions in the bill, section 1605 is subject to existing international agreements (see section 1604), including Status of Forces Agreements; if a remedy is available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).

Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section 1605(a)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state. It is noteworthy in this regard that while article 43 of the Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS 6820 (1970), expressly abolishes the immunity of consular officers with respect to civil actions brought by a third party for "damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft," there is no such provision in the Vienna Convention on Diplomatic Relations of 1961, *supra*. Consequently, no case relating to a traffic accident can be brought against a member of a diplomatic mission.

The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law. See, however, section 1605(c).

(b) *Maritime liens.*—Section 1605(b) denies immunity to a foreign state in cases where (i) a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign state, (ii) the maritime lien is based upon a commercial activity of the foreign state, and (iii) the conditions in paragraphs (1) and (2) of section 1605(b) have been complied with.

The purpose of this subsection is the permit a plaintiff to bring suit in a U.S. district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an in personam action against the foreign state in a manner analogous to bringing such a suit against the United States. Cf. 46 U.S.C. 741, *et seq.* In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit. Instead, as provided in paragraph (1), a copy of the summons and complaint must be delivered to the master or other person having possession of the vessel or cargo (such as the second in command of the ship).

If, however, the vessel or its cargo is arrested or attached, the plaintiff will lose his in personam remedy and the foreign state will

[page 22]

be entitled to immunity—except in the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. By contrast, evidence that a party had relied on a standard registry

of ships, which did not reveal a foreign state's interest in a vessel, would be prima facie evidence of the party's unawareness that a vessel of a foreign state was involved. More generally, a party could seek to establish its lack of awareness of the foreign state's ownership by submitting affidavits from itself and from its counsel. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, its right to immunity from arrest.

Under paragraph (2), the plaintiff must also be able to prove that the procedures for service under section 1608(a) or (b) have commenced—for example, that the clerk of the court has mailed the requisite copies of the summons and complaint. The plaintiff need not show that service has actually been made under section 1608(c). The reason for this second requirement is to help make certain that the foreign state concerned receives prompt and actual notice of the institution of a suit in admiralty in the United States, even if the copies served on the master of the vessel should fail to reach the foreign state.

Section 1605(b) would not preclude a suit in accordance with other provisions of the bill—e.g., section 1605(a)(2). Nor would it preclude a second action, otherwise permissible, to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.

Section 1606. Extent of liability

Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages. Under current international practice, punitive damages are usually not assessed against foreign states. See 5 Hackwork, Digest of International Law, 723-26 (1943); Garcia-Amador, State Reesponsibility, 94 Hague Recueil des Cours 365, 476-81 (1958). Interest prior to judgment and costs may be assessed against a foreign state just as against a private party. Cf. 46 U.S.C. 743, 745.

Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609-1610.

[page 23]

The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply.[7] Or if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. However, appropriate remedies would be

available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Section 1607. Counterclaims

Section 1607 applies to counterclaims against a foreign state which brings an action or intervenes in an action in a Federal or State court. It would deny immunity in three situations. First, immunity would be denied as to any counterclaim for which the foreign state would not be entitled to immunity under section 1605, if the counterclaim had been brought as a direct claim in a separate action against the foreign state. This provision is based upon article I of the European Convention on State Immunity 11 Int'l Legal Materials 470 (1972).

Second, even if a foreign state would otherwise be entitled to immunity under sections 1604–1606, it would not be immune from a counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." This is the same terminology as that used in rule 13(a) of the Federal Rules of Civil Procedure and is consistent with section 70(2)(b), Restatement of the Law, Second, Foreign Relations Law of the United States (1965). Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence. See, *Alfred Dunhill of London, Inc.*, v. *Cuba*, —— U.S. —— No. 73-1288, decided May 24, 1976).[10]

Third, notwithstanding that the foreign state may be immune under subsections (a) and (b), the foreign state nevertheless would not be immune from a setoff. Subsection (c) codifies the rule enunciated in *National Bank* v. *Republic of China*, 348 U.S. 356 (1955).[11]

Section 1608. Service; time to answer; default

Section 1608 sets forth the exclusive procedures with respect to service on, the filing of an answer or other responsive pleading by, and obtaining a default judgment against a foreign state or its political subdivisions, agencies or instrumentalities. These procedural provisions are intended to fill a void in existing Federal and State law, and to insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts.

Provisions in section 1608 are closely interconnected with other parts of the bill—particularly the proposed section 1330 and sections 1605–1607. If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605–1607 are satisfied, personal jurisdiction over a foreign state would exist under section 1330(b). In addition to its integral role in the bill, section 1608 follows on the

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[9] e.g. 5 U.S.C. 552 concerning public information.
10. 96 S.Ct. 1854, 48 L.Ed.2d 301.
11. 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 598, 349 U.S. 912, 99 L. Ed. 1247.

precedents of other statutory service provisions in areas of unusual Federal interest. See, for example, 8 U.S.C. 1105a(3) and 15 U.S.C. 21(f) and 77v.

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

(a) *Service on Foreign States and Political Subdivisions.*—Subsection (a) of section 1608 sets forth the exclusive procedures for service on a foreign state, or political subdivision thereof, but not on an agency or instrumentality of a foreign state which is covered in subsection (b). There is a hierarchy in the methods of service. Paragraph (1) provides for service in accordance with any special arrangement which may have been agreed upon between a plaintiff and the foreign state or political subdivision. If such an arrangement exists, service must be made under this method. The purpose of subsection (a)(1) is to encourage potential plaintiffs and foreign states to agree to a procedure on service.

If no special arrangement exists, paragraph (2) would permit service in accordance with an applicable international convention on service of judicial documents. The only such convention to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS 6638 (1969). In order for an international convention to be "applicable", both the United States and the foreign state concerned must be a party to the convention.

If neither an applicable international convention nor a special arrangement exists, paragraph (3) would provide for service by mail. The clerk of the court would send a copy of a "notice of suit" as prescribed by the Secretary of State by regulation, together with a copy of the summons and complaint, by mail to the head of the foreign state's ministry of foreign affairs or its equivalent. This procedure is based on rule 4(i)(1)(D), F.R. Civ. P.

Finally, as a method of last resort, paragraph (4) would provide for service through diplomatic channels if service could not be made by mail within 30 days. The clerk of the court would send two copies of the notice of suit, summons and complaint to the Secretary of State for transmittal through diplomatic channels. Transmittal through diplomatic channels would mean that the Office of Special Consular Services in the Department of State will pouch a copy of these papers to the U.S. Embassy in the foreign state in question. The U.S. Embassy, in turn, would prepare a diplomatic note of transmittal and deliver the diplomatic note with the other papers to the appropriate official in the ministry of foreign affairs of the foreign state. Use of diplomatic channels could also include transmittal of the papers by the Department of State to the foreign state's embassy in Washington, D.C. "Transmittal" of the notice of suit, summons and complaint does not require that the foreign state formally accept these papers. It only requires that these papers be transmitted in such a way that the foreign state has actual notice of the suit. All papers to be served would be accompanied by translations into an official language of the foreign state. Finally, the Secretary of State would be required to send back to the court the diplomatic note used in transmitting the papers to the foreign state.

A "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what

[page 25]

steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures.

LEGISLATIVE HISTORY
P.L. 94-583

Service through diplomatic channels is widely used in international practice. It is provided for in the European Convention on State Immunity, *supra*, which was negotiated by 18 European nations. It is accepted and indeed preferred by the United States in suits brought against the United States Government in foreign courts. See Department of State's circular instruction No. CA-10922, June 16, 1961, 56 Am. J. Int'l L. 523-33 (1962).

(b) *Service on Agencies or Instrumentalities.*—Subsection (b) of section 1608 provides the methods under which service shall be made upon an agency or instrumentality of a foreign state, as defined in section 1603(b). Again, service must always be made in accordance with any special arrangement for service between a plaintiff and the agency or instrumentality. If no such arrangement exists, then service must be made under subsection (b)(2) which provides for service upon officers, or managing, general or appointed agents in the United States of the agency or instrumentality—or in the alternative, in accordance with an applicable international convention such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, *supra*.

If there is no special arrangement and if the agency or instrumentality has no representative in the United States, service may be made under one of the three methods provided in subsection (b)(3). The first two methods provide for service by letter rogatory or request or by mail. The third method, subparagraph (C), authoizes a court to fashion a method of service, for example under rule 83, F.R. Civ. P., provided the method is "consistent with the law of the place where service is to be made." This latter language takes into account the fact that the laws of foreign countries may prohibit the service in their country of judicial documents by process servers from the United States. It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted. It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd.* v. *Moore*, 345 F. 2d 978 (D.C. Cir. 1965), or upon consular representatives, *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd*, 238 F. 2d 400 (2d Cir. 1956).

(c) *When Service Is Made.*—Subsection (c) of section 1608 establishes the time when service shall be deemed to have been made under each of the methods provided in subsections (a) and (b).

(d) *Time To Answer or Reply.*—Subsection (d) of section 1608 gives each foreign state, political subdivision thereof or agency or instrumentality of a foreign state or political subdivision up to 60 days from the time service is deemed to have been made in which to answer or file a responsive pleading. This corresponds to similar provisions applicable in suits against the United States or its officers or agencies. Rule 12(a), F.R. Civ. P.

(e) *Default Judgments.*—Subdivision (e) of section 1608 provides that no default judgment may be entered against a foreign state, or

[page 26]

its political subdivisions, agencies or instrumentalities, "unless the claimant establishes his claim or right to relief by evidence satisfactory

to the court." This is the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R. Civ. P. In determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign state.[2] Once the default judgment is entered, notice of such judgment must be sent in the manner prescribed for service in sections 1608(a) or (b).

Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state. First, the current practice of attempting to commence a suit by attachment of a foreign state's property would be prohibited under section 1609 in the bill, because of foreign relations considerations and because such attachments are rendered unnecessary by the liberal service and jurisdictional provisions of the bill. See the analysis to section 1609.

A second means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 465–50 (1974).

Section 1609. Immunity from Attachment and Execution of Property of a Foreign State

As in the case of section 1604 of the bill with respect to jurisdiction, section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(a), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611. Here, it should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit.

Attachment of foreign government property for jurisdictional purposes has been recognized "where under international law a foreign government is not immune from suit", and where the property in the United States is commercial in nature. *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct. N.Y. 1959). Even in such cases, however, it has been recognized that property attached for jurisdictional purposes cannot be retained to satisfy a judgment because, under current practice, the property of a foreign sovereign is immune from execution.

Attachments for jurisdictional purposes have been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the jurisdiction. Such cases frequently require the application of foreign law to events which occur entirely abroad.

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[2] Cf. Statement in the analysis of section 1604 noting that appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

LEGISLATIVE HISTORY
P.L. 94-583

[page 27]

Such attachments can also give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

At the same time, one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States. Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim for which the foreign state is not entitled to immunity. The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department.

Section 1610. Exceptions to Immunity from Attachment or Execution

Section 1610 sets forth circumstances under which the property of a foreign state is not immune from attachment or execution to satisfy a judgment. Though the enforcement or judgments against foreign state property remains a somewhat controversial subject in international law, there is a marked trend toward limiting the immunity from execution.

A number of treaties of friendship, commerce and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2, 1953, art. 18(2), 4 UST 2063, TIAS 2863). The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 196 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial services in the same way as against privately owned vessels. Although not a party to this treaty, the United States follows a policy of not claiming immunity for its publicly-owned merchant vessels, both domestically, 46 U.S.C. 742, 781, and abroad, 46 U.S.C. 747; 2 Hackworth, Digest of International Law, 438–39 (1941). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS 5639, to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used in commercial service.

However, the traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. *Dexter and Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 43 F. 2d 705 (2d Cir. 1930). Even after the "Tate Letter" of 1952, this continued to be the position of the Department of State and of the courts. See, *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469, 473 (Sup. Ct. N.Y. 1959). Sections 1610(a) and (b) are intended to modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill.

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

[page 28]

(a) *Execution Against Property of Foreign States.* Section 1610(a) relates to execution against property of a foreign state, including a political subdivision, agency, or instrumentality of a foreign state. The term "attachment in aid of execution" is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. See rule 69, F.R. Civ. P. The property in question must be used for a commercial activity in the United States. If so, attachment in aid of execution, and execution, upon judgments entered by Federal or State courts against the foreign state would be permitted in any of the circumstances set forth in paragraphs (1)–(5) of section 1610(a).

Paragraph (1) relates to explicit and implied waivers, and is governed by the same principles that apply to waivers of immunity from jurisdiction under section 1605(a)(1) of the bill. A foreign state may have waived its immunity from execution, *inter alia*, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution. As in section 1605(a)(1), a waiver on behalf of an agency or instrumentality of a foreign state may be made either by the agency or instrumentality or by the foreign state itself.

Paragraph (2) of section 1610(a) denies immunity from execution against property used by a foreign state for a commercial activity in the United States, provided that the commercial activity gave rise to the claim upon which the judgment is based. Included would be commercial activities encompassed by section 1605(a)(2). The provision also includes a commercial activity giving rise to a claim with respect to which the foreign state has waived immunity under section 1605(a)(1). In addition, it includes a commercial activity which gave rise to a maritime lien with respect to which an admiralty suit was brought under section 1605(b). One could, of course, execute against commercial property other than a vessel or cargo which is the subject of a suit under section 1605(b), provided that the property was used in the same commercial activity upon which the maritime lien was based.

The language "is or was used" in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971 A.M.C. 2651 (N.D. Calif.); *American Hawaiian Ventures* v. *M.V. Lutuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

Paragraph (3) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and which has been taken in violation of international law or has been exchanged for property taken in violation of international law. See the analysis to section 1605 (a)(3).

Paragraph (4) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residences of the chiefs of such missions. This exemption applies to all of the situations encompassed by sections 1610 (a) and (b); embassies and related buildings could not be deemed to be property used for a "commercial" activity as required by section 1610(a); also, since such buildings are those of the foreign state itself, they could not be property of an agency or instrumentality engaged in a commercial activity in the United States within the meaning of section 1610(b).

Paragraph (5) of section 1610(a) would deny immunity with respect to obligations owed to a foreign state under a policy of liability insurance. Such obligations would after judgment be treated as property of the foreign state subject to garnishment or related remedies in aid or in place of execution. The availability of such remedies would, of course, be governed by applicable State or Federal law. Paragraph (5) is intended to facilitate recovery by individuals who may be injured in accidents, including those involving vehicles operated by a foreign state or by its officials, or employees acting within the scope of their authority.

(b) *Additional Execution Against Agencies and Instrumentalities Engaged in Commercial Activity in the United States.*—Section 1610 (b) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in section 1610(a). However, the agency or instrumentality must be engaged in a commercial activity in the United States. If so, the plaintiff may obtain an attachment in aid of execution or execution against *any* property, commercial and noncommercial, of the agency or instrumentality, but only in the circumstances set forth in paragraphs (1) and (2).

Paragraph (1) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States, where the agency or instrumentality has waived its immunity from execution. See the analysis to paragraph (1) of section 1610(a).

Paragraph (2) of section 1610(b) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States in order to satisfy a judgment relating to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3) or (5), or 1605(b). Property will be subject to execution irrespective of whether the property was used for the same commercial or other activity upon which the claim giving rise to the judgment was based.

Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. See *Prelude Corp. v. Owners of F/V Atlantic*, 1971 A.M.C. 2651 (N.D. Calif.). There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between differ-

ent U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. See the analysis to section 1610(a) (2).

(c) *Necessity of court order following reasonable notice.*—Section 1610(c) prohibits attachment or execution under sections 1610(a) and (b) unless the court has issued an order for such attachment and execution. In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(e). In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.

(d) *Attachments upon explicit waiver to secure satisfaction of a judgment.*—Section 1610(d) relates to attachment against the property of a foreign state, or of a political subdivision, agency or instrumentality of a foreign state, prior to the entry of judgment or prior to the lapse of the "reasonable period of time" required under section 1610(c). Immunity from attachment will be denied only if the foreign state, political subdivision, agency or instrumentality has explicitly waived its immunity from attachment prior to judgment, and only if the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to secure jurisdiction. This subsection provides, in cases where there has been an explicit waiver, a provisional remedy, for example to prevent assets from being dissipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment.

Section 1611. Certain types of property immune from execution

Section 1611 exempts certain types of property from the immunity provisions of section 1610 relating to attachment and exectuion.

(a) *Property held by international organizations.*—Section 1611 (a) precludes attachment and execution against funds and other property of certain international organizations. The purpose of this subsection is to permit international organizations designated by the President pursuant to the International Organizations Immunities Act, 22 U.S.C. 288, *et seq.*, to carry out their functions from their offices located in the United States without hindrance by private claimants seeking to attach the payment of funds to a foreign state; such attachments would also violate the immunities accorded to such international institutions. See also article 9, section 3 of the Articles of Agreement of the International Monetary Fund, TIAS 1501, 60 Stat. 1401. International organizations covered by this provision would include,

LEGISLATIVE HISTORY
P.L. 94-583

[page 31]

inter alia, the International Monetary Fund and the World Bank. The reference to "international organizations" in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.

(b) *Central bank funds and military property.*—Section 1611(b)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

Section 1611(b)(2) provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of two conditions: the property is either (A) of a military character or (B) under the control of a military authority or defense agency. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, warships, tanks, communications equipment. Both the character and the function of the property must be military. The purpose of this condition is to avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments.

The second condition is intended to protect other military property, such as food, clothing, fuel and office equipment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control, and a "defense agency" is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military (e.g., surplus military equipment withdrawn from military use would not be immune). Both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act.

SEC. 5. VENUE

This section amends 28 U.S.C. § 1391, which deals with venue generally. Under the new subsection (f), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred." This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which

[page 32]

does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(b) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(b)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. § 1391(c).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (f) would, of course, not apply to entities that are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(b).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(h), F.R. Civ. P.)

SEC. 6. REMOVAL OF CASES FROM STATE COURTS

The bill adds a new provision to 28 U.S.C. 1441 to provide for removal to a Federal district court of civil actions brought in the courts of the States against a foreign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446.) However, in view of the 60-day period provided in section 1608(c) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition of removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

LEGISLATIVE HISTORY
P.L. 94-583

[page 33]

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (*Cf.* 28 U.S.C. 2402, precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court. (*Cf.* rule 81(c). F.R. Civ. P.) Because the judicial power of the United States specifically encompasses actions "between a State, or the Citizens thereof, and foreign States" (U.S. Constitution, art. III, sec. 2, cl. 1), this preemption of State court procedures in cases involving foreign sovereigns is clearly constitutional.

This section, again, would not apply to entities owned by a foreign state which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d), or created under the laws of a third country.

SEC. 7. SEVERABILITY OF PROVISIONS

This action provides that if a portion of the act or any application of the act should be found invalid for any reason, such invalidity would not affect any other provision or application of the act.

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.

STATEMENTS UNDER CLAUSE 2(l)(2)(B), CLAUSE 2(l)(3) AND CLAUSE 2(l)(4) OF RULE XI AND CLAUSE 7(a)(1) OF RULE XIII OF THE HOUSE OF REPRESENTATIVES

COMMITTEE VOTE

(Rule XI 2(l)(2)(B))

On September 9, 1976, the Full Committee on the Judiciary approved the bill H.R. 11315 by voice vote.

COST

(Rule XIII 7(a)(1))

The enactment of this bill will not require any new or additional authorization or appropriation of funds. Indeed, the enactment of the bill will result in a net saving, in an undetermined amount, in that the Department of State will no longer have to undertake a consideration of diplomatic requests for sovereign immunity, and the Department of Justice will not be required to appear in the courts in support of the suggestions of immunity that are filed pursuant to the Department of State's sovereign immunity determinations.

Exhibit 6 annexed to Affidavit of James G. Simms

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

OVERSIGHT STATEMENT

(Rule XI 2(l)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsi-

[page 34]

bility with reference matters involving the immunity of foreign states, in accordance with Rule VI(b) of the Rules of the Committee on the Judiciary. The favorable consideration of this bill was recommended by that subcommittee and the committee has determined that legislation should be enacted as set forth in this bill.

BUDGET STATEMENT

(Rule XI 2(l)(3)(B))

As has been indicated in the committee statement as to cost made pursuant to Rule XIII (7)(a)(1), the bill will not require any new or additional authorization or appropriation of funds. The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by Clause 2(l)(3)(B) of Rule XI.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

(Rule XI 2(l)(3)(C))

The estimate received from the Director of the Congressional Budget Office is as follows:

CONGRESS OF THE UNITED STATES,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 6, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of June 10, 1976 and pursuant to section 403 of the Congressional Budget Act, the Congressional Budget Office has analyzed the costs associated with H.R. 11315, the "Foreign Sovereign Immunities Act of 1976." This legislation is estimated to have no budgetary impact.

Should the committee so desire, we would be pleased to provide additional assistance on this and future legislation.

Sincerely,

ALICE M. RIVLIN,
Director.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI 2(l)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(l)(3) of House Rule XI.

Exhibit 6 annexed to Affidavit of James G. Simms

LEGISLATIVE HISTORY
P.L. 94-583

INFLATIONARY IMPACT

(Rule XI 2(l)(3))

In compliance with clause 2(l)(4) of House Rule XI it is stated that this legislation will have no inflationary impact on prices and costs in the operation of the national economy.

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[page 44]

[The executive communication from the Departments of State and Justice is as follows:]

DEPARTMENT OF STATE,
Washington, D.C., October 31, 1975.

Hon. CARL O. ALBERT,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: The Department of State and Department of Justice submit for your consideration and appropriate reference the

[page 45]

enclosed draft bill, entitled "To define the circumstances in which foreign states are immune from the jurisdiction of U.S. courts and in which execution may not be levied on their assets, and for other purposes." This is a proposed revision of the draft bill which was submitted in a letter (enclosed) to you dated January 16, 1973, and subsequently introduced by Chairman Peter W. Rodino, Jr., and Congressman Edward Hutchinson as H.R. 3493. A revised section-by-section analysis explaining the provisions of the bill in some detail is also enclosed. A hearing was held on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the Committee of the Judiciary in the House of Representatives in the 1st session of the 93d Congress on June 7, 1973.

The broad purposes of this legislation—to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation—remain the same. To this end the revised bill, like its predecessor, would entrust the resolution of questions of sovereign immunity to the judicial branch of Government. The statute would codify and refine the "restrictive theory" of sovereign immunity which has guided United States practice with respect to jurisdiction originally set forth in the letter of May 19, 1952, from the Acting Legal Adviser, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman. It would also replace the absolute immunity now accorded foreign states from execution of judgment with an immunity from execution conforming more closely to the restrictive theory of immunity from jurisdiction. The measure also includes provisions for service of process, venue, and jurisdiction, in cases against foreign states which would make it unnecessary to attach the assets of foreign states for purposes of jurisdiction.

Numerous technical changes have been made in the bill on the basis of the hearing in the House of Representatives, commentaries in a number of legal journals, and extensive discussions which have been held with members of the bar as well as the reports and recommendations of committees of several bar associations. A number of these technical revisions are important, but none of them alters the basic concept of the legislation as originally submitted.

FOREIGN SOVEREIGN IMMUNITIES ACT
P.L. 94-583

The most important changes include (1) further definition of "commercial activity carried on in the United States by a foreign state" and "public debt" in section 1603; (2) clarification of the limitations of immunity in tort actions (sec. 1605(5)), in respect of counterclaims (sec. 1607), and in case of execution of judgment (sec. 1610); and (3) substantial revision of section 1608 relating to service of process to conform with article XXII of the Convention on Diplomatic Relations, signed at Vienna April 18, 1961, and with the Federal Rules of Civil Procedure.

In addition, important new provisions have been added to preserve the jurisdiction of the courts of the United States in cases in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of a foreign state (sec. 1605(b)), and to avoid interference with disbursements to foreign states by certain international organizations located in the United States (sec. 1611(a)). These and other changes are discussed in the enclosed analysis.

The Departments of State and Justice believe that this revised draft bill is worthy of and will receive the support of the bar and would

[page 46]

welcome hearings before the appropriate committees of the House to consider this measure as soon as possible.

The Office of Management and Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the administration's program.

Sincerely,

ROBERT S. INGERSOLL,
Deputy Secretary of State.
HAROLD R. TYLER, Jr.,
Deputy Attorney General.

* * * * * * * * * * *

EXHIBIT 7 - LETTER DATED SEPTEMBER 30, 1975
ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 WALL STREET, NEW YORK, N.Y. 10015

New York September 30, 1975

INTERNATIONAL BANKING DIVISION

IN REPLYING PLEASE REFER TO
Commercial Credits

Texas Trading and Milling Corp.
11 Greenwich Street
New York, New York 10004

Gentlemen:

Re: Central Bank of Nigeria, Lagos
L/C CBN/EO/75/86
Our Ref: A 08356

We quote below text of cables we received from the Central Bank of Nigeria, Lagos:

"PLEASE STOP DEMURRAGE PAYMENTS AGAINST SPECIFIED DOCUMENTS UNLESS SUCH DOCUMENTS HAVE BEEN CERTIFIED FOR PAYMENT BY THE CENTRAL BANK OF NIGERIA"

"RE PAYMENT OF DEMURRAGE THE INSTRUCTIONS RELATES TO ALL CREDITS IN FORCE NOW STOP WE ARE NOT STOPPING PAYMENT COMPLETELY BUT WE WANT YOU TO HAVE OUR CLEARANCE BEFORE ANY PAYMENT IS MADE STOP THE DOCUMENTS STATING THE NUMBER OF DAYS THE SHIP HAS BEEN AT UR WHARF WITHOUT BEING DISCHARGED MUST CARRY THE STAMP AND SIGNATURE OF THE CENTRAL BANK BEFORE YOU CAN MAKE ANY PAYMENT OF DEMURRAGE OF ALL OUTSTANDING AND FUTURE CREDITS STOP WE ARE FULLY AWARE OF OUR OBLIGATIONS UNDER ARTICLE 3 OF UNIFORM CUSTOMS AND PRACTICE AND DO NOT INTEND TO TAKE ANY ARBITRARY AND UNILATERAL ACTION STOP YOU WILL AGREE THAT THE PAYMENT OF DEMURRAGE HAS TO BE BASED ON THE NUMBER OF DAYS THE SHIP STAYS AT OUR PORT WITHOUT BEING DISCHARGED STOP THIS FACT HAS TO CERTIFIED AND IT IS TO ENSURE THAT THE NUMBER OF DAYS IS CORRECTLY CERTIFIED THAT WE INSIST ON CLEARANCE WITH US STOP PLEASE MAKE OUR POSITION CLEAR TO THE BENEFICIARIES STOP ALL VALID CLAIMS FOR DEMURRAGE WILL BE PAID AFTER CERTIFICATION STOP ON NO ACCOUNT SHOULD ANY SUPPLIER INSTRUCT THE SHIP OWNER TO SAIL AWAY WITH THE CARGOES AS THE LIEN CANNOT BE ARBITRARILY EXERCISED WHEN WE HAVE NOT REFUSED PAYMENT STOP ALL SUPPLIERS ARE BEING INVITED TO NIGERIA FOR DISCUSSION STOP"

WE INSIST THAT SPECIFIED DOCUMENTS PRESENTED IN SUPPORT OF DEMURRAGE CLAIMS SHOULD BE SENT TO CENTRAL BANK OF NIGERIA FOR CERTIFICATION BEFORE PAYMENTS ARE MADE ON SUCH DOCUMENTS"

"THE NIGERIAN FEDERAL MILITARY GOVERNMENT HAS DIRECTED THAT IN VIEW OF OUR PORT SITUATION SHIPPING COMPANIES MUST GIVE TWO MONTHS NOTICE TO THE NIGERIAN PORTS AUTHORITY BEFORE SAILING STOP IN VIEW OF THIS YOU ARE REQUESTED NOT TO PAY AGAINST DOCUMENTS PRESENTED IN RESPECT OF LETTERS OF CREDIT WE HAVE OPENED UNLESS SUCH DOCUMENTS ARE ACCOMPANIED BY CERTIFICATES CONFIRMING THAT CLEARANCE HAS BEEN OBTAINED FOR THE

contd.....

Exhibit 7 annexed to Affidavit of James G. Simms

SHIPS TO SAIL TO NIGERIA STOP THUS WHEN DOCUMENTS ARE PRESENTED NO PAYMENT SHOULD BE MADE UNTIL WE CONFIRM TO YOU THAT THE SHIP HAS OBTAINED NECESSARY CLEARANCE TO SAIL TO NIGERIA STOP YOU SHOULD THEREFORE NOTIFY US OF THE NAME OF THE SHIP FOR WHICH DOCUMENTS HAVE BEEN PRESENTED SO THAT WE CAN ASCERTAIN CLEARANCE AND ADVISE YOU TO PAY ACCORDINGLY"

This is for your information and is without engagement or responsibility on our part.

Yours very truly,

Authorized Signature

EXHIBIT 8 - CABLE DATED SEPTEMBER, 1975
ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

TEXAS TRADING & MILLING CORPORATION,
11, Greenwich Street,
New York, N.Y. 10004, U.S.A.

AS YOU ARE AWARE THERE IS PORT CONGESTION IN ALL THE NIGERIAN PORTS AND IN ORDER TO DRASTICALLY REDUCE THE FLOW OF SHIPS CARRYING CEMENT INTO OUR HARBOURS THE FEDERAL MILITARY GOVERNMENT OF NIGERIA HAD SET UP RENEGOTIATING AND RESCHEDULING OF DELIVERY PANEL X

YOU AS A BENEFICIARY OF MINISTRY OF DEFENCE LETTER OF CREDIT FOR CEMENT (NO. CEM/BO/75/85) ARE INVITED TO A MEETING OF THE COMMITTEE TO BE HELD IN CENBANK LAGOS ON 8TH OCTOBER 1975 AT 10.00 A.M.

CENTRAL BANK OF NIGERIA
BILLS OFFICE
TINUBU SQUARE LAGOS

EXHIBIT 9 - UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, 1962 REVIEW ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

Reprint of

UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS

(1962 REVISION)

THE INTERNATIONAL CHAMBER OF COMMERCE BROCHURE NO. 222

GENERAL PROVISIONS AND DEFINITIONS

a. These provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

b. For the purposes of such provisions, definitions and articles the expressions "documentary credit(s)" and "credit(s)" used therein mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant for the credit), is to make payment to or to the order of a third party (the beneficiary) or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or authorizes such payments to be made or such drafts to be paid, accepted or negotiated by another bank, against stipulated documents and compliance with stipulated terms and conditions.

c. Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.

d. Credit instructions and the credits themselves must be complete and precise and, in order to guard against confusion and misunderstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail.

e. When the bank first entitled to avail itself of an option it enjoys under the following articles does so, its decision shall be binding upon all the parties concerned.

f. A beneficiary can in no case avail himself of the contractual relationships existing between banks or between the applicant for the credit and the issuing bank.

A.—FORM AND NOTIFICATION OF CREDITS

Article 1.—Credits may be either

a) revocable, or

b) irrevocable.

All credits, therefore, should clearly indicate whether they are revocable or irrevocable.

In the absence of such indication the credit shall be deemed to be revocable, even though an expiry date is stipulated.

Article 2.—A revocable credit does not constitute a legally binding undertaking between the bank or banks concerned and the beneficiary because such a credit may be modified or cancelled at any moment without notice to the beneficiary.

When, however, a revocable credit has been transmitted to and made available at a branch or other bank, its modification or cancellation shall become effective only upon receipt of notice thereof by such branch or other bank and shall not affect the right of that branch or other bank to be reimbursed for any payment, acceptance or negotiation made by it prior to receipt of such notice.

Article 3.—An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and bona fide holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.

An irrevocable credit may be advised to a beneficiary through another bank without engagement on the part of that other bank (the advising bank), but when an issuing bank authorizes another bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking on the part of the confirming bank either that the provisions for payment or acceptance will be duly fulfilled or, in the case of a credit available by negotiation of drafts, that the confirming bank will negotiate drafts without recourse to drawer.

Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

Article 4.—When an issuing bank instructs a bank by cable, telegram or telex to notify a credit and the original letter of credit itself is to be the operative credit instrument, the issuing bank must send the original letter of credit, and any subsequent amendments thereto, to the beneficiary through the notifying bank.

The issuing bank will be responsible for any consequences arising from its failure to follow this procedure.

Article 5.—When a bank is instructed by cable, telegram or telex to issue, confirm or advise a credit similar in terms to one previously established and which has been the subject of amendments, it shall be understood that the details of the credit being issued, confirmed or advised will be transmitted to the beneficiary excluding the amendments, unless the instructions specify clearly any amendments which are to apply.

Article 6.—If incomplete or unclear instructions are received to issue, confirm or advise a credit, the bank requested to act on such instructions may give preliminary notification of the credit to the beneficiary for information only and without responsibility; and in that case the credit will be issued, confirmed or advised only when the necessary information has been received.

B.—LIABILITIES AND RESPONSIBILITIES

Article 7.—Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit.

Article 8.—In documentary credit operations all parties concerned deal in documents and not in goods.

Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorized to do so, binds the party giving the authorization to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.

Exhibit 9 annexed to Affidavit of James G. Simms

If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

If such claim is to be made, notice to that effect, stating the reasons therefor, must be given by cable or other expeditious means to the bank from which the documents have been received and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto. The issuing bank shall have a reasonable time to examine the documents.

Article 9.—Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented thereby, or for the good faith or acts and/or omissions, solvency, performance or standing of the consignor, the carriers or the insurers of the goods or any other person whomsoever.

Article 10.—Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters or documents, or for delay, mutilation or other errors arising in the transmission of cables, telegrams or telex, or for errors in translation or interpretation of technical terms, and banks reserve the right to transmit credit terms without translating them.

Article 11.—Banks assume no liability or responsibility for consequences arising out of the interruption of their business by strikes, lock-outs, riots, civil commotions, insurrection, wars, Acts of God or any other causes beyond their control. Unless specifically authorized, banks will not effect payment, acceptance or negotiation after expiration under credits expiring during such interruption of business.

Article 12.—Banks utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of the latter.

They assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank.

The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.

C.—DOCUMENTS

Article 13.—All instructions to issue, confirm or advise a credit must state precisely the documents against which payment, acceptance or negotiation is to be made.

Terms such as "first class", "well known", "qualified" and the like shall not be used to describe the issuers of any documents called for under credits and if they are incorporated in the credit terms banks will accept documents as presented without further responsibility on their part.

Documents evidencing Shipment or Despatch (Shipping Documents)

Article 14.—Except as stated in Article 18, the date of the Bill of Lading, or date indicated in the reception stamp or by notation on any other document evidencing shipment or despatch, will be taken in each case to be the date of shipment or despatch of the goods.

Article 15.—If the words "freight paid" or "freight prepaid" appear by stamp or otherwise on documents evidencing shipment or despatch they will be accepted as constituting evidence of the payment of freight.

If the words "freight prepayable" or "freight to be prepaid" or words of similar effect appear by stamp or otherwise on such documents they will not be accepted as constituting evidence of the payment of freight.

Unless otherwise specified in the credit or inconsistent with any of the documents presented under the credit, banks may honour documents stating that freight or transportation charges are payable on delivery.

Article 16.—A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging.

Banks will refuse shipping documents bearing such clauses or notations unless the credit expressly states clauses or notations which may be accepted.

Marine Bills of Lading

Article 17.—Unless specifically authorized in the credit, Bills of Lading of the following nature will be rejected:

a) Bills of Lading issued by forwarding agents.

b) Bills of Lading which are issued under and are subject to the conditions of a Charter-Party.

c) Bills of Lading covering shipment by sailing vessels.

However, unless otherwise specified in the credit, Bills of Lading of the following nature will be accepted:

a) "Port" or "Custody" Bills of Lading for shipments of cotton from the United States of America.

b) "Through" Bills of Lading issued by steamship companies or their agents even though they cover several modes of transport.

Article 18.—Unless otherwise specified in the credit, Bills of Lading must show that the goods are loaded on board.

Loading on board may be evidenced by an on board Bill of Lading or by means of a notation to that effect dated and signed or initialled by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board and shipment.

Article 19.—Unless transhipment is prohibited by the terms of the credit, Bills of Lading will be accepted which indicate that the goods will be transhipped enroute, provided the entire voyage is covered by one and the same Bill of Lading.

Bills of Lading incorporating printed clauses stating that the carriers have the right to tranship will be accepted notwithstanding the fact that the credit prohibits transhipment.

Article 20.—Banks will refuse a Bill of Lading showing the stowage of goods on deck, unless specifically authorized in the credit.

Article 21.—Banks may require the name of the beneficiary to appear on the Bill of Lading as shipper or endorser, unless the terms of the credit provide otherwise.

Exhibit 9 annexed to Affidavit of James G. Simms

Other Shipping Documents, etc.

Article 22.—Banks will consider a Railway or Inland Waterway Bill of Lading or Consignment Note, Counterfoil Waybill, Postal Receipt, Certificate of Mailing, Air Mail Receipt, Air Transportation Waybill, Air Consignment Note or Air Receipt, Trucking Company Bill of Lading or any other similar document as regular when such document bears the reception stamp of the carrier or issuer, or when it bears a signature.

Article 23.—When a credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or any other official indication of weight on the shipping documents unless the credit calls for a separate or independent certificate of weight.

Insurance Documents

Article 24.—Insurance documents must be as specifically described in the credit, and must be issued and/or signed by insurance companies or their agents or by underwriters.

Cover notes issued by brokers will not be accepted, unless specifically authorized in the credit.

Article 25.—Unless otherwise specified in the credit, banks may refuse any insurance documents presented if they bear a date later than the date of shipment as evidenced by the shipping documents.

Article 26.—Unless otherwise specified in the credit, the insurance document must be expressed in the same currency as the credit.

The minimum amount for which insurance must be effected is the CIF. value of the goods concerned. However, when the CIF value of the goods cannot be determined from the documents on their face, banks will accept as such minimum amount the amount of the drawing under the credit or the amount of the relative commercial invoice, whichever is the greater.

Article 27.—Credits must expressly state the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as "usual risks" or "customary risks" shall not be used.

Failing specific instructions, banks will accept insurance cover as tendered.

Article 28.—When a credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, and will assume no responsibility if any particular risk is not covered.

Article 29.—Banks may accept an insurance document which indicates that the cover is subject to a franchise, unless it is specifically stated in the credit that the insurance must be issued irrespective of percentage.

Commercial Invoices

Article 30.—Unless otherwise specified in the credit, commercial invoices must be made out in the name of the applicant for the credit.

Unless otherwise specified in the credit, banks may refuse invoices issued for amounts in excess of the amount permitted by the credit.

The description of the goods in the commercial invoice must correspond with the description in the credit. In the remaining documents the goods may be described in general terms.

Other Documents

Article 31.—When other documents are required, such as Warehouse Receipts, Delivery Orders, Consular Invoices, Certificates of Origin, of Weight, of Quality or of Analysis, etc., without further definition, banks may accept such documents as tendered, without responsibility on their part.

D.—MISCELLANEOUS PROVISIONS

Quantity and Amount

Article 32.—The words "about", "circa" or similar expressions are to be construed as allowing a difference not to exceed 10% more or 10% less, applicable, according to their place in the instructions, to the amount of the credit or to the quantity or unit price of the goods.

Unless a credit stipulates that the quantity of the goods specified must not be exceeded or reduced, a tolerance of 3% more or 3% less will be permissible, always provided that the total amount of the drawings does not exceed the amount of the credit. This tolerance does not apply when the credit specifies quantity in terms of packing units or containers or individual items.

Partial Shipments

Article 33.—Partial shipments are allowed, unless the credit specifically states otherwise.

Shipments made on the same ship and for the same voyage, even if the Bills of Lading evidencing shipment "on board" bear different dates, will not be regarded as partial shipments.

Article 34.—If shipment by instalments within given periods is stipulated and any instalment is not shipped within the period allowed for that instalment, the credit ceases to be available for that or any subsequent instalment, unless otherwise specified in the credit.

Validity and Expiry Date

Article 35.—All irrevocable credits must stipulate an expiry date for presentation of documents for payment, acceptance or negotiation, notwithstanding the indication of a latest date for shipment.

Article 36.—The words "to", "until", "till" and words of similar import applying to the expiry date for presentation of documents for payment, acceptance or negotiation, or to the stipulated latest date for shipment, will be understood to include the date mentioned.

Article 37.—When the stipulated expiry date falls on a day on which banks are closed for reasons other than those mentioned in Article 11, the period of validity will be extended until the first following business day.

This does not apply to the date for shipment which, if stipulated, must be respected.

Banks paying, accepting or negotiating on such extended expiry date must add to the documents their certification in the following wording:

> "Presented for payment (or acceptance or negotiation as the case may be) within the expiry date extended in accordance with Article 37 of the Uniform Customs."

Exhibit 9 annexed to Affidavit of James G. Simms

Article 38.—The validity of a revocable credit, if no date is stipulated, will be considered to have expired six months from the date of the notification sent to the beneficiary by the bank with which the credit is available.

Article 39.—Unless otherwise expressly stated, any extension of the stipulated latest date for shipment shall extend for an equal period the validity of the credit.

Where a credit stipulates a latest date for shipment, an extension of the period of validity shall not extend the period permitted for shipment unless otherwise expressly stated.

Shipment, Loading or Despatch

Article 40.—Unless the terms of the credit indicate otherwise, the words "departure", "despatch", "loading" or "sailing" used in stipulating the latest date for shipment of the goods will be understood to be synonymous with "shipment".

Expressions such as "prompt", "immediately", "as soon as possible" and the like should not be used. If they are used, banks will interpret them as a request for shipment within thirty days from the date on the advice of the credit to the beneficiary by the issuing bank or by an advising bank, as the case may be.

Presentation

Article 41.—Documents must be presented within a reasonable time after issuance. Paying, accepting or negotiating banks may refuse documents if, in their judgment, they are presented to them with undue delay.

Article 42.—Banks are under no obligation to accept presentation of documents outside their banking hours.

Date Terms

Article 43.—The terms "first half", "second half" of a month shall be construed respectively as from the 1st to the 15th, and the 16th to the last day of each month, inclusive.

Article 44.—The terms "beginning", "middle" or "end" of a month shall be construed respectively as from the 1st to the 10th, the 11th to the 20th, and the 21st to the last day of each month, inclusive.

Article 45.—When a bank issuing a credit instructs that the credit be confirmed or advised as available "for one month", "for six months" or the like, but does not specify the date from which the time is to run, the confirming or advising bank will confirm or advise the credit as expiring at the end of such indicated period from the date of its confirmation or advice.

E.—TRANSFER

Article 46.—A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries).

A credit can be transferred only if it is expressly designated as "transferable" by the issuing bank. Terms such as "divisible", "fractionable", "assignable" and "transmissible" add nothing to the meaning of the term "transferable" and shall not be used.

A transferable credit can be transferred once only. Fractions of a transferable credit (not exceeding in the aggregate the amount of the credit) can be transferred separately, provided partial shipments are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the credit. The credit can be transferred only on the terms and conditions specified in the original credit, with the exception of the amount of the credit, of any unit price stated therein, and of the period of validity or period for shipment, any or all of which may be reduced or curtailed. Additionally, the name of the first beneficiary can be substituted for that of the applicant for the credit, but if the name of the applicant for the credit is specifically required by the original credit to appear in any document other than the invoice, such requirement must be fulfilled.

The first beneficiary has the right to substitute his own invoices for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices stipulated in the credit, and upon such substitution of invoices the first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices. When a credit has been transferred and the first beneficiary is to supply his own invoices in exchange for the second beneficiary's invoices but fails to do so on demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the credit, including the second beneficiary's invoices, without further responsibility to the first beneficiary.

The first beneficiary of a transferable credit can transfer the credit to a second beneficiary in the same country, but if he is to be permitted to transfer the credit to a second beneficiary in another country this must be expressly stated in the credit. The first beneficiary shall have the right to request that payment or negotiation be effected to the second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the original credit, and without prejudice to the first beneficiary's right subsequently to substitute his own invoices for those of the second beneficiary and to claim any difference due to him.

The bank requested to effect the transfer, whether it has confirmed the credit or not, shall be under no obligation to make such transfer except to the extent and in the manner expressly consented to by such bank, and until such bank's charges for transfer are paid.

Bank charges entailed by transfers are payable by the first beneficiary unless otherwise specified.

NOTE: *In the U.S.A. the Definitions of Export Quotations, which are now in wide use, are known as the "Revised American Foreign Trade Definitions—1941" adopted July 30, 1941.*

Adherence of the United States banks, which have subscribed to these regulations, is effective July 1, 1963.

Distributed by

Bankers' Association for Foreign Trade (U.S.A.) *and* Committee on International Banking (U.S.A.)

EXHIBIT 10 - AFFIDAVIT OF OLUJIMI JOLAOSO
ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

EMBASSY OF NIGERIA
2201 M STREET, N. W.
WASHINGTON, D. C. 20037

AFFIDAVIT

District of Columbia): ss.:

OLUJIMI JOLAOSO, being duly sworn, deposes and says:

1. I am the Ambassador to the United States from the Federal Republic of Nigeria. I make this affidavit on behalf of the Federal Republic of Nigeria (Nigeria) and the Central Bank of Nigeria (Central Bank), for use in several actions pending in the United States District Court for the Southern District of New York wherein Nigeria and Central Bank are defendants, which actions relate to cement contracts entered into by the Permanent Secretary of the Federal Ministry of Defense of Nigeria and letters of credit established by Central Bank pursuant to these cement contracts (the New York litigation).

2. I, on behalf of the Government of Nigeria and on behalf of Central Bank, assert sovereign immunity as a defense to the claims alleged by the plaintiffs in the New York litigation and as a defense to any application by any of the plaintiffs in the New York litigation to attach, or in any way to proceed against, any monies or other property of the Government of Nigeria or of Central Bank.

3. Central Bank was established in 1958 under the Central Bank of Nigeria Act 1958. Section 4 (1) of the Act

provides that:

> "The principal objects of the Bank shall be to issue legal tender currency in Nigeria, to maintain external reserves to safeguard the international value of that currency, to promote monetary stability and a sound financial structure in Nigeria and to act as banker and financial adviser to the Federal Government."

4. Central Bank is a department and organ of the Government of Nigeria and is the only agent of the Government authorized to hold funds of the Government of Nigeria extra-territorially. Central Bank acts as banker and financial advisor to the Government of Nigeria; it has no authority to exercise, and does not exercise, any judgment with respect to the financial transactions of the Government of Nigeria, but acts in accordance with the directives and requests of the Federal Ministry of Finance of the Government of Nigeria.

5. In August 1975, the Nigerian port of Lagos was completely congested by vessels principally carrying cement; these vessels were either berthed for unloading or were lying in Nigeria territorial waters awaiting clearance for berthing. Almost all available berths for unloading were preempted by the vessels discharging cement and as a result, the new Military Administration of the Federal Government of Nigeria which came into power on July 29, 1975, was greatly concerned by the scarcity of essential consumer goods (milk, sugar, salt, flour and other essentials). The congestion in the port of Lagos was causing a severe and dire disruption of vital commerce and by August 1975 was a critical threat to the economic and social survival of Nigeria. The new Government of Nigeria acted by adopting official measures with the force of law to deal with the vessels already in Nigerian territorial waters, to regulate the arrival of

new vessels and to allocate available berthing and warehouse facilities to allow for the importation of essential consumer goods. The Government published "Regulations on Sailings and Arrivals of Vessels into Nigerian Ports", Government Notice No. 1434, dated August 9, 1975, issued by the Permanent Secretary, Federal Ministry of Transport, Lagos, Nigeria, a copy of which is appended hereto as an exhibit. In addition, the new Government of Nigeria communicated with each of the cement suppliers who had contracted with the Federal Ministry of Defense of Nigeria to advise of the port congestion and the substance of Government Notice No. 1434, and to invite each of the cement suppliers to renegotiate the partially performed or unperformed cement contracts, a necessity dictated by the critical ports congestion. The Government of Nigeria established the Cement Contracts Negotiating Committee for the purpose of meeting with the cement suppliers; and since the organization of this Committee, meetings have been conducted and many of the cement contracts have been successfully renegotiated.

Olujimi Jolaoso

Sworn to before me this
25th day of October, 1977.

EMBASSY OF NIGERIA WASHINGTON, D.C.

Commissioner for Oaths

A 102

Exhibit 10 annexed to Affidavit of James G. Simms

Government Notice No. 1434

REGULATIONS ON SAILINGS AND ARRIVALS OF VESSELS INTO NIGERIAN PORTS

All Shipping Companies/Agents operating in Nigeria are requested to advise their Overseas Principals of the following regulations regarding arrivals of vessels in Nigerian Ports.

(1) With effect from 15th August, 1975, all Shipping Agents must register with the Nigerian Ports Authority before undertaking their activities in Nigeria.

(2) All shipping Companies/Agents must furnish the Nigerian Ports Authority, *at least two months prior to the departure of their vessels from the loading ports*, the following vital information :—

(a) Port/ports of sailing and estimated time of departure ;

(b) Port/ports of discharge in Nigeria ;

(c) Estimated dates of arrival in Nigerian Port/ports ;

(d) Detail information about cargo commodities to be imported into Nigeria ;

(e) Total deadweight/freight tonnage of cargo, e.g. general or bulk, carried in such vessels ;

(f) Description of the vessels, i.e. length, breadth and draught of such vessels.

(3) On receipt of the above information, the Nigerian Ports Authority will co-ordinate all sailing as well as regulate the arrivals of vessels in Nigerian ports.

(4) The information supplied will enable the Authority to confirm and approve such sailings or in the alternative, alter and fix a more suitable date(s) acceptable to the Authority.

(5) After the confirmation or alteration of the departure dates approved by the Authority, the Shipping Companies/Agents shall convey this information to their various Principals Overseas who in turn will be expected to arrange suitable sailings which should conform with the Authority's bookings.

A reconstituted Ports Operation Committee will be charged with the responsibility for allocating berths to ships which have obtained clearance with the Nigerian Ports Authority.

The Committee will, among others, consist of the Nigerian Ports Authority officials and some Shipping Companies/Agents' representatives and will normally meet once weekly.

There will also be weekly publication announcing estimated dates of arrival of vessels in Nigerian Ports and indicating their respective berths. This is to facilitate a pre-plan operation by all interested organisations.

Failure of any Shipping Company/Agent to comply with these regulations shall result in the Authority refusing service to their vessels.

Until the problem of ports congestion is resolved the Ministry of Finance has been requested to regulate the process by which it provides automatic foreign exchange covers to private ship charterers.

All enquiries in respect of this release should be forwarded to the appropriate Port Manager.

Y. A. GOMR,
Permanent Secretary,
Federal Ministry of Transport,
Lagos

9th August, 1975.

EXHIBIT 11 - NIGERIAN PORTS DECREE NO. 40, 1975
ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

Supplement to Official Gazette Extraordinary No. 63, Vol. 62, 22nd December, 1975—Part A

PORTS (EMERGENCY PROVISIONS) DECREE 1975

Decree No. 40

[19*th December* 1975] Commencement.

THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows :—

1. As from the commencement of this Decree, the owner of every ship intending to enter any port in Nigeria for any purpose whatsoever shall, not later than two months before the departure of that ship for Nigeria, furnish to the Nigerian Ports Authority (hereinafter referred to as "the Authority") a statement in writing setting out the following matters, that is to say— Supply of information before the departure of ship for Nigeria.

(*a*) the name and physical particulars of the ship ;

(*b*) the name of port or ports of sailing and estimated time of departure for Nigeria ;

(*c*) the name of port or ports of discharge in Nigeria ;

(*d*) the estimated date of arrival in Nigerian ports ; and

(*e*) detailed information (including tonnage) in respect of the cargo carried in the ship.

2. The Authority shall, on the receipt of the statement referred to in section 1 of this Decree, issue to the owner of the ship a notice hereinafter referred to as an "entry notice" stating— Notice of permission to enter Nigerian ports, etc.

(*a*) the port or ports in Nigeria to which the ship may proceed for any purpose ;

(*b*) the date on which the ship may enter any port or approach to a port in Nigeria ;

(*c*) the berth allocated to the ship in the port concerned and the period during which the ship may remain at such berth.

3. Except with the prior approval of the Authority, no ship shall enter any port or approach to any port in Nigeria except as may be permitted by and in accordance with the terms of an entry notice issued by the Authority in respect of that ship. Prohibition of entry into Nigeria of ships in certain cases.

Alteration of allocation of ports, etc.

4. Notwithstanding anything contained in this Decree, the Authority may, if satisfied that circumstances of the case so require, at any time alter the date allocated for the entry of any ship into any port or approach to a port in Nigeria and shall by such means as it may deem convenient notify the owner of the ship of such alteration.

Publication of information on movement of ship, etc.

5. The Authority shall, from time to time, publish in the *Gazette* and in such other manner as it may deem necessary the estimated date of arrival of any ship in Nigeria, the port allocated for that ship and the berth at which that ship may discharge cargo.

Offences and penalty.

6.—(1) If any ship—

(*a*) enters any port or any approach thereto without an entry notice having been issued by the Authority in respect of that ship ; or

(*b*) enters any port or approach thereto otherwise than as permitted by the entry notice ; or

(*c*) fails to leave any port or approach thereto or to leave any berth at the port when required to do so by the harbour master of the port,

the master of that ship shall be guilty of an offence under this section and shall on conviction be sentenced to imprisonment for two years without the option of a fine.

(2) Where an offence under subsection (1) of this section is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of the owner of that ship, the owner shall be deemed to be guilty of the offence and shall on conviction—

(*a*) in the case of an individual, be sentenced to imprisonment for two years and a fine of N10,000 and a further fine of N10,000 for each day or part of a day during which the offence continues ; and

(*b*) in the case of a body corporate be sentenced to a fine of N10,000 and a further fine of N10,000 for each day or part of a day during which the offence continues.

(3) Any offence under this Decree shall, for the avoidance of doubt, be triable by the Federal Revenue Court.

Interpretation, etc.

Cap. 55.

7.—(1) In this Decree—

"the Authority" means the Nigerian Ports Authority established under section 7 of the Ports Act ;

"entry notice" means a notice issued by the Authority pursuant to section 2 of this Decree ;

"owner" includes any agent of the owner.

(2) Without prejudice to subsection (1) of this section expressions used in this Decree have the same meanings as in the Ports Act.

(3) Nothing in this Decree shall be construed as limiting to any extent whatsoever any powers conferred on the Authority under the Ports Act or any regulations made thereunder with respect to the maintenance, control and management of any port or approach thereto and with respect to the maintenance of good order in any port or approach thereto.

8. This Decree may be cited as the Ports (Emergency Provisions) Decree 1975. Citation.

MADE at Lagos this 19th day of December 1975.

BRIGADIER M. R. MUHAMMED,
Head of the Federal Military Government,
Commander-in-Chief of the Armed Forces,
Federal Republic of Nigeria

EXPLANATORY NOTE

(This note does not form part of the above Decree but is intended to explain its purport)

As an important measure towards ports decongestion, the Decree makes it obligatory for the owner or agent of the owner of every ship intending to enter into any port in Nigeria to supply certain information concerning that ship and its movements to the Nigerian Ports Authority at least two months before the departure of the ship for Nigerian ports. The Authority may after receipt of the required information issue an entry notice to the ship concerned.

If the master of a ship contravenes the provisions of the Decree he shall be liable to imprisonment for two years without the option of a fine.

PUBLISHED BY AUTHORITY OF THE FEDERAL MILITARY GOVERNMENT OF NIGERIA AND PRINTED BY THE MINISTRY OF INFORMATION, PRINTING DIVISION, LAGOS

EXHIBIT 12 - RECOMMENDATION OF MAGISTRATE SCHREIBER
ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC., Plaintiff, -against- FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants	77 Civ. 2809 (LWP)
CHENAX MAJESTY, INC., Plaintiff, -against- FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 3045 (LWP)
DECOR BY NIKKEI INTERNATIONAL, INC., Plaintiff, -against- FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants.	77 Civ. 2348 (LWP) MAGISTRATE'S RECOMMENDATION

This is an action for damages arising out of alleged breach of contracts for the purchase of cement and

documentary letters of credit established pursuant to those contracts. The cement contracts were entered into between plaintiffs and the Federal Ministry of Defense of Nigeria and, pursuant thereto, letters of credit were established in Nigeria by the Central Bank of Nigeria. The contracts and the circumstances surrounding their breach are substantially similar, so plaintiffs have consolidated their claims. Defendants have moved to dismiss for lack of jurisdiction. In addition, both sides have moved for summary judgment. The motions were referred to me by Judge Lawrence Pierce of this court for review and recommendation.

In each action jurisdiction is asserted pursuant to the Foreign Sovereign Immunities Act of 1976 (hereinafter the "Immunities Act"), 28 U.S.C. §1605, the relevant sections of which provide:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection

> with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign . . state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. §1605(a)(1)-(2) (1976).

Defendants assert the defenses of lack of jurisdiction under the Immunities Act, sovereign immunity and act of state.

The purchase agreements in question are mimeographed form contracts in which each plaintiff agreed to supply the Ministry of Defense of Nigeria with 240,000 metric tons of cement. To pay for the cement, letters of credit were established in Nigeria by defendant Central Bank and made payable through Morgan Guaranty Bank in New York. Each letter of credit provides that it is irrevocable, transferable abroad and subject to the Uniform Customs and Practice for Documentary Credits, 1962 Revision, International Chamber of Commerce, Brochure No. 222. The only material differences in the contracts are with respect to the law which is to govern the contracts and the banks through which letters of credit are to be advised. The contracts entered into by plaintiffs East Europe Import-Export, Inc. and Decor by Nikkei International Inc. provide that they are to be governed by the laws of the United States and that letters of credit established pursuant

the contracts are to be advised through First National City Bank in New York City. The contract with plaintiff Chenax Majesty, Inc. states that it is to be governed by the laws of Switzerland, with the letters of credit to be advised through Schroeder, Muenchmeyer, Hengst & Co. of Hamburg, Germany.

The alleged breach of the cement contracts arose out of Nigeria's embargo on all shipping entering the Nigerian port of Lagos Apapa in August 1975. Nigeria had mounted a massive cement purchase program, including orders totalling over twenty million metric tons in 68 different contracts with suppliers throughout the world. The huge quantities ordered greatly exceeded the unloading capacity of Nigeria's deep water ports. Although Nigeria's experience with contracts of this nature indicated that they could expect delivery of only 10% of the orders, the principal port of Lagos Apapa eventually became so congested with cement-laden vessels that an embargo on all shipping was imposed to alleviate the burden on the port's facilities. There was some concern on the part of Nigerian authorities that the unexpected response to the cement orders resulted from suppliers' visions of huge demurrage [1] claims when the inevitable port

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[1] Demurrage is a penalty imposed upon a consignee when a vessel is delayed in discharging its cargo, Hellenic Lines, Ltd. v. Director General of India Supply Mission, 319 F.Supp. 821 (S.D.N. 1970), aff'd, 452 F.2d 810 (2d Cir. 1971). The Nigerian cement contracts provided for such penalties.

congestion delayed unloading. To enforce the embargo, Nigeria declared that all suppliers must henceforth give two months' advance notice of sailing and receive Nigerian permission for departure. Central Bank then cabled instructions to Morgan Guaranty Bank in New York, which in turn informed plaintiffs, that no letters of credit would be honored with respect to vessels transporting cement to Nigeria unless the letters of credit were accompanied by documents showing that Nigeria had been given two months' advance notice of the departure of each vessel and had approved the ship's departure. Plaintiffs contend that these instructions were a unilateral, unauthorized amendment of the terms of the letters of credit and therefore an anticipatory breach of the letters of credit and cement contracts.

This recommendation will principally discuss the issues presented by defendants' motions to dismiss, principally (1) whether this court has jurisdiction over defendant Nigeria pursuant to §1605 of the Immunities Act and (2) whether the act of state doctrine requires this court to decline to exercise Immunities Act jurisdiction on the grounds that the instant litigation would entail review of Nigeria's acts of embargoing its port and requiring prior notice and approval of cement shipments to Nigeria.

In 1976 the Immunities Act was passed to establish when and how parties can maintain lawsuits against foreign states and their entities in United States courts. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7, reprinted in [1976] U.S. Code Cong. and Ad. News 6604 (hereinafter the "House Report"). One of the principal purposes of the Immunities Act is to codify the "restrictive" principle of sovereign immunity, which provides that the immunity of a foreign state is restricted to suits involving the state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). Id. The Immunities Act also transfers the function of making determinations of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these decisions are made on consistent and purely legal grounds. Id. It was the intent of Congress to free the

Department of State from the pressures of foreign governments to recognize their immunity from suit and from adverse consequences resulting from unpopular determinations as to immunity status. Id.

The Immunities Act outines several types of situations in which foreign sovereigns should not be granted immunity, 28 U.S.C, §§1605-07, and provides federal subject matter jurisdiction whenever the foreign sovereign is not immune, 28 U.S.C. §1330(a). In addition, Congress created a long-arm statute for acquiring in personam jurisdiction over foreign sovereigns 28 U.S.C. §1330(b), and the due process requirement of minimum contacts is embodied within the Immunities Act itself. See House Report 6612, for each of the immunity provisions, §§1605-07, requires some connection between the subject matter of the lawsuit and the United States, thus prescribing the necessary contacts which much exist before United States courts can exercise personal jurisdiction.

The specific exception to immunity applicable to the instant suit is the "commercial activity" rule of §1605(a)(2) of the Immunities Act, which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case. . .

> a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if-
>
> . . .
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Comment (f) to §18 explains:

> The exercise of jurisdiction under the rule stated in Clause (b) of this section generally involves matters of an economic nature. In those circumstances, the rule stated in this clause does not require intent in the subjective sense and will usually deal with conduct which was intended to produce the effect within the territory in the sense that those responsible for the conduct had reason to foresee that the effect within the territory would result from the conduct outside.

See Markham v. Gray, 393 F.Supp. 163, 165-66 (S.D.N.Y. 1975), aff'd sub nom., Markham v. Anderson, 531 F.2d 634 (2d Cir. 1976).

The cement contracts are clearly commercial in nature and Nigeria's unilateral amendment of the letters of credit established pursuant to those contracts constitutes "an act outside the territory of the United States in connection

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The cement contracts are clearly commercial in nature and Nigeria's unilateral amendment of the letters of credit established pursuant to those contracts constitutes "an act outside the territory of the United States in connection

with commercial activity elsewhere." Therefore, the pivotal question for this court to determine is whether there has been a direct, foreseeable and substantial effect within the United States as a result of the amendment of the letters of credit.

All of the beneficiaries of the letters of credit were incorporated in New York and the letters were payable at Morgan Guaranty Bank in New York. Nigeria's amendment of the letters directly affected the beneficiaries in New York, for after the amendment none could collect the debts owed to it without the appropriate documents newly demanded by Nigeria. This effect was foreseeable by that nation, because it had entered contracts with New York corporations, made payable at a New York bank and expressly instructed Morgan Guaranty Bank in New York to dishonor letters of credit not complying with the amended payment procedures. Finally, the effects of the attempted amendment of the contracts are substantial, for over $42,000,000 worth of credit owed to the three plaintiffs has been cancelled. Accordingly, this court has subject matter jurisdiction pursuant to 28 U.S.C. §1605(a)(2).

Personal jurisdiction also exists over defendant Nigeria pursuant to §1330(b) of the Immunities Act. The legislative history of that section of the statute supports such a finding on the ground that Nigeria's conduct in connection with contracts havi

foreseeable and substantial effects in New York provides in and of itself, sufficient contact with this state for due process purposes.

In addition, quasi in rem jurisdiction can be found over Nigeria on the basis that it maintains substantial funds on deposit with the Federal Reserve Bank in the form of treasury bills and over Central Bank because it maintains sizeable accounts with Morgan Guaranty Bank which are used to pay a wide range of trade debts incurred by Nigeria. Finally, officia at Morgan Guaranty Bank have the power to transfer Nigeria's deposits at the Federal Reserve to Central Bank's account at Morgan Guaranty Bank if Morgan officials decide the level of deposits has fallen too low.[2]

In addition to its defense of lack of personal jurisdiction, Nigeria contends that the instant litigation is preclud by the act of state doctrine. The traditional definition of that doctrine is found in Underhill v. Hernandez, 168 U.S. 250 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the

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[2] In National American Corp. v. Fed. Rep. of Nigeria, 448 F.Sup 622 (S.D.N.Y. 1978), another case resulting from the Nigerian cement purchase program, Judge Goettel found these contacts sufficient to sustain jurisdiction under the rule of Shaffer v. Heitner, 97 S.Ct. 2569 (1977), upon quasi in rem grounds.

> government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Two policy considerations have been articulated as the basis for the act of state doctrine. Some courts have emphasized that the doctrine rests on concern for international comity and respect for sovereignty, Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918), while others have emphasized that the doctrine is fundamental to our principles of separation of powers, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Although the disparate rationales have made consistent application of the doctrine difficult, it has been generally agreed that the question of whether to invoke the doctrine in a given case is matter of judicial discretion, Id.; Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 714 (1976)(Powell, J., concurring).

Since both the act of state doctrine and sovereign immunity can effectively destroy a litigant's claim, the two principles have often been confused. It is, therefore, important to note the distinction between the two. Sovereign immunity accords a defendant exemption from suit by virtue of its status as a foreign sovereign. Alfred Dunhill, supra, at 726 (Marshall, J., dissenting). The act of state doctrine, on the other hand, applies whether a sovereign nation is a

party or not and precludes a suit from going forward when a court determines that the litigation will require inquiry into the validity of the public acts of a foreign sovereign. Id. A decision on whether to apply the act of state doctrine is made after considering the potential embarassment to the executive branch, and the general consensus on the issue in international law, Banco Nacional de Cuba, supra, at 428.

The instant suit requires scrutiny of two recent cases, Alfred Dunhill, supra, and Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977). When the Immunities Act was passed, Congress expressly declined to address the act of state doctrine, stating that it was confident that Alfred Dunhill provided the courts with adequate guidance for dealing with improper assertions of the doctrine. House Report 6619 n.1. That confidence may have been ill-founded.

In Alfred Dunhill, at 425 U.S. 682 (Part III), four members of the Court supported what has been termed the "commercial exception" to the act of state doctrine, the justices emphasizing that the doctrine applied only to governmental public acts and should not be extended to allow

repudiation of a commercial debt, Id, at 705, That case arose after the Cuban government confiscated the business and assets of certain Cuban manufacturers of cigars and named "interventors" to take possession of and operate the seized businesses. Following the intervention, a number of United States importers paid the interventors for shipments which had been made by the original owners. When the District Court held that the Cuban interventors had to refund those payments to the American importers, the Cuban interventors indicated that they had no intention of doing so and that the court could not question their decision because it was an act of state. While accepting the premise that the confiscation was an act of state, the Supreme Court held, 5-4, that no second act of state had been proven, Id. at 690, stating that even if Cuba had repudiated the debt, the act of state doctrine did not apply to purely commercial acts.

The four dissenting justices refused to recognize any inflexible commercial/non-commercial distinction between acts of state, Id. at 716, and maintained that the interventors' refusal to recognize that they owed any debt was legally indistinguishable from the original intervention. Id. The dissent noted that the act of state doctrine rested upon different considerations than sovereign immunity and warned that the broad commercial exception to sovereign immunity should

not be automatically transferred to the act of state doctrine emphasizing that act of state determinations should be made on a flexible case-by-case basis with all of the appropriate considerations being taken into account, Id. at 728.

Prior to Alfred Dunhill, courts interpreting the act of state doctrine made a preliminary determination as to, first, whether an act was vested with sovereign authority, and, second, whether adjudication of the claim would entail inquiry into the validity of the act such that there was potential for embarassment to the executive branch, Banco Nacional de Cuba, supra. Under the Alfred Dunhill approach urged by Congress, courts must now additionally make a preliminary characterization as to the commercial or non-commercial nature of the act. The appropriate extent of this preliminary inquiry remains unsettled.

Hunt v. Mobil Oil Co., supra, the most recent Second Circuit opinion construing the act of state doctrine, suggests that this inquiry should be limited in scope, and, in fact, the decision is contrary to a recent trend limiting application of the doctrine. Hunt was an anti-trust suit against seven major oil companies working in the Persian Gulf and Libyan oil fields, with plaintiff, an independent oil producer operating in Libya, alleging that the oil companies had manipulated plaintiff's transactions with Libya in such a manner as to provoke nationalization of plaintiff's oil assets. The

court held that plaintiff could not prove his claim without inquiring into Libya's motivation for nationalizing the oil fields and that the act of state doctrine precluded such inquiry, 550 F.2d at 77. Although the doctrine had traditionally precluded inquiry into the validity of sovereign acts, the Second Circuit determined that Libya's motivation and the validity of the seizure were logically inseparable, reasoning that examination of the motivation required assessment of the validity of the act, Id. at 77-78. Thus, the court held that the act of state doctrine precludes judicial inquiry into either motivation for or the validity of the acts of a foreign sovereign committed within its own territory.

Judge Van Graafeiland's dissenting opinion in Hunt argued that Alfred Dunhill illustrated that the act of state doctrine required, rather than precluded, inquiry into the nature of the act and its relationship to the foreign sovereign. Id. at 79.

It is apparent that after Hunt an inquiry into the commercial nature of conduct alleged to be an act of state should not include scrutiny of the sovereign's motivation for the act, but rather should be limited to those facts presented by the pleadings and affidavits.

Defendant Nigeria has alleged two acts of state: (1) the embargo of its ports and (2) the amendment of the letters of credit to require evidence of two months' notice and prior approval of shipment before payment.

The embargo should be accepted as a legitimate governmental act of state, for the inquiry necessary to characterize it a commercial act would require review of Nigeria's motivation for the embargo. Recognition of the embargo as an act of state does not, however render plaintiffs' claims nonjustifiable, becaus this action can proceed without a review of the validity of the embargo. There is no direct causal link between the embargo and the alleged damages, for plaintiffs have alleged that their damage resulted not from the embargo, but rather from the amendment of the irrevocable letters of credit.

Defendants argue that the amendment of the letters of credit was merely an implementaion of the embargo. Althoug the embargo and the amendment of the letters of credit may have been part of an overall scheme to alleviate the confusion surroundi the overcrowded port, the acts are not inseparable, for Nigeria did a number of things to rectify the cement debacle, all of which cannot be lumped into one "act of state." For example, that government formed the Cement Contracts Negotiating Committee to settle claims arising from the situation. It would be logically inconsistentto find that the effort to settle the disputes and the amendment resulting in more disputes were both a single act of state. Furthermore, the embargo would not itself have rendered the letters of credit uncollectable. Thus, since the embargo and the amendment of the letters of credit are severable acts, the instant litigation may proceed despite recognition of the

embargo as a public act of state.

Nigeria contends that the amendment of the letters of credit is also an act of state, but it may not properly be so characterized, for the amendment lies within the Alfred Dunhill "purely commercial" exception to the act of state doctrine. The letters of credit arise out of a specific commercial contract for goods and the attempted amendment or modification of the letters was specifically directed at the cement suppliers. It is clear that Nigeria sought to alter the terms of a commercial agreement and this modification, like the repudiation of the commercial debt in Alfred Dunhill, was a purely commercial act. ~~The instant suit~~ DEFENDANTS' INSTANT MOTION is precisely of the type which Congress hoped Alfred Dunhill would prevent.

For the above reasons, it is recommended that defendants' motion to dismiss be denied. The cross-motions for summary judgmer should also be denied for there are numerous factual disputes.

Respectfully submitted,

/s/ S. Schreiber

SOL SCHREIBER
UNITED STATES MAGISTRATE

New York, New York
September 19, 1978

EXHIBIT 13 - CERTIFICATION OF NEGOTIATING COMMITTEE
ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

CEMENT CONTRACTS NEGOTIATING COMMITTEE

We hereby certify that we have concluded negotiations with TEXAS TRADING & MILLING CORPORATION represented by MR. RICHARD L. TROTMAN and that we have agreed as follows:

1. That the balance of metric tonnes of cement under contract with the Permanent Secretary Ministry of Defence be cancelled without any payment of compensation costs and indemnities however arising and that any letter of credit issued in furtherance of the contract be construed accordingly

2. That TEXAS TRADING & MILLING CORPORATION be invited to negotiate for the supply of cement in the event of a resumption of cement importation

3. That subject to the presentation of satisfactory documents all existing cargo and demurrage obligations be met on the basis of pro rata construction of all demurrage clauses

4. That the vessels listed in the Schedule at present awaiting discharge of cargo be accepted in accordance with paragraph 3 of this agreement

5. That TEXAS TRADING & MILLING CORPORATION undertake to return to the Central Bank of Nigeria the original letter of credit within 14 days of the resumption of payments as stipulated in paragraph 3

SCHEDULE

Vessels	Tonnages	Notice of Readiness
COSMARIA	8,800	June 23, 1975
ALFONSO	2,350	July 26, 1975
JOWOOD	3,900	August 1975
BANGLAN-POLYKENI	10,350	August 13, 1975
PICOVERDE	2,950	August 12, 1975
MARICHU	2,640	Sept. 4, 1975
PROSPERITAS	8,600	Sept. 10, 1975

Exhibit 18 annexed to Affidavit of James G. Simme

DATED the 30th day of January, 1976

Fred Egbe

D. A. Okwuraiye

V. O. Kukoyi

Lt. Col. M. Hagoro

G. O. Mogaji

H. E. David-West

Mallam U. Idris

A. O. Okafor

EXHIBIT 14 - FORM OF AGREEMENT OF DISCHARGE ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

AGREEMENT OF DISCHARGE

THIS AGREEMENT is made the day of One thousand nine hundred and seventy five BETWEEN THE PERMANENT SECRETARY FEDERAL MINISTRY OF DEFENCE whose address is at Republic House, Marina, Lagos (hereinafter called "Permdefence") of the one part AND represented by (hereinafter called the "Supplier") of the other part

W H E R E A S by a Contract dated and made between the Permdefence and the Supplier the Supplier undertook to supply for reward metric tonnes of cement for the consideration and demurrage provisions in the said Contract

AND WHEREAS a total of metric tonnes of cement have either been delivered under the said Contract or are at present awaiting delivery in vessels lying within Nigerian territorial waters

AND WHEREAS the parties have agreed that owing to the present congestion of Nigerian ports any further deliveries of cement or any further performance of the terms of the said Contract have become impossible

AND WHEREAS the Permdefence and the Supplier have decided upon mutual release and discharge from the terms of the said Contract

NOW it is hereby agreed as follows:

Each of the parties hereto hereby releases and discharges the other of them from all sums of money actions proceedings accounts claims and demands whatsoever which each of them now has or at any time heretofore had or may have against the other for or on account of or in relation to any act omission cause matter or thing whatsoever relating to the said Contract

AND the Supplier hereby indemnifies the Permdefence against all claims demands actions proceedings costs loss damages and expenses which may be brought or made against Permdefence or which may be suffered by Permdefence as a result of this Contract

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first above-written

Exhibit 14 annexed to Affidavit of James G. Simms

THE COMMON SEAL of the within-named
PERMANENT SECRETARY FEDERAL
MINISTRY OF DEFENCE was hereunto affixed our
presence:

(1) Signature:

Address:

Occupation:

(2) Signature:

Address:

Occupation:

SIGNED SEALED AND DELIVERED BY
the within-named
in our presence:

Director:

Secretary

EXHIBIT 15 - FORM OF AGREEMENT OF DISCHARGE ANNEXED TO AFFIDAVIT OF JAMES G. SIMMS

AGREEMENT OF DISCHARGE

B E T W E E N CENTRAL BANK OF NIGERIA a bank incorporated under the Laws of the Federal Republic of Nigeria and having its registered office at (hereinafter called "Centralbank") of the one part and represented by (hereinafter called the "Beneficiary" of the other part

W H E R E A S by a letter of Credit No. dated Centralbank undertook payment for the supply of metric tonnes of cement and demurrage in the manner provided in the said original Letter of Credit AND WHEREAS a total of metric tonnes of Cement have either been delivered under the said Letter of Credit or are at present awaiting delivery in vessels lying within Nigerian territorial waters

AND WHEREAS the parties have agreed that owing to the present congestion of Nigerian ports any further deliveries of cement or any further performance of the terms of the Letter of Credit have become impossible

AND WHEREAS the Centralbank and the Beneficiaries have decided upon mutual release and discharge from the terms of the said Letter of Credit

NOW it is hereby agreed as follows:

Each of the parties hereto hereby releases and discharges the other of them from all sums of money actions proceedings accounts claims and demands whatsoever which each of them now has or at any time heretofore had or may have against the other for or on account of or in relation to any act omission cause matter or thing whatsoever relating to the said Letters of Credit

And the Beneficiaries hereby indemnify the Centralbank against all claims demands actions proceedings costs loss damages and expenses which may be brought or made against Centralbank or which may be suffered by Centralbank as a result of this Letter of Credit

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first above-written

Exhibit 15 annexed to Affidavit of James G. Simms

THE COMMON SEAL of the within-named CENTRAL BANK OF NIGERIA was hereunto affixed in our presence: }

Governor:

Secretary

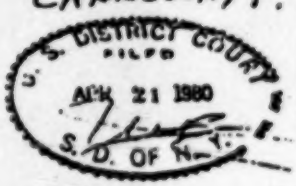
THE COMMON SEAL of the within-named Beneficiary was hereunto affixed in our presence: }

Director:

Secretary:

AFFIDAVIT OF RICHARD H. WEBBER IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

CANNELLA, T.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXAS TRADING & MILLING CORP.,	:	Index No.
Plaintiff,	:	78 Civ. 2395 (JMC)
- against -	:	
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,	:	AFFIDAVIT
Defendants.	:	

RICHARD H. WEBBER, being duly sworn, deposes and says as follows:

1. I am a member of the firm of Hill, Rivkins, Carey, Loesberg, O[illegible]en and Mulroy, attorneys for plaintiff Texas Trading & Milling Corporation (hereinafter "Texas"), am fully familiar with all the pleadings and proceedings heretofore had herein, and make this affidavit in opposition to the motion of defendants Federal Republic of Nigeria (hereinafter "Nigeria") and Central Bank of Nigeria (Hereinafter "Central Bank") for an order dismissing the complaint herein.

2. This action was commenced on May 23, 1978, by the filing of the summons and complaint with the Clerk of the United States District Court for the Southern District of New York. Service was made upon Nigeria and upon Central Bank on May 25 and 23, 1978, respectively in accordance with 28 U.S.C. §1608 (a)(3), see Exhibits 1 and 2 annexed hereto, although no return receipt was ever received. On August 29, 1978, Nigeria was reserved in an excess of caution since we had now obtained a detailed address for the Nigerian Ministry of External Affairs. See Exhibit 3 annexed hereto. On

October 5, 1978, more than four months after commencement of the action, counsel for Nigeria and Central Bank first contacted us advising that they did not then represent Nigeria or Central Bank. Finally, in or about February, 1979, we were finally advised by counsel for Nigeria and Central Bank that proper service was conceded and that they would appear, answer or otherwise move within 60 days. I mention this point because defendants will undoubtedly argue in connection with plaintiff's allegations of economic duress, as a means of avoiding an alleged settlement agreement, that appropriate relief was available in law. Nine months to respond to a complaint may not be a long period for a foreign state - it is for the average small businessman.

3. The basic facts giving rise to the instant dispute are set forth in the affidavit of Richard L. Trotman, annexed hereto as Exhibit 4.

4. In any event, should the Court conclude that there were valid settlement agreements, this does not absolve defendant Nigeria from liability to Texas. There are substantial sums of money still owed by Nigeria to Texas even under the so-called "certification" of the Cement Contract Negotiating Committee. For example, the Nigerian port authorities arbitrarily and without explanation eliminated 15 days, 19 hours and 28 minutes from the M/V COSMARIA demurrage statement. Even at the reduced demurrage rate of $.40 per metric ton of cargo per day, Texas is still due $55,654.72 in demurrage on the 8,800 metric tons cement cargo of the COSMARIA. Similarly, Nigeria has arbitrarily withheld about $3,098.08 in demurrage on the M/V ALFONSO, about $11[illegible] on the M/V JOWOOD, about $396,000 on the M/V

BANGLAR POLYXENI, about $2,360 on the M/V PICO VERDE, about $73,105.27 on the M/V MARICHU and about $364,640 on the M/V PROSPERITAS. Thus, Nigeria itself apparently thinks so little of its alleged settlements that it has failed to pay recalculated demurrage in excess of $1,000,000.00. It is worthy of note that despite repeated suggestions by counsel for Texas that these outstanding items be resolved, neither Nigeria nor its counsel has seen fit to give the matter serious attention. On the contrary, Nigeria seeks by this motion, to evade legitimate liability on the so-called "settlement" with Texas.

RICHARD H. WEBBER

Sworn and subscribed to before me this 15th day of April, 1980.

Notary Public
DOROTHEA E. MAXWELL
Notary Public, State of New York
No. 31-4[illegible]
Qualified in New York County
Commission expires March 30, 19[illegible]

EXHIBIT 1 - LETTER DATED MAY 25, 1978 ANNEXED TO AFFIDAVIT OF RICHARD H. WEBBER

BY HAND

May 25, 1978

The Clerk of the Court
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Texas Trading & Milling Corporation v. Central Bank of Nigeria and Federal Bank of Nigeria
78 Civ. 2395 (LWP)
Our File No. 12043-RHW

Supplemental

Dear Sir:

Pursuant to Title 28, United States Code §1608 (a)(3), you are hereby requested to serve a copy of the enclosed Summons & Complaint together with the enclosed Notice of Suit, in the above-captioned matter by registered mail, return receipt requested, upon: (The Minister for Foreign Affairs, The Ministry for Foreign Affairs, Lagos, Nigeria.) Service pursuant to Title 28, United States Code, §1608(a)(3) is requested because no special arrangement for service exists between the plaintiff and the Federal Republic of Nigeria, pursuant to Title 28, §1608(a)(1) and because the Federal Republic of Nigeria is not a party to an International Convention on Service of Judicial Documents within the meaning of Title 28, United States Code, §1608(a)(2).

Thank you for your cooperation in this regard.

Very truly yours,

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN

By:

Richard H. Webber

RHW:ank:
Enclosures

EXHIBIT 2 - LETTER DATED MAY 23, 1978 ANNEXED TO AFFIDAVIT OF RICHARD H. WEBBER

LAW OFFICES
OF
HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
72 WALL STREET
NEW YORK, N.Y. 10005

May 23, 1978

12043

The Clerk of the Court
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Texas Trading & Milling Corp.
v. Central Bank of Nigeria &
Federal Republic of Nigeria
Our File No. 12043-RHW

Dear Sir:

As you will note from the Complaint filed herewith, this action involves a proceeding against a "foreign state" and an "agency or instrumentality of a foreign state" as defined in 28 U.S.C. §1603. Accordingly, service of process must be made in accordance with 28 U.S.C. §1608.

At this time, we are asking you to make service upon Central Bank of Nigeria in accordance with §1608 (b)(3)(B) by mailing a copy of the Summons and Complaint by registered mail, return receipt requested, to Central Bank of Nigeria whose address is Tinubu Square, Lagos, Nigeria. We note that the Federal Republic of Nigeria is not a party to the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters. Nor is there any special arrangement for service between the plaintiff and Central Bank of Nigeria. Accordingly, service under 28 U.S.C. §1608 (b)(1) & (2) cannot be made. It is for this reason that we are requesting service through your good offices.

Very truly yours,

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN

By: Richard H. Webber

RHW:amk
Enclosure

EXHIBIT 3 - LETTER DATED AUGUST 29, 1978 ANNEXED TO AFFIDAVIT OF RICHARD H. WEBBER

BY HAND

August 29, 1978

The Clerk of the Court
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Texas Trading & Milling Corporation v. Central Bank of Nigeria and Federal Republic of Nigeria
78 Civ. 2395 (LNP)
Our File No. 12043-RHW

Dear Sir:

Pursuant to Title 28, United States Code §1608 (a)(3), you are hereby requested to serve a copy of the enclosed Supplemental Summons and Complaint together with the enclosed Notice of Suit, in the above-captioned matter by registered mail, return receipt requested, upon: the Permanent Secretary, Ministry of External Affairs, P.O. Box 12600, Lagos, Nigeria. Service pursuant to Title 28, United States Code, §1608(a)(3) is requested because no special arrangement for service exists between the plaintiff and the Federal Republic of Nigeria, pursuant to Title 28, §1608(a)(1) and because the Federal Republic of Nigeria is not a party to an International Convention on Service of Judicial Documents within the meaning of Title 28, United States Code, §1608(a)(2).

Thank you for your cooperation in this regard.

Very truly yours,

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN

By:

Richard H. Webber

RHW:rmk
Enclosures

EXHIBIT 4 - AFFIDAVIT OF RICHARD L. TROTMAN ANNEXED TO AFFIDAVIT OF RICHARD H. WEBBER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXAS TRADING & MILLING CORP.,	:	Index No.
Plaintiff,	:	78 Civ. 2395 (JMC)
- against -	:	
FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,	:	AFFIDAVIT
Defendants.	:	

RICHARD L. TROTMAN, being duly sworn, deposes and says as follows:

1. I am now and was in 1975-1976 the president and controlling shareholder of Texas Trading & Milling Corporation (hereinafter "Texas"), the plaintiff in this action. Texas was and is a New York corporation with its principal office and place of business at 11 Broadway, New York, New York. The business of Texas is the purchase and subsequent sale of commodities, including cement, for profit. In other words, Texas is a "trading company" whose profits are based upon the difference between its purchase price and subsequent selling price. It is as a "trading company" that Texas is known in international business circles.

2. On March 8, 1975 Texas, under my direction, entered into a contract with the Federal Republic of Nigeria (hereinafter "Nigeria") whereby Texas agreed to sell and Nigeria agreed to buy 240,000 metric tons of Portland cement at $60.00 per ton on C.I.F. Lagos/Apapa terms with delivery to be at the rate of 20,000 metric tons per month. The contract also provided that demurrage, i.e. the time by

which the discharge of the ocean vessels exceeded that allowed in the contract, would run at $4,000.000 per day, said demurrage to be for the account of Nigeria. A true copy of the contract is annexed hereto as Exhibit A.

3. Nigeria also agreed to open an irrevocable letter of credit through the Central Bank of Nigeria (hereinafter "Central Bank") with Texas as the beneficiary. The contract set the amount of the Central Bank letter of credit as $14,400,000 in the first instance to cover the C.I.F. cost of the cement plus demurrage. The requisite letter of credit was opened in due course and was thereafter advised by Morgan Guaranty Trust Co. and, in turn, by Fidelity International Bank, both of New York City. A true copy of the letter of credit is annexed hereto as Exhibit B.

4. Since Texas was not a manufacturer of Portland cement, Texas entered into a contract with Vazman, S.A., for the supply of cement from Spain on terms similar to those of the Texas contract with Nigeria. A true copy of the Vazman contract is annexed hereto as Exhibit C.

5. As stated in paragraphs Eleventh and Thirteenth of the complaint filed by Texas, in the latter part of September, 1975, after Texas had already shipped 39,590 metric tons of cement, Texas was advised by Nigeria that no further shipments under the contract would be accepted by Nigeria and that demurrage already due and owing would not be paid. At about the same time Texas learned that Central Bank had unilaterally amended the terms and conditions of the confirmed, irrevocable letter of credit notwithstanding the fact that Texas, as beneficiary of the letter of credit, had failed to agree to any of the amendments. The

practical effect of the amendments was to strip Texas of its rights to collect demurrage under the letter of credit and to obtain payment for further deliveries of cement.

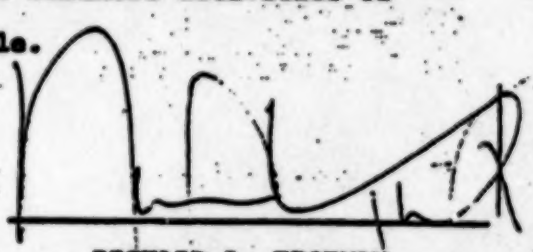
6. The obligation of Texas to pay demurrage to its supplier, Vazman, S.A., ran notwithstanding the wrongful acts of Nigeria and Central Bank.

7. In January, 1976 I was summoned to Nigeria to meet with the so-called "Cement Contracts Negotiating Committee". At that meeting I told the Committee that the refusal to pay demurrage had placed Texas and me at the brink of financial ruin because Texas had an obligation to pay demurrage on the vessels which had lifted the first 39,590 metric tons of cement notwithstanding any actions of Nigeria or of Central Bank. Indeed, the M/V COSMARIA, M/V JOWOOD, M/V BANGLAR and M/V PROSPERITAS were still in Nigerian territorial waters at the time of the meeting. Texas was being charged demurrage on these vessels at a rate of $3,500 per vessel per day. I was told that if Texas did not accede to the requirements of the Committee that the demurrage rate be lowered and the letter of credit cancelled, Nigeria would pay no demurrage at all and, moreover, would refuse to let the aforementioned vessels discharge their cargoes or, indeed, sail from Nigeria. In the circumstances I had no alternative but to accept the dictates of the Committee. I should like to stress that there were no settlement negotiations in the usual sense of that term. The "negotiations" consisted of the Nigerian representatives presenting me with a "take it or leave it" proposition. A true copy of the certificate of the Committee is annexed hereto as Exhibit D.

Exhibit 4 annexed to Affidavit of Richard H. Webber

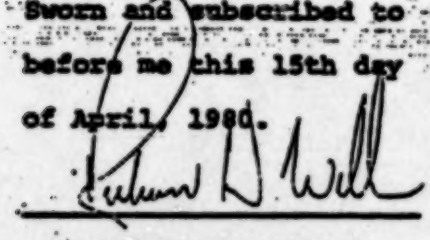
8. I would like to note that the chairman of the Committee, one Fred Ehgz, stated to me that I must "chalk up" the Nigerian incident to business experience and that there was nothing that Nigeria or Central Bank could do for me or for Texas in the circumstances.

9. Had Texas not acceded to the demands of the Committee the only alternative would have been bankruptcy, with its attendant irreparable injury to the business reputation of both Texas and myself, since Texas was under severe pressure from its creditors, including Vaxman, S.A. in respect of obligations to pay vessel demurrage. This pressure was solely the result of the actions of Nigerian and of Central Bank since other business activities of Texas continued to be profitable.

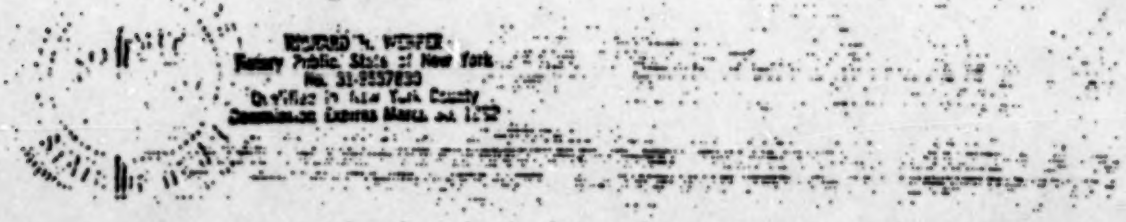


RICHARD L. TROTMAN

Sworn and subscribed to
before me this 15th day
of April, 1980.



Notary Public



A 140

EXHIBIT A - CONTRACT ANNEXED TO AFFIDAVIT OF RICHARD L. TROTMAN

MARCH, 5

THIS AGREEMENT is made the 24th day of ..... 197..., BETWEEN IBRAHIM M. DANCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria (hereinafter called "the buyer") of the one part

Texas Trading and Milling Corporation of 11, Greenwich Street, New York, N.Y. 10004, U.S.A.

represented in Nigeria by
Clarkson de Majemi

.....whose registered place of business is
No. 5, Ado Avenue, Apapa, Nigeria

.....(hereinafter called "the seller")

of the other part.

WITNESSETH AS FOLLOWS:

1. The Buyer agrees to buy from the seller and the seller agrees to sell to the buyer cement on the terms and conditions hereinafter expressed.

(i) DESCRIPTION: The cement shall be Portland Cement conforming to B.S.S.12/1958 or B.S.S.12/1971.

(ii) QUANTITY: 240,000 metric tons, plus or minus 10% at seller's option.

(iii) PRICE: The price shall be $ U.S. 60.00 per metric ton C.I.F. Lagos/Apapa Free Cut (Incoterms 1953), making a total sum of $.U.S. 14,400,000.00, plus or minus 10%.

(iv) PACKING: In 6-Ply kraft paper bags each containing 50 kgs G/W. Also .....-Ply empty spare bags, to be supplied free of cost, equal to 3 per cent of total number of filled bags comprising each consignment.

...../2

Exhibit A annexed to Affidavit of Richard L. Trotman

(v) TERMS OF PAYMENT: By virtue of a revolving Performance Bond, in the sum of £ U.S. 36,000.00 (representing one-twelfth of 3% of the total purchase price) already deposited by the seller with the Central Bank of Nigeria, Lagos, the buyer undertakes to establish, within twenty-one (21) days from the date hereinbefore mentioned, an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price, through Fidelity International Bank of 99, William Street, New York, U.S.A. ..... Drafts drawn under the Letter of Credit shall be payable at sight, on presentation to the bank designated above of Invoices, Clean on Board Bills of Lading and Insurance Certificates.

(vi) SHIPMENT: Shipment to commence within 30 days after receipt of the Letter of Credit in New York by the seller. Delivery shall be at the rate of 20,000 metric tons per vessel, plus or minus 10% at seller's option. (F.P.A.)

(vii) INSURANCE: Insurance by the seller shall be from Bremen and/or Seville ..... to the Lagos/Apapa Quays. The buyer shall insure the goods against all risks during discharge at the Lagos/Apapa Quays, and therefrom to his warehouse.

(viii) UNLOADING: The buyer shall arrange the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from Customs and complying with all necessary formalities, and shall pay all clearance charges, .../3

Customs duties, and harbour and anchorage dues.

(ix) DEMURRAGE: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbourmaster, whether the vessel is berthed or not), demurrage not exceeding $ U.S. 4,000.00... per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the bank designated in sub-clause (v) above of time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's agents in Lagos.

2. The construction, validity and performance of this contract shall be governed by the Laws of .....Nigeria,..... ..... and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient.

.. ../4

Exhibit A annexed to Affidavit of Richard L. Trotman

IN WITNESS WHEREOF IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria has hereunto set his hand and seal, and ...R. L. TROTMAN..... for and on behalf of ..Texas Trading and Milling Corporation has set his hand and seal the day and year first above appearing.

SIGNED SEALED AND DELIVERED by the said IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria.

In the presence of ..C. G. LAMIN-SMITH.....

SIGNED SEALED AND DELIVERED

by ...R. L. TROTMAN.....

for and on behalf of .Texas Trading and Milling Corporation

in the presence of CLARKSON DE MAJONI.....

A 144

EXHIBIT B - LETTER OF CREDIT ANNEXED TO AFFIDAVIT OF RICHARD L. TROTMAN

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

FORM 11-4-94LD

4

Texas Trading and [illegible]
[illegible] Greenwich Street
New York, N. Y. [illegible]

D

May 6, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A-08856

Dear Sirs:

This refers to our advice of April 25, 1975 [illegible] International Bank, [illegible] William St., New York, N.Y. and our telephone conversation of today.

We are instructed to advise you of the establishment by Central Bank of Nigeria, Lagos, Nigeria of their Irrevocable Credit No. CLT/LO/75/05

for U.S.$14,400,000.00 ([illegible] MILLION FOUR HUNDRED THOUSAND U.S. DOLLARS)---------- plus or minus ten per cent,

available upon presentation to us of your drafts at sight on us, for 100% of the C.I.F. invoice value, accompanied by:

Commercial invoice in quadruplicate describing the merchandise as indicated below,

Insurance Certificate in duplicate covering All Risks as per Institute Cargo Clauses including War Risks and [illegible] for Invoice Value plus at least 10%. Insurance (F.P.A.) by the seller shall be from Bremen and/or Seville to the Lagos/Apapa Port.

Full set (2/2) clean on board bills of lading issued to order blank endorsed marked notify The Permanent Secretary, Ministry of Defence, Lagos, marked freight prepaid dated latest June 15, 1976.

Evidencing shipment CIF [illegible]: 240,000 METRIC TONS OF PORTLAND CEMENT PLUS OR MINUS 10% AT SELLER'S OPTION CONFORMING TO B.S.S.12/1958 OR 12/1971 AT $60.00 PER METRIC TON FROM ANY SPANISH MEDITERRANEAN PORTS TO LAGOS/APAPA PORT. PACKING IS IN 6-PLY KRAFT PAPER BAGS EACH CONTAINING 50 KGS. G/N. ALSO 6-PLY EMPTY SPARE BAGS TO BE SUPPLIED FREE OF COST, EQUAL TO 3% OF TOTAL NUMBER OF FILLED BAGS COMPRISING EACH CONSIGNMENT (and documents must so indicate SHIPMENT TO COMMENCE WITHIN 30 DAYS AFTER RECEIPT OF THE LETTER OF CREDIT BY THE SELLER (and the letter of credit is subject to our amendment). Delivery shall be at the rate of 20,000 metric tons per month plus or minus 10% at seller's option.

Our principals state: "Unloading of each consignment shall be the sole responsibility of the buyer and all charges and dues connected with it shall be for the buyers account".

Partial shipments and payments permitted. Transhipment prohibited.

This credit is issued in your favor and/or transferees. This credit is transferable to second beneficiaries including abroad. Should you desire to transfer same, such transfer will be subject to the return to us of this advice together with your written instruction on either of the enclosed forms. Our transfer charges shall be for the account of the Buyer.

This letter of credit is confirmed by the Central Bank of Nigeria, Lagos.

All documents to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos, Nigeria.

-CONTINUED ON PAGE 2-

COPY - NOT NEGOTIABLE

Exhibit B annexed to Affidavit of Richard L. Trotman

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

FORM 11-4-946D

May 8, 1975

[illegible]
[illegible] Street
New York, N. Y. 10004

On all communications please refer to
OUR REFERENCE NUMBER
A-[illegible]

-PAGE 2-

Our principals state: "[illegible]: Unloading of each consignment of cement which shall be the sole responsibility of the buyer shall be completed within ten days where such consignment is of 10,000 metric tons or [illegible] rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour Master whether the vessel is berthed or not), demurrage not exceeding U.S.$[illegible],000.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the letter of credit, on presentation at the Beneficiary's Banker of time-sheets and statements of facts duly certified as correct by the ship's master and by the ship's agent in Lagos."

Except as otherwise expressly stated herein, this advice is subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision) International Chamber of Commerce, Brochure No. 222.

Your drafts must indicate that they are drawn under the aforementioned Irrevocable Credit Number CBN/B/75/[illegible] of the Central Bank of Nigeria, Lagos, Nigeria and must be presented to our Commercial Credits Department, 15 Broad Street, New York, N.Y. 10015 with specified documents, not later than June 30, 1976 on which date this advice expires.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO [illegible] BY US.

Dated April 23, 1975

Yours very truly,

Authorized Signature

[illegible] clarification [illegible] insurance coverage [illegible] this [illegible] is subject to [illegible] the meantime [illegible]

COPY - NOT NEGOTIABLE

A 146

EXHIBIT C - CONTRACT WITH VAZMAN, S.A. ANNEXED TO AFFIDAVIT OF RICHARD L. TROTMAN

VAZMAN, S. A.
International Trading
500 Fifth Ave. Suite 837.
New York, N. Y. 10036. U. S. A.
Phones (212) 221-7076
Telex 620316 Cable: VAZMANCO

SPANISH COMPANY
318, Av. Pahlavi - Yusefabad
Teherán 14-IRAN

B 12043

vazman, s.a.
Comercio Exterior
Estébanez Calderón, 3
Apartado 36314
Madrid-20-SPAIN
Tel. 270 32 91
Telex 22352 y 23694 -naves e
Direc. Telegr. VAZMANMADRID

AGREEMENT

This Agreement is made on May 14, 1975 between Texas Trading and Milling Corporation of 11 Greenwich Street, New York, N.Y.10004, U.S.A., hereinafter called the "Buyer" of the one part, and Vazman, S.A. of Estébanez Calderón,3, Madrid-20,Spain, and its subsidiary Vazman,Inc. of New York, hereinafter called the "Seller" of the other part.

The Buyer agrees to buy from the Seller and the Seller agrees to sell to the Buyer cement of the terms and conditions hereinafter expressed:

Discription:	Grey Portland Cement conforming to BSS 12/1958 or BSS 12/1971.
Packing:	In six ply Kraft bags each containing 50 kilos gross for net. Also, 6 empty spares to be supplied free of charge equal to 3% of total number of filled bags comprising each shipment. (See Supplemental letter"A").
Price:	The price shall be US$53.10, per metric ton C&F Lagos/Apapa free out for a total sum of US$12,744.000.
Terms of Payment:	By an irrevocable, revolving, transferable, divisible and confirmed Letter of Credit in favor of Vazman,S.A. based on 20,000 metric tons,10% plus or minus, per month. Drafts drawn under the L/C shall be payable at sight upon presentation of Bill of Lading and Commercial Invoice (See Supplemental Letter"B").
Performance Bond:	A revolving Performance Bond in the sum of US$31,860 representing one twelfth of 3% of the total purchase price, shall be deposited with the Buyer.

IP EP

Shipment: Shipments to commence within two M. C.F weeks after receipt of the L/C by the Seller. Delivery shall be at the rate of 20,000 metric tons per month. (10% more or less) Partial shipments allowed.

Unloading: The Buyer shall arrange for the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The Buyer shall also be responsible for clearing the goods from customs and complying with all necessary formalities and shall pay all clearance charges, customs, duties and harbour and anchorage dues.

Demurrage: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the case of any greater or less quantity. At the lapse of such period, demurrage not exceeding US$3500.00 per diem shall be for the account of the Buyer, provided that the Seller shall give due notice to the Buyer of the arrival at Lagos/Apapa of each consignment. Said demurrage payments shall be paid to Seller(in addition to full purchase price) out of the Letter of Credit set forth in paragraph above upon presentation of the following documents:

- Statement of facts of discharge port,duly signed by master or their agents and ship agents.
- Lay time statement established by Seller or his agent.

Arbitration: The construction, validity, and performance of the contract shall be governed by the Laws of Nigeria, and all disputes which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with the rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient.

The destination of the cement is theMinistry of Defense of Nigeria in Lagos, Nigeria.

FOB CF M

vazman, s.a.

Exhibit C annexed to Affidavit of Richard L. Trotman

This represents a back to back contract of the one signed between Texas Trading and Milling Corporation and the Ministry of Defense of the Federal Republic of Nigeria.

TEXAS TRADING AND MILLING CORPORATION

BY

Richard L.Trotman, President

VAZMAN,S.A.

BY

Jesús de Azcarreta y Pérez,
Director

VAZMAN,Inc.

BY

Carlos Fabé, General Manager

vazman, s.a.

Exhibit C annexed to Affidavit of Richard L. Trotman

SUPPLEMENTAL LETTER "A"

On May 14, 1975 Vazman,S.A. of Madrid, Spain, and its subsidiary Vazman,Inc. of New York and Texas Trading and Milling Corp., New York City, USA, entered into an Agreement involving 240,000 metric tons of cement destined for Lagos, Nigeria. The purpose of this letter is to further set forth the understanding of the parties on one particular item in the aforementioned Agreement.

The Seller, Vazman,S.A., agrees in the Agreement to supply 3% extra empty spare bags of 6 ply quality. Buyer and Seller both understand that this is probably a mistake in the original drafting of a contract between Texas Trading and Milling Corp. and the Nigerian Government, and that 3 ply spare bags will be acceptable to the Nigerian Government.

Vazman,S.A. and Texas Trading understand and agree herewith that instead of 6 ply spare bags, Vazman,S.A. will supply 3 ply bags as needed.

If at any time during the life of the Agreement between Texas Trading and Vazman,S.A., Texas Trading is required by the Nigerian Government to supply the spare bags with 6 plys, then Vazman,S.A. will immediately change and comply with the 6 ply requirement.

Vazman,S.A.
Jesús de Azcarreta y Pérez,
Director

Vazman,Inc.
Carlos Fabé, General Manager

Texas Trading & Milling Corp.
Richard L.Trotman, President

vazman, s.a.

Exhibit C annexed to Affidavit of Richard L. Trotman

SUPPLEMENTAL LETTER "B"

On May 14, 1975 Vazman;S.A. of Madrid, Spain, and its subsidiary Vazman, Inc. of New York, and Texas Trading and Milling Corporation, N.Y.C., U.S.A. entered into an Agreement involving 240,000 metric tons of cement destined for Lagos, Nigeria. The purpose of this letter is to further set forth the understanding of the parties on one particular item in the aforementioned Agreement.

We now agree that payment will be made by the establishment through a prime US bank by the Buyer in favor of the Seller, of an irrevocable, revolving, transferable, divisible and confirmed Letter of Credit, based upon 20,000 metric tons (10% more or less). Drafts drawn under the L/C will be payable at sight upon presentation of

- -Bills of Lading (2/2)
- -Commercial Invoices
- -Certificate of country of origin (Spain)

This L/C should further state:

a) shipments to be made from any Spanish port;

b) partial shipments are allowed;

c) L/C is transferable to more than one beneficiary.

All the other conditions of the present contract remain unchanged.

Vazman,S.A.
Jesús de Azcarreta y Pérez,
Director

Texas Trading & Milling Corp.
Richard L.Trotman, President

Vazman,Inc.
Carlos Tabé, General Manager

vazman, s.a.

A 151

Exhibit C annexed to Affidavit of Richard L. Trotman

SUPPLEMENTAL LETTER "C"

If it is absolutely necessary for this contract to establish bills of lading in liner terms without reference to any charter party, the following clauses will become effective:

a) Although the bills of lading will be signed in liner terms it is always understood that the terms of the charter party covering the transportation of the cement on whichever vessel it might be, remain applicable and constitute a formal obligation for both parties signing this contract. In case of demurrages incurred at the port of destination (unloading), payment of said demurrages at the specified rate, will be automatically guaranteed by Texas Trading and will be paid upon presentation by Vazman,S.A. of the required documents.

b) In any case, Texas Trading will release Vazman,S.A. from any responsibility which might arise from the issuance of bills of lading in liner terms when charter party has been established with all its proper terms and conditions.

c) These clauses will cease to be effective on receipt of amendment to have the L/C accept charter party bills of lading requested by Texas Trading to the Ministry of Defense of the Government of Nigeria, to the L/C of Texas Trading.

Vazman,S.A.
Jesús de Azcarreta y Pérez,
Director

Texas Trading & Milling Corp.
Richard L.Trotman, President

Vazman,Inc.
Carlos Fabé, General Manager

May 14, 1975

vazman, s.a.

Exhibit C annexed to Affidavit of Richard L. Trotman

SUPPLEMENTAL LETTER "D"

It is understood that Texas Trading and Milling Corp. will amend the irrevocable revolving, transferable, and divisible Letter of Credit issued in favor of Vazman S.A. by Fidelity International Bank of New York, to read "Any Spanish port" as per agreed in our contract.

In the meantime, Vazman S.A. will make a minimum of two shipments and a maximum of three from a Spanish Mediterranean port. After these shipments Vazman S.A. is released by Texas Trading and Milling Corp. of its obligation to ship from a Spanish Mediterranean port and is free to ship from "any Spanish port".

Should Texas Trading and Milling Corp. fail to amend the above Letter of Credit after the first two shipments, this contract will become null and void, with no responsibility by Vazman S.A. and no loss of the performance bond issued in favor of Texas Trading and Milling Corp.

Vazman, S.A.
Jesus Azcarreta y Perez,
Director

Texas Trading & Milling Corp.
Richard L. Trotman,
President

Vazman, Inc.
Carlos Fabe
General Manager

vazman, s.a.

EXHIBIT D - CERTIFICATE OF NEGOTIATING COMMITTEE ANNEXED TO AFFIDAVIT OF RICHARD L. TROTMAN

CEMENT CONTRACTS NEGOTIATING COMMITTEE

We hereby certify that we have concluded negotiations with

TEXAS TRADING & MILLING CORPORATION represented

by MR. RICHARD L. TROTMAN and that we have agreed as follows:

1. That the balance of 200,410 metric tonnes of cement under contract with the Permanent Secretary Ministry of Defence be cancelled without any payment of compensation costs and indemnities however arising and that any letter of credit issued in furtherance of the contract be construed accordingly

2. That TEXAS TRADING & MILLING CORPORATION be invited to negotiate for the supply of cement in the event of a resumption of cement importation

3. That subject to the presentation of satisfactory documents all existing cargo and demurrage obligations be met on the basis of pro rata construction of all demurrage clauses.

4. That the vessels listed in the Schedule at present awaiting discharge of cargo be accepted in accordance with paragraph 3 of this agreement

5. That TEXAS TRADING & MILLING CORPORATION undertake to return to the Central Bank of Nigeria the original letter of credit within 14 days of the resumption of payments as stipulated in paragraph 3

SCHEDULE

Vessels	Tonnages	Notice of Readiness
COSMARIA	8,800	June 28, 1975
ALFONSO	2,350	July 26, 1975
JOWOOD	3,900	August 1st 1975
BANGLAN-POLYXENI	10,350	August 13, 1975
PICOVERDE	2,950	August 12, 1975
MARICNU	2,640	Sept. 4, 1975
PROSPERITAS	8,600	Sept. 10, 1975

Exhibit D annexed to Affidavit of Richard L. Trotman

DATED the 30th day of January, 1976

Fred Egbe

D. A. Chinyere

V. O. Kukoyi

Lt. Col. M. Kagoro

G. O. Kolaji

H. F. David-West

MEMORANDUM AND ORDER GRANTING MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

TEXAS TRADING & MILLING CORP.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

MEMORANDUM AND ORDER

78 Civ. 2395 (JMC)

----------X

Appearances:

Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, Esqs., New York City (Richard H. Webber, of counsel), for plaintiff.

Kissam, Halpin & Genovese, Esqs., New York City (James G. Simms and Laurence May, of counsel), for defendants.

CANNELLA, D.J.:

The defendants' motion to dismiss the complaint for lack of subject matter and personal jurisdiction is granted. Fed. R. Civ. P. 12(b)(1), (2).

FACTS

Plaintiff, a New York corporation with its principal place of business in New York City, has commenced this action under the Foreign Sovereign Immunities Act of

1976, 28 U.S.C. §§ 1330, 1391, 1441, 1601-1611, for anticipatory breach of a contract for the purchase of cement and of a documentary letter of credit established pursuant to that contract. On March 8, 1975, plaintiff entered into a contract with the Federal Republic of Nigeria ["Nigeria"], wherein Nigeria agreed to buy from plaintiff 240,000 metric tons, plus or minus 10% at seller's option, of Portland Cement for the price of $60 (U.S.) per ton, or a total of $14,400,000. Nigeria agreed to establish within 21 days after the contract was signed, "an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Fidelity International Bank of 99 William Street, New York, U.S.A." Defendants' Notice of Motion, Exhibit 2, at 2 (filed Dec. 20, 1979). Shipment was to be made at the rate of 20,000 metric tons per mensem commencing 30 days after receipt of the letter of credit. The contract provided for the payment of demurrage at the rate of $4,000 per diem per vessel, whenever the discharge of cargo was not completed at the rate of at least 1,000 tons per diem, provided the seller gave notice to the buyer of the departure from the port of loading of each consignment. Demurrage was to be payable, under the terms of the letter of credit, on presentation at the bank of time-sheets and

statements of facts duly certified as correct by the ship's master and the ship's agents in Lagos Apapa, the main port of Nigeria. The contract further provided that it would be governed by the laws of Nigeria, and that all disputes arising under it would be submitted to arbitration before the International Chamber of Commerce, Paris, France.

On April 23, 1975, the Central Bank of Nigeria ["Central Bank"], which is an "agency or instrumentality of a foreign state" within the meaning of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b), established and confirmed its Documentary Credit No. CBN/BO/75/86 in favor of plaintiff for the full contract price. The letter of credit is governed by the Uniform Customs and Practice for Documentary Credits (The International Chamber of Commerce Brochure No. 222) (1962 Revision). Contrary to the contract terms, the confirmed, irrevocable letter of credit was advised and made payable through Morgan Guaranty Bank in New York ["Morgan"]. Morgan did not, however, add its own confirmation to the letter of credit.

Plaintiff alleges that it thereafter entered into a contract with a Spanish supplier for the purchase

of 240,000 metric tons of Portland Cement, and delivered 39,590 metric tons to Nigeria. During the course of these deliveries, $4,484,476.87 in demurrage was incurred, of which $2,102,305.20 was paid by Nigeria.

Plaintiff's cement purchase contract was only one in a massive cement purchase program undertaken by Nigeria's Ministry of Defense.[1/] What the Ministry appears not to have anticipated, however, is that the huge quantities of cement ordered exceeded the unloading capacity of Nigeria's deep water ports, so that by August 1975, Nigerian ports were so congested with vessels carrying cement that other essential imports could not be unloaded. To deal with this problem, a new Nigerian government issued regulations that required every ship intending to enter a Nigerian port to notify the Nigerian Port Authority two months prior to its departure in order to obtain approval of its arrival date. No ship could thereafter enter a Nigerian port without prior approval. See Defendants' Notice of Motion, Exhibits 10, 11. Plaintiff contends that these actions by the defendants constitute an anticipatory breach of the contract.

In mid-September 1975, Central Bank informed

its correspondent banks, including Morgan, that it had unilaterally amended all irrevocable letters of credit issued in connection with the cement contracts. On September 30, 1975, Morgan cabled plaintiff to advise it that Morgan had been directed to stop demurrage payments against documents unless they had been sent to and certified for payment by Central Bank. Plaintiff was further advised that no payments would be made for those shipments that were not cleared and approved two months prior to their arrival, and plaintiff was invited to meet with Nigeria's Cement Contracts Negotiating Committee. See id., Exhibit 7. There is no doubt that this unilateral amendment of the irrevocable letter of credit violated the provisions of Article 3 of the Uniform Customs and Practice for Documentary Credits. See id., Exhibit 9.

Although not alluded to in plaintiff's complaint, in January 1976, plaintiff's president met with the Cement Contracts Negotiating Committee which was established by the Nigerian Government for the purpose of renegotiating the cement contracts. See id., Exhibit 10, ¶ 5. Plaintiff contends that under conditions that amounted to economic duress, it was forced to enter into a settlement agreement with the Negotiating Committee

which reduced the demurrage rate and cancelled the letter of credit and the balance of the cement contract. See Affidavit of Richard L. Trotman, ¶ 7 and Exhibit D (filed April 21, 1980). Plaintiff further contends that, even were the Court to conclude that the settlement agreement is valid, there are still substantial amounts of demurrage payments owed to plaintiff under the settlement. See Affidavit of Richard H. Webber, ¶ 4 (filed April 21, 1980).

As a result of the alleged breach of the contract and letter of credit, plaintiff seeks to recover damages for loss of profits on the sale of 200,410 metric tons of Portland Cement in the amount of $1,382,829 and unpaid demurrage in the amount of $2,382,171.67, as well as reasonable attorney's fees, costs and expenses. The defendants now move to dismiss the complaint on the grounds that this Court lacks subject matter and personal jurisdiction, Fed. R. Civ. P. 12(b)(1), (2), and that the complaint fails to state a claim upon which relief can be granted because of the alleged settlement agreement, Fed. R. Civ. P, 12(b)(6).

DISCUSSION

Plaintiff alleges that this Court has jurisdiction under the Foreign Sovereign Immunities Act of 1976 ["the Immunities Act"], 28 U.S.C. §§ 1330, 1391, 1441, 1601-1611. The Immunities Act provides the district courts with both subject matter and personal jurisdiction over nonjury civil actions against foreign states, in actions in which, pursuant to 28 U.S.C. §§ 1605-1607, foreign states are not immune. Id. § 1330. In this respect, the Immunities Act codifies the "restrictive" principle of sovereign immunity which affords immunity to a foreign state's public acts, but not to suits based upon its commercial or private acts. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7, reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6605 ["the House Report"]. The Act operates as a federal long-arm statute over foreign states and their instrumentalities, and embodies the due process requirements of minimum jurisdictional contacts and adequate notice. Id. at 13, reprinted in [1976] U.S. Code Cong. & Ad. News at 6612. The Act, however, "authorize[s] the exercise of less than the complete personal jurisdiction that might constitutionally be afforded American courts under traditional

concepts of fairness and due process." Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1059 (E.D.N.Y. 1979).

> Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

House Report at 13, reprinted in [1976] U.S. Code Cong. & Ad. News at 6612.

Although the allegations of plaintiff's complaint predicate jurisdiction upon the defendants' alleged conduct of commercial activity within the United States through their purported agent, Morgan, plaintiff appears to have abandoned that theory,[2/] and now relies on the portion of section 1605(a)(2) that provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--
>
> . . . ;

> (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).[3/]

The term "commercial activity" is defined by the Immunity Act as follows:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). See House Report at 16, reprinted in [1976] U.S. Code Cong. & Ad. News at 6614-15.

The defendants assert that jurisdiction does not exist under this section because the defendants' acts abroad did not have a "direct effect" in the United States as contemplated by the Immunities Act, and because the acts giving rise to plaintiff's claim, the embargo and unilateral amendment of the letter of credit, were acts of state[4/] rather than commercial in nature. The Court will address only the first of the defendants' objections since it finds that the "direct effect" requirement of section 1605(a)(2) has not been met in this case.

Even if the defendants' embargo, unilateral amendment of the letter of credit, and alleged breach of the settlement agreement, are commercial activities, the language of the statute still requires that such conduct occurring outside the United States have a "direct effect" in the United States. While the meaning of "direct effect" in this context is less than clear, it does indicate that an examination of the defendants' contacts with the United States in connection with the specific transaction at issue is required. See East Europe Domestic International Sales Corp. v. Terra, 467 F. Supp. 383, 388 (S.D.N.Y.), aff'd mem., 610 F.2d 806 (2d Cir. 1979).

The House Report affords some guidance by explaining that the Immunities Act would subject foreign states to the jurisdiction of United States courts when consistent with the principles of section 18, Restatement (Second) of Foreign Relations Laws of the United States (1965), which provides:

> Jurisdiction to Prescribe With Respect to Effect Within Territory.
>
> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Id.

The House Report suggests that further guidance is provided by the District of Columbia's long-arm statute.[5/] House Report at 13, reprinted in [1976] U.S. Code Cong. &

Ad. News at 6612; see Harris v. VAO Intourist, Moscow, supra, 481 F. Supp. at 1063. In Harris, Judge Weinstein described the problems that attend any comparison of the Immunities Act with more familiar jurisdictional statutes:

> Ascertaining the meaning of "direct effect" and the interpretation of section 1605(a)(2) are difficult because the jurisdictional statutes on which section 1605(a)(2) was patterned are, as a comparison of the Act and relevant statutes show, quite different in approach. Although they focus on the contacts of the non-resident, the Virginia, Maryland and District of Columbia statutes, in effect, make distinctions based on traditional classifications of causes of action such as "commercial"--e.g., contract--and "tort" --e.g., negligence, products liability and libel. See Note, The Virginia "Long Arm" Statute, 51 Virginia L.Rev. 719, 732 (1965).
>
> In contrast, the Foreign Sovereign Immunities Act is grounded in the history of the State Department's attempts to regularize our courts' treatment of foreign state agencies. The basic distinction is between "governmental" and "commercial" activity. See "Tate Letter" to Acting Attorney General Perlman, 26 Dept. State 984 (1954). The "immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 13, reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 6604, 6605. . . .
>
> . . . .
>
> Thus, because of the structure and history of the Immunities Act, it does not reflect the same classifications used by the District of Columbia and similar long-arm statutes. Included in the concept of "commercial activity," as used

> in the third cause [sic] of section 1605(a)(2), are actions which would be characterized as contractual or tortious arising from the "commercial" governmental activities of foreign state-owned entities. The third clause of section 1605(a)(2) encompasses tortious acts outside the United States related to commercial activity (as opposed to governmental activity), having direct effects in the United States.
>
> This interpretation and the legislative history already adverted to would suggest that section 13-423(a)(4) of the District of Columbia statute dealing with tortious acts or omissions outside the District causing tortious injury within the District provides the strongest analogy to the direct effect clause of section 1605(a)(2) in a factual situation such as the one before us.

Id. at 1063-64.

As difficult as analogies are in this context, the import of both section 18 and comparisons to the District of Columbia's long-arm statute is that the "direct effect" requirement of section 1605(a)(2) is fulfilled only where there are significant contacts between the transaction underlying the cause of action and the United States.

Thus, in Harris, Judge Weinstein concluded that defendants' alleged acts of negligence in causing the death of plaintiff's American decedent in a Moscow hotel fire did not cause a "direct effect" in the United States within the meaning of the third exception to section 1605(a)(2),

since the only contact with the forum was an "injurious consequence" of conduct occurring outside the United States. Id. at 1064-65; accord, Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), aff'd 607 F.2d 494 (D.C. Cir. 1979).

In the present case, all negotiations of the contract and subsequent settlement agreement between the parties were carried on outside the United States and the contract is governed by Nigerian law. Even if the Court assumes that the parties did not enter into a binding settlement agreement which superseded the original cement purchase contract and letter of credit, the only effect in the United States asserted by plaintiff is that the letter of credit was payable in New York to plaintiff, a New York corporation, through a New York correspondent bank of the Central Bank. A letter of credit payable in New York is an accommodation to plaintiff. Its existence does not present a materially different situation from that which exists when a contract calls for payment of the contract price to a New York plaintiff in New York.[6/] In that situation, as in this, the purported injury caused by the breach of contract takes place in the United States "only because the plaintiff is domiciled or doing

business here." This, however, "is an insufficient contact for due process purposes." East Europe Domestic International Sales Corp. v. Terra, supra, 467 F. Supp. at 390. While the defendants' alleged breach of the contract and letter of credit may have had foreseeable effects in the United States, "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 566 (1980). Furthermore, the House Report clearly indicates, albeit in the context of the "commercial activity carried on in the United States" exception, that Congress intended to bestow jurisdiction only in cases in which there is "a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." House Report at 17, reprinted in [1976] U.S. Code Cong. & Ad. News at 6616 (emphasis added).

To the extent that this result is inconsistent with the opinions in National American Corporation v. Federal Republic of Nigeria, 448 F. Supp. 622, 639 (S.D. N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979) and Verlinden B.V. v. Central Bank of Nigeria, No. 79 Civ. 1150 (EW), slip op. at 34 (filed April 21, 1980), the Court

notes that each case is distinguishable. In National Republic of Nigeria, jurisdiction was based upon a quasi-in-rem attachment of Nigeria's assets. In Verlinden, plaintiff was a Dutch corporation and the locus of injury was outside the United States, which dispelled any possibility of a finding of "direct effect" inside the United States. Therefore, these cases are inapposite here.[7/]

Furthermore, plaintiff's reliance upon Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979), is misplaced. In that case, a Bahamian subsidiary of the New York plaintiff had entered into a contract for the delivery of oil with a company owned by the Government of Libya. In an action by the parent company and an assignee of the subsidiary for non-delivery of the oil, the Second Circuit found no "direct effect" in the United States under section 1605(a)(2). Contrary to plaintiff's interpretation, Carey does not stand for the proposition that a breach of contract will have a "direct effect" in the United States in all cases where plaintiff is a party to the contract and is domiciled or doing business in the United States. The Second Circuit noted that section 1605(a)(2) embodies the due process standard set forth in International Shoe Co. v. Washington, 326 U.S. 310,

316 (1945), which states that a defendant over whom jurisdiction is sought must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantive justice.'" Carey v. National Oil Corp., supra, 592 F.2d at 676. As in Carey, there is no indication in the present case that the defendants purposefully availed themselves of the privilege of conducting business in the United States either by injecting products into United States markets, a possible jurisdictional contact noted in Carey, or otherwise. Carey v. National Oil Corp., supra, 592 F.2d at 677 n.8. See also Hanson v. Denkla, 357 U.S. 235, 253 (1958). Since the allegations of plaintiff's complaint do not fulfill the "minimum contacts" requirements of International Shoe and its progeny,[8/] they cannot reach the level of "direct effect" described in section 1605(a)(2). Carey v. National Oil Corp., supra, 592 F.2d at 677.

CONCLUSION

Accordingly, the defendants' motion to dismiss the complaint for lack of subject matter and personal

jurisdiction is granted. Fed. R. Civ. P. 12(b)(1), (2). The Clerk of the Court is directed to prepare and enter a Judgment dismissing the complaint.

SO ORDERED.

John M. Cannella
JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
July 16, 1980.

Texas Trading vs. Federal
Republic of Nigeria, et ano.
78 Civ. 2395 (JMC)

FOOTNOTES

1/ Nigeria entered into approximately sixty-eight contracts with international suppoliers for an aggregate of over twenty million metric tons of Portland Cement. See National American Corp. v. Federal Republic Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979).

2/ In Verlinden B.V. v. Central Bank of Nigeria, No. 79 Civ. 1150 (EW), slip op. at 26-30 (filed April 21, 1980), Judge Weinfeld concluded that the establishment of a letter of credit which was advised through Morgan, a New York bank, did not constitute commercial conduct carried on in the United States by the defendants since it did not involve "substantial contact" with the United States as required by 28 U.S.C. § 1603(e).

3/ Section 1605(a)(2) defines two other "commercial activity" situations in which a foreign state is not entitled to immunity. These are when:

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere . . . .

28 U.S.C. § 1605(a)(2).

In its Memorandum of Law at 13-14 (filed April 21, 1980), plaintiff asserts, however, that Nigeria implicitly waived its sovereign immunity by contractually agreeing to arbitrate disputes arising under the contract in France. While there is some support for plaintiff's argument at

least with respect to Nigeria, if not the Central Bank, see House Report at 7, reprinted in [1976] U.S. Code Cong. & Ad. News at 6617; Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978), the Court declines to adopt such reasoning. An agreement that the contract will be governed by the law of another country or submitted to arbitration in another country doesnot reflect an intention to waive governmental immunity to actions brought against the foreign state in the courts of the United States.

> Plaintiff's view, if adopted, would presage a vast increase in the jurisdiction of federal courts in matters involving sensitive foreign relations: whenever a foreign sovereign had contracted with a private party anywhere in the world, and chose to be governed by the laws or answer in the forum of any country other than its own, it would expose itself to personal liability in the courts of the United States. [The parties to the contract] could scarcely have foreseen this untoward result when they signed the contract; and it is unlikely that Congress could have intended it.

Verlinden B.V. v. Central Bank of Nigeria, supra, No. 79 Civ. 1130 (EW), slip op. at 43.

4/ See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977).

5/ The long-arm provision of the District of Columbia provides in pertinent part:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief from the person's--

(1) transacting any business in the District of Columbia;

(2) contracting to supply services in the District of Columbia;

(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

(5) having an interest in, using, or possessing real property in the District of Columbia; or

(6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing.

13 D.C. Code § 13-423 (1973).

6/ The letter of credit in this case is an engagement or guarantee undertaken by the Central Bank in Nigeria. The Central Bank guaranteed that amounts due under the cement contract would be paid to plaintiff upon presentation of the appropriate documents at the advising bank, Morgan. Morgan, however, acted only as a correspondent bank, and did not confirm or guarantee the irrevocable letter of credit issued by the Central Bank so that Morgan's contacts with New York have no jurisdictional significance.

In effect, plaintiff alleges a breach of two separate agreements: (1) Nigeria's breach of the cement contract which was occasioned by the embargo and subsequent non-payment of moneys due thereunder, and (2) the Central

Bank's breach of the terms of the letter of credit by amending the terms of the irrevocable letter of credit unilaterally. The only contact of either transaction with the United States relates to payments to be made to plaintiff in New York because of the purely fortuitous circumstance that it is a New York corporation.

7/ Furthermore, the Court declines to follow former Magistrate Sol Schreiber's recommendation in East Europe Import-Export, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria, 77 Civ. 2809 (LWP) (filed Sept. 19, 1978) and two consolidated Nigerian cement cases which are currently pending before Judge Pierce. See Defendants' Notice of Motion, Exhibit 12. In those cases, where the plaintiffs are New York corporations, Judge Pierce confirmed the Magistrate's finding that the alleged breach of a letter of credit payable in New York through a New York correspondent bank of the Central Bank caused a "direct effect" in the United States within the meaning of section 1605(a)(2). The defendants, however, have renewed their sovereign immunity arguments in their post-trial memoranda, and those actions are currently sub judice. Since there has been no final judgment in the consolidated actions before Judge Pierce, plaintiff's contention that the Magistrate's finding should collaterally estop the defendants from relitigating the issues decided therein is without merit.

8/ See Rush v. Savchuk, 100 S. Ct. 571 (1980); World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977); McGee v. International Life Insurance Co., 355 U.S. 22 (1957).

A 177

JUDGMENT DISMISSING COMPLAINT

Cannella J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

TEXAS TRADING & MILLING CORP.

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

- -X

78 CIVIL 2395 (TPC)

JUDGMENT

U.S. DISTRICT COURT FILED JUL 23 1980 S. D. OF N. Y.

Defendants having moved the Court pursuant to Rule 12,(b)(1)(2) of the Federal Rules of Civil Procedure, and the said motion having come before the Honorable John M. Cannella, U.S.D.J., and the Court thereafter on July 21, 1980, having handed down its memorandum and order granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
July 23, 1980

Raymond Burghardt

CLERK

A 178

LETTER FROM KISSAM, HALPIN & GENOVESE

212 962-2000
CABLE "LEKISSAM"
TELEX 424038 LEK UI

KISSAM, HALPIN & GENOVESE
180 BROADWAY
NEW YORK, N[illegible]0005

RECEIVED
JUL 2[illegible] 1980
CHAMBERS OF
[illegible]

BY HAND

July 22, 1980

DISTRICT COURT
JUL 15 1980

Hon. John M. Cannella
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Texas Trading & Milling Corp.
v. Federal Republic of Nigeria
and Central Bank of Nigeria,
Index No. 78 Civ. 2395 (JMC)

Dear Judge Cannella:

We are the attorneys for defendants Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank) in the above-captioned action and respectfully submit the following comments and requests with respect to the statement of facts in your Honor's Memorandum and Order dated July 16, 1980:

1. Description of the Cement Contract

At page 2 of the Memorandum and Order, your Honor describes the provisions of the cement contract between plaintiff Texas Trading & Milling Corp. (Texas) and the Federal Ministry of Defence of Nigeria. A copy of this contract is Exhibit 2 to Defendants' Notice of Motion.

In describing the demurrage provisions in the contract, your Honor states that: "The contract provided for the payment of demurrage at the rate of $4,000 per diem per vessel . . ."

The cement contract, however, at page 3, paragraph 1(ix), provides with respect to the demurrage rate that: "demurrage not exceeding $ U.S. 4,000.00 per diem shall be for the account of [Nigeria] . . ." (Emphasis added).

Nigeria and Central Bank respectfully submit that the language in the cement contract concerning demurrage is clear and unambiguous and that demurrage was not payable at

a flat per diem rate of $4,000, but was payable at a rate not to exceed a maximum of $4,000 per diem. Nigeria and Central Bank have taken this position consistently with respect to the same language in other cement contracts which are at issue in separate litigation pending in this Court brought by other cement suppliers against Nigeria and Central Bank.

Nigeria and Central Bank respectfully request that your Honor amend the subject sentence at page 2 of the Memorandum and Order to conform to the provisions of the Texas cement contract and to read as follows: "The contract provided for the payment of demurrage at a rate not to exceed $4,000 per diem per vessel . . . "

2. The Texas Letter of Credit

The letter of credit established by Central Bank in favor of Texas pursuant to the Texas cement contract is Exhibit 3 to Defendants' Notice of Motion. Your Honor describes the letter of credit at page 3 of the Memorandum and Order, and states, in part: "Contrary to the contract terms, the confirmed, irrevocable letter of credit was advised and made payable through Morgan Guaranty Bank in New York ["Morgan"]."

Nigeria and Central Bank respectfully submit that this statement is not correct. The letter of credit was advised both through Morgan and through Texas' own bank - Fidelity International Bank in New York; however, the letter of credit was payable only at Morgan.

The Texas cement contract, Exhibit 2 to Defendants' Notice of Motion, at page 2, paragraph 1(v) provides that Central Bank was to establish the letter of credit "through Fidelity International Bank, of 99 William Street, New York, U.S.A." (Fidelity). Your Honor notes this provision at page 2 of the Memorandum and Order. Fidelity was designated by Texas as its advising bank on the letter of credit. However, Central Bank's only correspondent bank in New York was Morgan; Central Bank did not maintain an account at Fidelity. Therefore, Central Bank designated Morgan as an "advising and paying bank" on the letter of credit, as those terms are defined by the Uniform Customs and Practice for Documentary Credits, 1962 Revision, International Chamber of Commerce Brochure No. 222 (UCP, 1962 Revision). In addition, Central Bank instructed Morgan to advise the Texas letter of credit through Fidelity; see, the Texas letter of credit (Exhibit 3 to Defendants' Notice of Motion) at page 2: under the heading "Additional Instructions", Central Bank states: "Credit to be

advised through Fidelity International Bank of 99 William St., N.Y., U.S.A." Morgan complied with this instruction.

All written advices with respect to the letter of credit were transmitted by Morgan to Fidelity. Exhibit 4 to Defendants' Notice of Motion is the letter advice from Morgan to Texas dated May 8, 1975 of the establishment of the letter of credit. The letter begins with the statement: "This refers to our advices of April 25, 1975 and May 5, 1975 thru Fidelity International Bank, 99 William St., New York, N.Y. and our telephone conversation of today."

Pursuant to UCP, 1962 Revision, Texas could present documents for payment at either advising bank, Fidelity or Morgan; and any documents presented to Fidelity would be transmitted by it to Morgan for payment.

By virtue of the above, Nigeria and Central Bank respectfully request that the last two sentences of the full paragraph at page 3 of your Honor's Memorandum and Order be amended to read as follows:

> "The irrevocable letter of credit was advised and made payable through Morgan Guaranty Trust Company of New York ["Morgan"]; Morgan did not, however, add its own confirmation to the letter of credit. In compliance with plaintiff's request, the letter of credit was also advised through Fidelity International Bank in New York."

For the convenience of the Court we attach hereto copies of pages 2 and 3 of your Honor's Memorandum and Order noting the amendments requested by Nigeria and Central Bank.

Respectfully submitted,

KISSAM, HALPIN & GENOVESE

By James G. Simms
James G. Simms

JGS/sl
#2876
Enc.

cc: R. M. Webber, Esq.
Hill, Rivkins, Carey, Loesberg,
O'Brien & Mulroy
Attorneys for Plaintiff

LETTER FROM HILL, RIVKINS, CAREY, LOESBERG, O'BRIEN & MULROY

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FRANCIS J. O'BRIEN
MARTIN D. MULROY
VINCENT J. RYAN
RAYMOND P. HAYDEN
RICHARD M. WEBBER
ROBERT J. RYNIKER
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BRUCE J. HECTOR
GEORGE W. CLARKE
JOHN ERIC OLSON
THOMAS E. WILLOUGHBY
TIMOTHY D. FORD
MICHAEL J. MAWEENEY
D. CHRISTOPHER HECKMAN
ANN P. WYLLIE
PAUL A. HENDRICK
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LAW OFFICES
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NEW JERSEY OFFICE
60 PARK PLACE
NEWARK, N. J. OFFICE

August 1, 1980

U.S. DISTRICT COURT
FILED
AUG 15 1980
S. D. OF N. Y.

Hon. John M. Cannella
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

RECEIVED
AUG 1 1980
CHAMBERS OF
HON. JOHN M. CANNELLA

Re: Texas Trading & Milling Corp.
v. Federal Republic of Nigeria
and Central Bank of Nigeria,
Index No. 78 Civ. 2395 (JMC)

Sir:

We are in receipt of a letter dated July 22, 1980, addressed to your Honor by the defendants' attorneys. In reply thereto we join in defendants' application for a review and amendment of your Honor's Memorandum and Order dated July 16, 1980.

The defendants have requested two amendments both of which are unsupported by the record. The Court's attention is directed to Exhibit 2 to defendants' Notice of Motion, i.e. the contract entered into between the plaintiff and defendant Federal Republic of Nigeria (Nigeria). This contract speaks for itself and supports only such an amendment as contains the exact words of the contract itself. Thus, to the extent that the Memorandum and Order may misquote the agreement, the Memorandum and Order should be amended to read (Page 2): "Paragraph 1.) (IX) of the contract between the plaintiff, Texas, and the defendant, Federal Republic of Nigeria, states in applicable part: '... demurrage not exceeding $ U.S. 4,000.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each such consignment.'"

The defendants second requested amendment should similarly be rejected because unsupported by the record, ie. Exhibits 2, 3, and 4 defendants' Notice of Motion. As suggested above, only the exact words of the contract [Exhibit 2], documentary letter of credit [Exhibit 3] and Morgan Guaranty's advice to the plaintiff,

Texas, [Exhibit 4] can constitute any such amendment. Thus, the defendants' requested addition of the words "In compliance with plaintiff's request..." warrant rejection because unsupported by the record.

It is on the basis of such a search of the record that the plaintiff respectfully recommends to your Honor that the conclusion (page 13) "A letter of credit payable in New York is an accommodation to plaintiff", also has no support in the present record. Rather, the record clearly demonstrates that the details relating to the letter of credit were specific contract terms none of which support the conclusion of your Honor. For this reason, it is requested that the Memorandum and Order be amended by omitting the aforementioned sentence entirely.

A
Recommendations by Plaintiff

Your Honor's Memorandum and Order makes reference to some of the numerous cases still pending in this Court wherein the present defendants, through the same attorneys, are litigating the very same issues which were the subject of the present motion. This opportunity to "test the waters" again was given to the present defendants as a result of the fortuitous assignment of this case to your Honor.

Because the plaintiff believes that your Honor's conclusion in his Memorandum and Order conflicts with prior decisions, cursory review of these cases is appropriate. The plaintiff believes that the following cases, whether by specific ruling, dictum, or inference supports the proposition that the breach of the cement contract and repudiation of the letter of credit in the present case had a "direct effect" in the United States:

1) East Europe Import-Export Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria 77 Civ. 2809 (LWP)

   Chenex Majesty, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria 77 Civ. 3045 (LWP)

   Decor by Nikkei International, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria 77 Civ. 2348 (LWP)

These are consolidated actions.

Magistrate Sol Schreiber recommended and Judge Pierce later confirmed that this Court had in personam jurisdiction over the defendant by reason of their breach of the cement contract and repudiation of the letter of credit. The defendants subsequently reasserted the jurisdictional defenses in their answer but Judge Pierce struck them down by order dated June 18, 1979. Since the sole issue before Judge Pierce was in personam jurisdiction and not subject matter jurisdiction[1], it is respectfully submitted that, contrary to your Honor's Memorandum and Order, [Page 21, fn 7] Judge Pierce's confirmation and order are, in that action, law of the case and not sub judice.

2) Reale International Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria 78 Civ. 0023 (CSH)

Judge Haight held that Judge Pierce's confirmation and order in East Europe et al. (supra) was law of the case in Reale because the parties in Reale had agreed to be bound by Judge Pierce's decision. Although known, of course, to the present defendants' attorneys, the binding effect of Judge Pierce's opinion in this companion suit did not come to the plaintiff's attention until after your Honor's Memorandum and Order. Judge Haight's order is attached hereto as Exhibit I.

3) National American Corp. v. Federal Republic of Nigeria 448 F. Supp. 622 aff'd 597 F2d 314 (2nd Cir. 1979)

Judge Goettel, in dictum, held (at page 639): "The breach of the letter of credit having a New York beneficiary, advised by and payable through New York banks, would appear to satisfy the last criteria of 28 U.S.C. 1605(a)(2) that jurisdiction exists over claims arising from an act committed outside the United States committed in the cause of commercial activity having a 'direct effect in the United States.'"

4) Verlinden v. Central Bank of Nigeria 79 Civ. 1150 (EW), slip. op.

Judge Weinfeld here cited Judge Goettel's dictum (supra) (at page 34) in the context of distinguishing Verlinden from National American Corp. It is suggested, however, that a reasonable inference can be drawn that Judge Weinfeld had adopted Judge Goettel's

[1]It is submitted that under the authority of Verlinden v. Central Bank of Nigeria, 79 Civ. 1150 (at page 17) this Court has subject matter jurisdiction.

dictum in Verlinden because, as in the present case [Texas Trading], "... the plaintiff, the named beneficiary in the letter of credit, was a New York Corporation. New York was the final destination for payment under that credit, the locus of the injury occasioned by the alleged breach of credit, and the home state of the beneficiary. Thus, the act of the anticipatory repudiation had a direct effect in New York" [at page 34 (emphasis added)].

5) Carey v. National Oil Corp., 592 F2d 673 (2d Cir. 1979)

Carey was relied upon by Judge Weinfeld in Verlinden (supra) when he commented upon Judge Goettel's ruling in National American Corp., (supra):

> "Although Judge Goettel's holding in that case actually was based upon pre-Immunities Act law, his dictum is consistent with those subsequent cases, already discussed, in which courts have held that the locus of the injury is crucial in determining whether jurisdiction exists under the third 'commercial activity' exception of the Act.(75)"
>
> "(75) See note 68, supra." (page 34)
>
> [Note 68, cites, inter alia Carey v. National Oil Corp. 592 F2d 673, 676 (2d Cir. 1979]

It is respectfully urged that plaintiff's original contention (p. 6 Memorandum of Law in Opposition) that, "[T]hus, it would seem clear that had the plaintiff in Carey v. National Oil Corp., supra, been an American company, the Court of Appeals would have found that the defendants' acts had the requisite direct effect." is supported by Judge Goettel [National American (supra)] and Judge Weinfeld.[Verlinden (supra)]

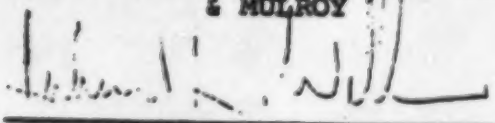
Further, Judge Weinfeld in Verlinden makes it clear that the Court of Appeals in Carey (supra)[at page 676] is discussing "... the third 'commercial activity' exception of the Act." [emphasis added] The paragraph in Carey (p. 676) [relied upon by your Honor (pages 15-16 Memorandum and Order)] which immediately follows the paragraph relied upon by the present plaintiff and Judge Weinfeld and which starts "at no time did NOC or Libya 'purposely avail itself of the privilege' of conducting business in the United States", refers to the first "commercial activity" exception of the Act and, therefore, is unrelated to the issue of "direct effect" before your Honor in the present motion.

Letter from Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy

For these reasons and upon the basis of the cases cited, it is respectfully requested that your Honor amend his Memorandum and Order to conform to these prior decisions by finding that the present defendants' breach of the cement contract and repudiation of the letter of credit had a "direct effect" in the United States, thus giving this Court subject matter jurisdiction and in personam jurisdiction over the defendants. In the alternative, it is requested that your Honor schedule an evidentiary hearing [see Bernstein v. Universal Pictures, 517 F2d 976, 979-80 (2d Cir. 1975)] so that the plaintiff may demonstrate further that the activities of the defendants in the instant action bring them within the third "commercial activity" exception of the Act.

Respectfully,

HILL RIVKINS CAREY LOESBERG O'BRIEN & MULROY

By: 

Richard H. Webber

/11

cc - Kissam, Halpin & Genovese
120 Broadway
New York, New York 10005

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

TEXAS TRADING & MILLING CORP.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------X

78 Civ. 2395 (JMC)

NOTICE OF APPEAL

Notice is hereby given that TEXAS TRADING & MILLING, plaintiff in the above-captioned matter, hereby appeals to the United States Court of Appeals for the Second Circuit from the Memorandum and Order filed in this action on the 16th day of July, 1980, with respect to: granting the defendants', FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Motion to dismiss the plaintiff's complaint for lack of subject matter and personal jurisdiction.

DATED: New York, New York
August 14, 1980

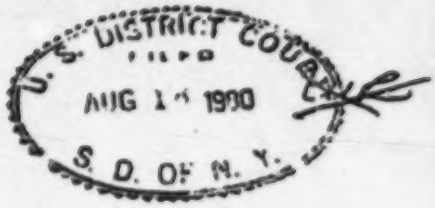
HILL RIVKINS CAREY LOESBERG
O'BRIEN & MULROY
Attorneys for Plaintiff
TEXAS TRADING & MILLING CORP.

By: _____
Richard H. Webber

72 Wall Street
New York, NY 10005

TO: KISSAM, HALPIN & GENOVESE
Attorneys for Defendants
FEDERAL REPUBLIC OF NIGERIA
and CENTRAL BANK OF NIGERIA
120 Broadway
New York, NY 10005

MEMORANDUM AND ORDER AMENDING STATEMENT OF FACTS



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

TEXAS TRADING & MILLING CORP.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------X

MEMORANDUM AND ORDER

78 Civ. 2395 (JMC)

CANNELLA, D.J.:

Defendants' motion to amend the statement of facts contained in the Court's Memorandum and Order of July 16, 1980, is granted.

On July 16, 1980, the Court granted the defendants' motion to dismiss the complaint for lack of subject matter and personal jurisdiction. Fed. R. Civ. P. 12(b)(1), (2). In a letter dated July 22, 1980, the defendants requested amendment of two factual statements contained in that Memorandum and Order. The plaintiff responded in a letter dated August 1, 1980. The amendment of these factual statements is the sole issue properly before the Court, and consequently will be the sole issue addressed in this Memorandum and Order.

After a review of the pertinent documents, the Court amends its July 16, 1980 Memorandum and Order as follows:

Page 2, line 18, which states

> The contract provided for the payment of demurrage at a rate of $4,000 per diem per vessel, whenever the discharge of cargo was not completed at the rate of at least 1,000 tons per diem, provided the seller gave notice to the buyer of the departure from the port of loading of each consignment.

is amended to read:

> The contract provided for the payment of demurrage not exceeding $4,000 per diem per per vessel, whenever the discharge of cargo was not completed at the rate of at least 1,000 tons per diem, provided the seller gave notice to the buyer of the departure from the port of loading of each consignment.

Page 3, line 17, which states

> Contrary to the contract terms, the confirmed, irrevocable letter of credit was advised and made payable through Morgan Guaranty Bank in New York ["Morgan"].

is amended to read:

> The confirmed, irrevocable letter of credit was advised and made payable through Morgan

Guaranty Trust Company ["Morgan"] in New York, with instructions that the credit be advised through Fidelity International Bank in New York.

SO ORDERED.

Dated: New York, N.Y.
August 18, 1980.

John M. Cannella
JOHN M. CANNELLA
United States District Judge

Joint Appendix

4

Office - Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. ... VAS.
CLERK

No. 81-920

In The

Supreme Court of the United States

October Term, 1981

VERLINDEN B.V.,

Petitioner,

— v. —

CENTRAL BANK OF NIGERIA,

Respondent.

JOINT APPENDICES
Vol. IV

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Petition for Certiorari Filed November 13, 1981.
Certiorari Granted January 11, 1982.

Motion to Dispense with Printing of New Appendix, and Permitting This Case to be Heard on the Appendices Used in the Court Below, Granted February 22, 1982.

INDEX TO APPENDIX

	Page
DOCKET ENTRIES	1a
COMPLAINT	5a
ANSWER	22a
STIPULATION AND ORDER PROVIDING THAT DETERMINATION BY JUDGE PIERCE OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS SHALL BE DEEMED IN ALL RESPECTS APPLICABLE TO THIS ACTION	32a
AFFIDAVIT OF BERTHOLD H. HOENIGER, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION FOR ORDER STRIKING DEFENDANTS' AFFIRMATIVE DEFENSES RELATING TO JURISDICTION	35a
EXHIBIT A TO HOENIGER AFFIDAVIT - STIPULATION AND ORDER RE APPLICABILITY HEREIN OF JUDGE PIERCE'S DETERMINATION ON DEFENDANTS' MOTION TO DISMISS IN EAST EUROPE, NIKKEI AND CHENAX (REPRODUCED HEREIN AT PAGES 32a-34a).	-
EXHIBIT B TO HOENIGER AFFIDAVIT - MAGISTRATE'S RECOMMENDATION BY MAGISTRATE SCHREIBER DATED SEPTEMBER 19, 1978 (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 129a-145a).	-
EXHIBIT C TO HOENIGER AFFIDAVIT - SEPTEMBER 25, 1978 LETTER OF MAGISTRATE SCHREIBER TO ATTORNEYS IN EAST EUROPE, NIKKEI AND CHENAX ACTIONS	38a
EXHIBIT D TO HOENIGER AFFIDAVIT - ORDER OF JUDGE PIERCE ADOPTING MAGISTRATE SCHREIBER'S RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS IN EAST EUROPE, NIKKEI AND CHENAX ACTIONS	40a
EXHIBIT E TO HOENIGER AFFIDAVIT - ANSWER (REPRODUCED HEREIN AT PAGES 22a-31a).	-
MEMORANDUM OPINION AND ORDER OF JUDGE HAIGHT STRIKING DEFENDANTS' AFFIRMATIVE DEFENSES RELATING TO JURISDICTION	42a

Page

DEFENDANTS' LETTER TO JUDGE HAIGHT DATED JUNE 24, 1980 43a

EXHIBIT 1 TO DEFENDANTS' LETTER - DECISION IN HARRIS VS. VAO INTOURIST, MOSCOW, AS REPORTED AT 481 F.SUPP. 1056 (EDNY 1979) -

EXHIBIT 2 TO DEFENDANTS' LETTER-OPINION OF JUDGE WEINFELD IN VERLINDEN, DISMISSING COMPLAINT FOR LACK OF PERSONAL JURISDICTION OF DEFENDANTS (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 339a-383a) -

EXHIBIT 3 TO DEFENDANTS' LETTER - COMPLAINT (REPRODUCED HEREIN AT PAGES 5a-21a) -

EXHIBIT 4 TO DEFENDANTS' LETTER - STIPULATION AND ORDER DATED MAY 18, 1978 (REPRODUCED HEREIN AT PAGES 32a-34a) -

EXHIBIT 5 TO DEFENDANTS' LETTER - MAGISTRATE SCHREIBER'S RECOMMENDATION ON JURISDICTION IN EAST EUROPE, NIKKEI AND CHENAX ACTIONS (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 129a-145a) -

EXHIBIT 6 TO DEFENDANTS' LETTER - MEMORANDUM OPINION AND ORDER OF JUDGE HAIGHT STRIKING DEFENDANTS' AFFIRMATIVE DEFENSES RELATING TO JURISDICTION (REPRODUCED HEREIN AT PAGES 42a-42a-1) -

EXHIBIT 7 TO DEFENDANTS' LETTER - PLAINTIFF'S CEMENT AGREEMENT WITH MINISTRY OF DEFENSE OF NIGERIA DATED MARCH 8, 1975 57a

EXHIBIT 8 TO DEFENDANTS' LETTER - CENTRAL BANK OF NIGERIA'S DOCUMENTARY CREDIT ESTABLISHED IN FAVOR OF PLAINTIFF 63a

PLAINTIFF'S LETTER TO JUDGE HAIGHT DATED JULY 15, 1980. 67a

EXHIBIT A TO PLAINTIFF'S LETTER - MEMORANDUM OPINION AND ORDER OF JUDGE HAIGHT STRIKING DEFENDANTS' AFFIRMATIVE DEFENSES RELATING TO JURISDICTION (REPRODUCED HEREIN AT PAGES 42a-42a-1)

	Page
EXHIBIT B TO PLAINTIFF'S LETTER - PLAINTIFF'S CEMENT AGREEMENT WITH MINISTRY OF DEFENSE OF NIGERIA DATED MARCH 8, 1975 (REPRODUCED HEREIN AT PAGES 57a-62a)	-
EXHIBIT C TO PLAINTIFF'S LETTER - EXTRACTS FROM INTERNATIONAL CHAMBER OF COMMERCE BROCHURE SETTING FORTH RULES FOR THE ICC COURT OF ARBITRATION	85a
EXHIBIT D TO PLAINTIFF'S LETTER - EXTRACTS FROM INTERNATIONAL CHAMBER OF COMMERCE PAMPHLET ENTITLED ICC ARBITRATION - THE INTERNATIONAL SOLUTION TO INTERNATIONAL BUSINESS DISPUTES	89a
EXHIBIT E TO PLAINTIFF'S LETTER - PROVISIONS OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 70a-80a)	-
EXHIBIT F TO PLAINTIFF'S LETTER - LEGISLATIVE HISTORY TO FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 81a-112a)	-
EXHIBIT G TO PLAINTIFF'S LETTER - APRIL 15, 1975 LETTER FROM MORGAN GUARANTY TRUST COMPANY OF NEW YORK TO CENTRAL BANK OF NIGERIA	92a
EXHIBIT H TO PLAINTIFF'S LETTER - APRIL 29, 1975 LETTER FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY TRUST COMPANY	94a
EXHIBIT I TO PLAINTIFF'S LETTER - TESTIMONY OF G.W. RYAN, OFFICER OF FEDERAL RESERVE BANK OF NEW YORK GIVEN AT TRIAL OF NATIONAL AMERICAN ACTION; AT PAGES 308-332 OF TRIAL MINUTES THEREIN	95a
EXHIBIT J TO PLAINTIFF'S LETTER - TESTIMONY OF P.W. FITZPATRICK, OFFICER OF MORGAN GUARANTY TRUST COMPANY AT TRIAL OF NATIONAL AMERICAN ACTION; AT PAGES 209-231 OF TRIAL MINUTES THEREIN	119a
EXHIBIT K TO PLAINTIFF'S LETTER - MAY 8, 1975 LETTER FROM MORGAN GUARANTY TRUST COMPANY TO PLAINTIFF ADVISING OF ESTABLISHMENT OF LETTER OF CREDIT BY CENTRAL BANK OF NIGERIA	142a
EXHIBIT L TO PLAINTIFF'S LETTER - PAGES 9-16 AND 536-541 OF TRIAL MINUTES IN EAST EUROPE/NIKKEI/CHENAX ACTIONS AND DEFENDANTS' SECOND TRIAL MEMORANDUM SUBMITTED THEREIN	144a

	Page
EXHIBIT M TO PLAINTIFF'S LETTER - CERTIFICATE # 820980 ISSUED BY FIREMEN'S FUND INSURANCE COMPANY	165a
EXHIBIT N TO PLAINTIFF'S LETTER - DOCUMENTS FROM FILES OF MORGAN GUARANTY TRUST COMPANY	166a
EXHIBIT O TO PLAINTIFF'S LETTER - OPINION OF THE NEW YORK COURT OF APPEALS IN EHRLICH-BOBER & CO., INC. V. THE UNIVERSITY OF HOUSTON, AS REPORTED IN NEW YORK LAW JOURNAL, APRIL 23, 1980; NOW OFFICIALLY REPORTED AT 49 N.Y.2d 574, 427 N.Y.S.2d 604, 404 N.E. 2d 726 (1980)	-
EXHIBIT P TO PLAINTIFF'S LETTER - OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY IN MIRABELLA V. BANCO INDUSTRIAL DE LA REPUBLIC OF ARGENTINA, AS REPORTED IN NEW YORK LAW JOURNAL, APRIL 13, 1979	187a
EXHIBIT Q TO PLAINTIFF'S LETTER - OPINION OF THE COURT OF APPEAL OF ENGLAND IN TRENDTEX TRADING CORP. V. CENTRAL BANK OF NIGERIA (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 196a-229a)	-
EXHIBIT R TO PLAINTIFF'S LETTER - ENGLISH TRANSLATION OF FRANKFURT GERMANY DISTRICT COURT JUDGMENT IN NADA V. CENTRAL BANK OF NIGERIA (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 230a-255a)	-
EXHIBIT S TO PLAINTIFF'S LETTER - ARBITRATOR'S AWARD IN IPITRADE INTERNATIONAL V. FEDERAL REPUBLIC OF NIGERIA (REPRODUCED IN VERLINDEN APPENDIX AT PAGES 256a-273a)	-
DEFENDANTS' LETTER TO JUDGE HAIGHT DATED JULY 25, 1980	189a
EXHIBIT 1 TO DEFENDANTS' LETTER - MEMORANDUM AND ORDER OF JUDGE CANNELLA IN TEXAS TRADING ACTION (REPRODUCED IN TEXAS TRADING APPENDIX AT PAGES 57-78)	-
EXHIBIT 2 TO DEFENDANTS' LETTER - EXTRACT FROM INTERNATIONAL CHAMBER OF COMMERCE PAMPHLET ENTITLED ICC ARBITRATION - THE INTERNATIONAL SOLUTION TO INTERNATIONAL BUSINESS DISPUTES	201a
PLAINTIFF'S LETTER TO JUDGE HAIGHT DATED AUGUST 4, 1980	210a

	Page
EXHIBIT T TO PLAINTIFF'S LETTER - EXCERPTS FROM DEPOSITION TESTIMONY OF A. KOEBEL AND A. BROWN, OFFICERS OF MORGAN GUARANTY TRUST COMPANY, GIVEN ON AUGUST 2, 1979 AND JANUARY 8, 1980	225a
EXHIBIT U TO PLAINTIFF'S LETTER - EXTRACT FROM SEPTEMBER 1978 CONFIDENTIAL INFORMATION MEMORANDUM ON FEDERAL REPUBLIC OF NIGERIA MULTICURRENCY CREDIT FACILITY	306a
EXHIBIT V TO PLAINTIFF'S LETTER - JULY 23, 1980 LETTER FROM B. H. HOENIGER TO Y. DERAINS OF THE ICC COURT OF ARBITRATION	318a
EXHIBIT W TO PLAINTIFF'S LETTER - CABLE MESSAGE FROM Y. DERAINS TO B. H. HOENIGER	321a
EXHIBIT X TO PLAINTIFF'S LETTER - PAMPHLET PUBLICATION BY INTERNATIONAL CHAMBER OF COMMERCE ENTITLED ICC ARBITRATION - THE INTERNATIONAL SOLUTION TO INTERNATIONAL BUSINESS DISPUTES (EXCERPTS OF WHICH ARE REPRODUCED HEREIN AT PAGES 89a-91a and 201a-209a)	-
PLAINTIFF'S LETTER TO JUDGE HAIGHT, DATED AUGUST 20, 1980	322a
ENCLOSURE TO PLAINTIFF'S LETTER - OPINION AND ORDER OF JUDGE PIERCE IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS (REPRODUCED IN APPENDIX THEREIN AT PAGES 618a-664a)	-
DEFENDANTS' LETTER TO JUDGE HAIGHT, DATED AUGUST 25, 1980	324a
EXHIBIT 1 TO DEFENDANTS' LETTER - MEMORANDUM AND ORDER OF JUDGE CANNELLA IN TEXAS TRADING ACTION AMENDING PRIOR ORDER OF JULY 16, 1980	333a
EXHIBIT 2 TO DEFENDANTS' LETTER - EXCERPTS OF DEPOSITION TESTIMONY HEREIN BY A. REALE, PRESIDENT OF PLAINTIFF	336a
PLAINTIFF'S LETTER TO JUDGE HAIGHT, DATED SEPTEMBER 10, 1980	371a
EXHIBIT Y TO PLAINTIFF'S LETTER - AFFIDAVIT OF R. L. TROTMAN SUBMITTED BY PLAINTIFF IN TEXAS TRADING IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (REPRODUCED IN TEXAS TRADING APPENDIX AT PAGES 32-41)	-
EXHIBIT Z TO PLAINTIFF'S LETTER - EXCERPTS OF TESTIMONY BY A. KOEBEL, OFFICER OF MORGAN GUARANTY TRUST CO. GIVEN AT TRIAL OF EAST EUROPE, NIKKEI AND CHENAX ACTIONS AT PRETRIAL DEPOSITION HEREIN	406a

	Page
EXHIBIT AA TO PLAINTIFF'S LETTER - MEMORANDUM DECISION OF UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, IN EAST EUROPE DOMESTIC INTERNATIONAL SALES CORP. V. TERRA, CIV. 79-7365; NOT OFFICIALLY REPORTED	412a
EXHIBIT BB TO PLAINTIFF'S LETTER - DECISION OF COURT OF APPEAL OF ENGLAND IN HISPANO AMERICANA MERCANTIL S.A. V. CENTRAL BANK OF NIGERIA (1979)	414a
MEMORANDUM OPINION AND ORDER OF JUDGE HAIGHT DATED SEPTEMBER 30, 1980 DENYING DEFENDANTS' RENEWED MOTION FOR ORDER DISMISSING COMPLAINT, CERTIFYING JURISDICTIONAL ISSUES FOR INTERLOCUTORY APPEAL AND PLACING ACTION ON SUSPENSE DOCKET	418a
DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. Section 1292(b)	425a
EXHIBIT 1 to DEFENDANTS' PETITION - MEMORANDUM AND ORDER OF JUDGE HAIGHT DATED SEPTEMBER 30, 1980 (REPRODUCED HEREIN AT PAGES 418a-424a)	-
EXHIBIT 2 to DEFENDANTS' PETITION - STIPULATION AND ORDER OF CONSOLIDATION FOR BRIEFING AND HEARING APPEALS	430a
PLAINTIFF'S RESPONSE TO DEFENDANTS' PETITION TO APPEAL PURSUANT TO 28 U.S.C. Section 1292(b)	438a
SUPPLEMENTAL STIPULATION AND ORDER OF CONSOLIDATION FOR BRIEFING AND HEARING APPEALS	441a

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

Docket No. 80-8145

- x

REALE INTERNATIONAL, INC.,

Plaintiff-Appellee,

-against-

FEDERAL REPUBLIC OF NIGERIA AND CENTRAL BANK OF NIGERIA,

Defendants-Appellants.

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

- x

DOCKET ENTRIES.

1-4-78	1	Filed Complaint, issued summons
1-6-78	2	Filed Certificate of mailing of summons and complaitn by certified mail, ret. receipt requested, Addressed to: Central Bank of Nigeria Tinubu Square Lagos NIGERIA Receipt #224029 Rec'd_____ &Receipt @224030 Rec'd_____
3-20-78	3	Filed Certificate of mailing of summons and complaint by certified mail, ret. receipt requested, addressed to: Secretary of STate Washington, D.C. 20560 Attention: Director of Special Consular Services receipt No.214022 Received:_____
3-21-78	4	Filed affidavit of James G. Simms in opposition to the ex-parte- application by pltff. for an order permitting service of the summons & complaint upon Morgan Guaranty Trust.
3-30-78	5	Filed Affdvt. of Arthur J. Brown in opposition to pltff. motion

DOCKET ENTRIES.

6-19-78	6	Fld Stip & Order that the Dist. Court decision of dfts. motion in the said case shall be deemed in all respects applicable to this action,etc. with respect to the dfts. motions to dismiss & for summary judgment in those 3 actions. So Ordered Haight J.
12-22-78	7	Fld Pltffs. Memo. in support of its' motion under FRCP 12(f) to strike foru affirmati defenses in dfts. answer.
12-22-78	8	Fld pltffs. Notice of Motion to strike defenses pur to FRCP 12(f) Ret. 1-5-79/
1-2-79	9	Fld pltffs. 1st set of interrogs. ,document request & requests to admit propounded to dfts.
12-26-78	10	Fld Copy of document #3 & marshals ret. Served Dressner Sales Co. on 12-15-78.
1-5-79	11	Fld Dfts. Memo. in opposition to pltffs. motion to strike 4 defenses in dfts. answer
1-5-79	12	Fld ANSWER. khg
1-16-79	13	Fld pltffs. Notions of depositions of Non Party witnesses = 3 Subp. iss. of Banque Nationale de Paris ,& others as stated. on dates as stated.
1-22-79	14	Fld Opinion #48121. Dfts. move for order be bound by Judge Pierce decision with respect to motions for dismissal or summary judgment bearing numbers as stated. pltff. moved for an order pur to 12(f)FRCP striking mentioned affirmative defenses,etc. Pltffs. motions granted, dfts. 1,2,3,& 9 affirmative defenses are ghereby stricken So Ordered. Haight J. (mn)
1-29-79	—	PRE-TRIAL CONFERENCE HELD BY Judge Haight
2-5-79	15	Fld Memo. . Opinion #48178. Depositions will go forward in accordance with terms as stated. Etc. An appropriate Stipulation should be prepared,etc. Haight J. (mn)
2-8-79	16	Fld Dfts. Objections & responseses to pltffs. 1st set of discivorery requests.
2-16-79	17	Fldpltffs. 2nd set of interrogs. & document request propounded to dfts.
3-5-79	18	Fld pltffs. 3rd set of document requests propounded by dfts.
3-6-79	19	Fld Opinion #48303 Refer action for supervision of all pretrial procedures & of a prepartion of a pretrial order. So Ordered Haight J.(mn)
3-15-79	20	Filed defts' Objections & Responses to pltff's Second & Third Sets of Discovery Requests.
4-11-79	—	PRE-TRIAL CONFERENCE HELD BY Mag. Gershon

DOCKET ENTRIES.

4-20-79	21	Filed Société Generale REsponse & objections to subpoena Duces Tecum by Non pty witness.
4-27-79	22	Filed defts' response to pltff's first set of Interrogs, etc.
5-4-79	23	Filed pltffs. reframed 2nd set ofinterrogs. & documents requests proposed to dfts
5-7-79	—	PRE-TRIAL CONFERENCE HELD BY Mag. Gershon
7-10-79	24	Filed Response & Objections to pltffs. superseding Notice to take deposition of Non Party Witness Societe Gernerale.
7-2-79	25	Filed Pltff's Superseding Notice to take Depositions of Non-Party Witnesses before trial, before Lorraine Handel on 7-19-79.
8-3-79	26	Filed defts' Notice of deposition of pltff by oral examination of Antonio Reale on 8-14-79, and Request for Documents etc.
8-7-79	27	Filed defts' First Interrogs. & Requests for Production of Documents.
11-30-79	28	Filed CONSENT ORDER, Ordered that each party shall make available to its opponent for oral pretrial deposition etc. Ordered, that each party shall be precluded from calling at the trial any such fact witness who has not been made available for pretrial deposition in accordance herewith. Mag. Gershon.
11/14/79	29	Filed Dfts, Repponses to pltffs, Reframed 2nd Set of Interrogs., etc.
11/23/79	30	Filed Pltffs. Damand for Production of Documents, under Rule 34FRCP
1-31-80		
12/21/79	31	Filed Dfts, objections to pltffs. Demand for Production of Documents.
12/27/79	32	Filed Pltffs. Response to Dfts. 1st Interrogs & Requests for production of documents .
1-8-80	33	Filed Pltff's AFFDVT. & NOTICE OF MOTION pur. to FRCP 26(c), vacating & striking defts' first interrogs. propounded to pltff, dated 8-6-79, & granting pltff. such other further & different protection & relief, Ret: 1-31-80 at 11:00 a.m. Room 633.
1-8-80	34	Filed Pltff's MEMORANDUM OF LAW in support of its motion for a protective order.

DOCKET ENTRIES.

1-8-80	35	Filed Pltff's NOTICE OF MOTION pur. to 37(a)(2) and (4) FRCP compelling defts to furnish the three documents demanded to be produced for inspection & copying by pltff. Ret: 1-31-80 at 11:00 a.m.
1-8-79	36	Filed Pltff's MEMORANDUM OF LAW in support of its motion for orders under FRCP 37 (a) (2) and (4).
11-15-79	—	PRE-TRIAL CONFERENCE HELD BY Mag. Gershon
1-31-80	37	Filed AFFDVT. in opposition to pltff's motions for protective order & to compel Production of Documents. By James G. Simms.
1-31-80	38	Filed defts' MEMORANDUM OF LAW in opposition to pltff's motions for a protective order & to compel production of documents.
2-1-80		Filed MEMO ENDORSED on document #33, Motion granted in part & denied in part See Transcript of Hearing this date. 2-1-80. So ordered Mag. Gershon, m/n
2-14-80	39	Filed transcript of record of proceedings, dated Mag. Gershon 2-2-80
2-1-80	—	PRE-TRIAL CONFERENCE HELD BY Mag Gershon
2-1-80	—	PRE-TRIAL CONFERENCE HELD BY Mag. Gershon
2-2-80	40	Filed Original ORDER. pltff has moved to compel production of three documents etc as stated. In addition no serious attempt has been made by defts to counter pltff's showing that the proceedings of the Tribunal were public & open to the press etc. The motion is granted. So ordered Mag. Gershon, J.
4-30-80	41	Filed Pltff's Responses to defts' First Interrogs. & Requests for Production of
5/28/80	42	Fld Documents. pltff notice of motion for an order pur R 37d
5/28/80	43	Fld pltffs memo in support of its motion pur R 37
6-12-80	44	Filed AFFDVT. in opposition to pltff's Rule 37 Motion, compelling further responses to certain discovery requests contained in Reale's First Interrogs. etc. dated 12-28-78. By James G. Simms.
6-17-80	45	Filed Pltff's REPLY AFFDVT. in support of its motion under FRCP 37(b)(2) and 37(d).
10-1-80	46	Filed Opinion #50667. Accordingly Dfts. renewed motion for an orderX dismissing Complt. denied, etc. Pending Resolution of the controlling judisdiction al issues in the Court of Appeals, this case,placed on suspense docket, etc. Haight J. (Sent Copy XXX to Sexton) (MN) (Csc)

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

REALE INTERNATIONAL INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------X

78 Civ. 0023 (CSH)

COMPLAINT

Plaintiff, complaining of the defendants by its attorneys, BAILEY MARSHALL HOENIGER & FREITAG, respectfully shows to this Court and alleges:

FEDERAL JURISDICTION; VENUE

1. Federal jurisdiction is founded upon the provisions of §2(a) of the Foreign Sovereign Immunities Act of 1976 (Pub.L. 94-583, 90 Stat. 2891, 28 U.S.C. §§1330, 1391(f), 1441(d), and 1602 through 1611), 28 U.S.C. §1330(a) and (b).

2. Venue is properly laid in this District under §3 of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1391(f), because a substantial part of the events giving rise to the claim occurred within this District, and also because, upon information and belief, both defendants are doing business in this District.

PARTIES TO THE ACTION

3. Plaintiff is, and at all times relevant hereto has been, a Connecticut corporation engaged, among other activities, in the import-export business, with a principal office at 508 Tolland Street, East Hartford, Connecticut 06108, and several European offices.

4. Defendant FEDERAL REPUBLIC OF NIGERIA ("Nigeria") is a foreign state for purposes of the Foreign Sovereign Immunities Act of 1976 (the "Act"), as defined in §4.(a) of the Act, 28 U.S.C. §1603(a). Nigeria, located on the west coast of Africa, is black Africa's most populous country, with a population of 67,000,000 or more, is the world's sixth largest petroleum producer and exporter, is a member of OPEC, and, through one or more corporations wholly owned by it, sells its petroleum as well as other commodities to foreign purchasers. Such petroleum is, upon information and belief, sold to various United States and international oil companies with headquarters or offices in this District, and the United States is the single largest customer for and importer of Nigerian petroleum. Likewise, defendant Nigeria itself, directly as a state and not through any agency, instrumentality or trading corporation, now purchases and at all times relevant hereto purchased large quantities of commodities, such as cement, and other products

from many U.S. and foreign suppliers, and thus carried and carries on commercial activities on a systematic, continuous, and very substantial scale in the United States.

5. Defendant CENTRAL BANK OF NIGERIA ("CBN") is Nigeria's central bank, and an agency or instrumentality of Nigeria for purposes of the Act and as defined in §4.(a) thereof, 28 U.S.C. §1603(b). Throughout the relevant period, MORGAN GUARANTY TRUST COMPANY OF NEW YORK ("Morgan Guaranty"), headquartered in this District, was the United States correspondent bank for CBN, and acted as and was defendants' agent in the United States.

FACTS CONSTITUTING THE CLAIM FOR RELIEF

6. On March 8, 1975, Nigeria entered into an agreement in writing with plaintiff (the "cement contract") for the purchase by Nigeria and the sale and delivery by plaintiff of 240,000 metric tons of Portland cement of $59.50 per ton, CIF Lagos/Apapa, Nigeria, or a total contract price of $14,280,000.

7. Said contract -- a mimeographed form contract prepared by Nigeria, and one of approximately 68 such cement contracts entered into by Nigeria in or about 1975 -- provides inter alia that

(a) Nigeria will pay the purchase price of U.S. $14,280,000 by establishing "an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Banco de Bilbao of Oviedo, Spain" (the bank designated by plaintiff);

(b) "Drafts drawn under the Letter of Credit shall be payable at sight, on presentation to the bank designated above of Invoices, Clean on Board Bills of Lading and Insurance Certificates";

(c) Unloading by Nigeria of each vessel delivering cement was to be completed within 10 days after the vessel's arrival at Lagos, based on a 10,000-ton cargo, or within a pro rata longer or shorter period if the vessel carried more or less than 10,000 tons; thereafter, demurrage of $4,100 per day was to be paid by Nigeria "(in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the bank designated * * * above of time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's agents in Lagos"; and

(d) all disputes arising under or out of the contract "shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof."

8. On or about April 26, 1975, defendant CBN telexed instructions to its correspondent and agent, Morgan Guaranty, to "please open and advise our confirmed irrevocable * * * letter of credit in favour of Real [sic] International Inc., 508 Tolland Street East Hartford Ct. 06108 USA for the sum of US Dollars $14,280,000 * * *. * * * Credit to be advised through beneficiary's bankers Banco de Bilbao Oviedo Spain." On or about April 29, 1975, defendant CBN sent its Documentary Credit No. CBN/BO/75/89 to Morgan Guaranty, together with CBN's covering letter to Morgan Guaranty stating in part:

> "In consideration of your advising the credit, please debit our account and advise us accordingly with the amounts of payments effected thereunder . . .".

9. Defendants' insertion and use of Morgan Guaranty as the advising and paying bank were solely the defendants' unilateral decision and act, were not called for by the cement contract, had not been requested by or discussed with plaintiff, and, upon information and belief, were done as a matter of convenience to defendants in pursuance of their practice to use their U.S. correspondent and agent, Morgan Guaranty, as the advising and paying bank for all letters of credit issued under cement contracts with U.S. suppliers.

10. On or about May 8, 1975, Morgan Guaranty advised both plaintiff and Banco de Bilbao in Spain in writing "of the establishment by Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria, of their IRREVOCABLE Credit CBN/BO/75/89 in your favor For US $14,280,000.00 . . .".

11. The aforesaid acts of defendants Nigeria and CBN in negotiating and entering into said cement contract with plaintiff and in establishing said irrevocable letter of credit in plaintiff's favor through Morgan Guaranty were part of the large-scale commercial activity carried on in the United States by said defendants, and specifically were part of the commercial activity of contracting for the purchase of some 16 to 20 million tons of cement from U.S. and other foreign suppliers. Alternatively, said acts constituted acts performed in the Unites States by defendants in connection with a commercial activity of defendant Nigeria elsewhere.

12. Promptly upon being advised of the establishment of said letter of credit, plaintiff entered upon the performance of the terms and conditions of the cement contract on its part, and duly performed all the terms and conditions of said contract on its part until prevented or excused from further performance by the breaches of said contract and irrevocable letter of credit thereunder by said defendants as alleged in ¶¶14-16, below. Specifically, pursuant to and in performance of the cement contract, plaintiff

(a) contracted with a Spanish cement manufacturer, S. A. Tudela Veguin, Oviedo, Spain, to sell and supply to plaintiff 240,000 metric tons of Portland cement complying in all respects with the specifications and with the times of delivery stipulated in plaintiff's cement contract with Nigeria, at a price of $31.25 per ton, FOB and stowed Gijon/Musel, Spain;

(b) contracted through Romualdo Alvargonzalez, S.A., Spanish ship brokers/chartering agents/managing owners, for the charter of six vessels for the delivery of cement, in accordance with the delivery schedule specified in plaintiff's cement contract with Nigeria, to Lagos/Apapa, Nigeria, at $19.60 per ton;

(c) caused $12,204,000 out of plaintiff's $14,280,000 credit to be transferred to S.A. Tudela Veguin in payment for the supply (at $31.25 per ton) and delivery (at $19.60 per ton) of said 240,000 tons of cement to Nigeria, so as to leave plaintiff a profit of $8.65 per ton, or an aggregate of $2,034,000, exclusive of profit on demurrage; and

(d) commenced delivery of cement pursuant to plaintiff's cement contract with Nigeria to Lagos/Apapa, Nigeria, by the following vessels, each bearing the following cargo of cement, and each of which arrived at Lagos/Apapa on the following dates:

S. S. Tariq -- 9,520 metric tons -- July 1, 1975

S. S. Gina Juliano -- 8,480 metric tons -- August 4, 1975

S. S. Nordwind -- 10,180 metric tons -- August 17, 1975

S. S. Athen Glory -- 10,000 metric tons -- September 3, 1975

S. S. Acquarios -- 8,000 metric tons -- October 1, 1975

S. S. Dimitrios B -- 10,400 metric tons -- October 12, 1975.

All of said vessels were loaded at Gijon/Musel and departed therefrom for Lagos/Apapa prior to plaintiff's receipt of the notices alleged in ¶14, below.

13. Since 1966, defendant Nigeria had been ruled by a military government headed by Col. Yakubu Gowon. On July 29, 1975, the Gowon government was overthrown by a military coup d'etat headed by Brig. Muritala Rufai Mohammed (who in turn was assassinated on February 13, 1976, and succeeded by Lieut. Gen. Olusegun Obasanjo).

14. In October, 1975, after all six of the aforesaid vessels had left Spain loaded with cement and were either already at anchor outside Lagos waiting for the discharge of their cargoes or were on the high seas en route to Lagos, Morgan Guaranty, as CBN's agent, advised plaintiff that, because of congestion at Lagos and other Nigerian ports, the (new) Nigerian government had suspended all importation of cement for three months, and that plaintiff was required to defer all further chartering and loading of vessels as scheduled under terms of plaintiff's cement contract with Nigeria, and further advised plaintiff that, pursuant to instructions received by Morgan Guaranty from its principal, defendant CBN, Morgan Guaranty would refuse any and all payments under the aforesaid letter of credit to plaintiff or plaintiff's assignee unless plaintiff agreed to, and did, give two month's advance notice to the Nigerian Ports Authority prior to the departure of each vessel engaged to transport cement to Nigeria pursuant to the terms of plaintiff's contract and unless plaintiff further agreed not to, and did not, ship any further cement to Nigeria under plaintiff's contract unless prior clearance for each proposed shipment had been obtained from defendants, and unless plaintiff agreed to other material changes in the terms of the aforesaid cement contract and letter of credit.

15. Said advice by defendants to plaintiff through their agent, Morgan Guaranty, that they were unilaterally and in material respects purporting to alter and to modify the aforesaid cement contract and irrevocable, confirmed letter of credit, and said instructions by defendant CBN to Morgan Guaranty not to honor said irrevocable, confirmed letter of credit in accordance with its terms, were wholly unilateral, unauthorized, and unlawful, and were done wholly without plaintiff's authorization, agreement or consent, and constituted a breach and anticipatory breach of said cement contract and letter of credit, and were acts performed either in the United States in connection with commercial activities of said defendants in the United States and elsewhere or were acts outside the territory of the United States in connection with commercial activities of said defendants elsewhere whose foreseeable consequence was to cause, and which did cause, a direct effect in the United States, to plaintiff's injury and detriment.

16. Pursuant to said instruction from defendants, its principals, Morgan Guaranty also advised Banco de Bilbao that the latter could not pay sight drafts drawn under the aforesaid letter of credit for cement loaded pursuant to plaintiff's cement contract with Nigeria and said letter of credit, despite the fact that said sight drafts were duly accompanied by all documents required by said contract and letter of credit and had been presented to Banco de Bilbao for payment prior to plaintiff's receipt of any of the aforesaid notices or advices of defendants'

unilateral alterations and conditions to said contract and letter of credit; and Morgan Guaranty advised Banco de Bilbao that if the latter were to make such payment, it, Morgan Guaranty, would not pay or reimburse Banco de Bilbao therefor. Subsequently, defendants placed a total embargo on cement shipments to Nigeria, and caused their agent, Morgan Guaranty, to advise both plaintiff and Banco de Bilbao thereof.

17. By letter dated November 14, 1975, Morgan Guaranty further advised plaintiff that at the request of CBN, it was forwarding to plaintiff therewith a copy of the text of a press conference held on October 29, 1975 by the Commissioner for Transport of defendant Nigeria. In said text of his press conference, said official was reported as stating at the conclusion:

> "However, I wish to warn those suppliers who are threatening to obtain their pound of flesh, that Nigeria is not here today and gone tomorrow. This is a battle for economic survival and we shall not hesitate to declare all detractors as enemies of the people of Nigeria and to deal with them ruthlessly. I would like to assure the Nigerian public that this Administration is doing, and will continue to do everything possible to safeguard and protect our national interest." (Emphasis added.)

18. Towards the end of 1975, defendants invited plaintiff and the other 68 cement suppliers to attend meetings with their officials in Lagos, which invitation plaintiff accepted. At that time, six vessels carrying a total of approximately 56,580 tons of cement sold and delivered by plaintiff pursuant to its cement contract were lying at anchor outside of Lagos, waiting to discharge their cargo, and four of them had

been so lying for several months and were incurring daily demurrage for which plaintiff was liable to the shipowners and for the payment of which he was being pressed by said shipowners; and further, because of Banco de Bilbao's inability to pay sight drafts under the aforementioned letter of credit because of Morgan Guaranty's aforesaid instructions and advice to it, plaintiff was being pressed by S. A. Tudela Veguin for payment for cement delivered by the latter in accordance with the terms of its contract with plaintiff; and plaintiff was thus in a situation of extreme economic duress as a result of defendants' wrongful acts.

19. At said meeting in Lagos in late 1975, officials and representatives of defendants represented to plaintiff that

(a) unless plaintiff agreed to modify the cement contract and letter of credit by reducing the quantity of cement and the payment therefor to that lying aboard the vessels carrying such cement which were then anchored at Lagos waiting to discharge, defendants would make no payments whatever to plaintiff or its assignees either for cement or demurrage;

(b) if plaintiff agreed to such modification, and discharged defendants from any further or other liability for the as yet undelivered 183,500 tons of cement under said cement contract and said letter of credit, plaintiff would be invited to

negotiate for the supply of cement if, as, and when Nigeria resumed the importation of cement; and

(c) if, as, and when the importation of cement by Nigeria was resumed, plaintiff would be awarded new cement contracts to compensate it for its cancellation of over 75% of the aforesaid cement contract.

20. In reliance upon the representation set forth in subparagraph 19.(c), and as a result of the coercion and duress through their threats of nonpayment for cement already shipped and for demurrage already incurred, and for which plaintiff was liable to its supplier and to shipowners and for which it was being pressed, plaintiff, in December, 1975, executed a document headed "Cement Contracts Negotiating Committee," dated December 18, 1975, pursuant to which plaintiff purported to cancel the balance of 183,500 tons of its cement contract and under which defendants undertook to pay for the cement cargo in and demurrage on the six vessels alleged in ¶12(d) hereof, and which further provided

> "that REALE INTERNATIONAL INCORPORATED be invited to negotiate for the supply of cement in the event of a resumption of cement importation";

and plaintiff further executed a document denominated "Agreement of Discharge" with Nigeria, and a similar document with defendant CBN, both dated December 17, 1975. None of said three documents set forth any obligation by defendants to award plaintiff new cement contracts in the future, or to do anything that they were not already legally bound to do under the original cement contract and letter of credit with and to plaintiff.

21. Plaintiff's execution of said documents was induced and obtained by coercion and duress on the part of defendants, and by defendants' fraud, in that the representation alleged in subparagraph 19(c) was material, and induced plaintiff to execute said purported discharge agreements, was false when made, and was known by defendants to be false when made, in that defendants did not in fact then intend to award any new cement contracts to plaintiff, and have not done so despite the fact that Nigeria resumed contracting for the purchase of cement in or about September, 1976, and despite the further fact that plaintiff has repeatedly demanded the award of new cement contracts since that time.

22. (a) Additionally, said discharge agreements are void for lack of consideration, in that, as previously alleged, there was no consideration whatever flowing from defendants to plaintiff, and defendants merely undertook to perform less than 25% of obligations which they were already legally obligated to perform in full under the cement contract with and letter of credit to plaintiff.

(b) Alternatively, if this Court determines that the above-quoted undertaking in the so-called "Cement Contracts Negotiating Committee" document that plaintiff would "be invited to negotiate for the supply of cement" if, as, and when Nigeria resumed the importation of cement constituted consideration, said discharge agreements have been materially breached by defendants in that, despite the fact that Nigeria resumed the importation of cement well over a year ago, plaintiff, in spite of repeated demands therefor, has never been invited to negotiate for the supply of any of such cement to Nigeria; and if the Court finds that such undertaking by defendants did constitute consideration, plaintiff, by reason of such breach by defendants, elects to treat said discharge agreements as having been avoided and rendered null and void and of no further force and effect by reason of defendants' said material breach thereof.

23. By reason of the premises, plaintiff lost profits of $8.65 per ton on the 183,500 tons of cement never accepted by defendants, or a total of $1,587,275; lost profits on demurrage which it would have realized had defendants performed said cement contract and letter of credit of at least $5,000,000; sustained out-of-pocket costs, losses, and expenses of $50,000 or more; and will sustain additional losses if and to the extent that it is liable to its cement supplier or to shipowners with whom it contracted to fulfill its cement contract with defendant Nigeria.

24. The wrongful acts and conduct of defendants hereinabove alleged were willful, intentional, and deliberate, evinced a high degree of moral turpitude, and demonstrated such wanton dishonesty, under internationally recognized basic principles of commercial conduct and honor, as to imply a criminal indifference to civil obligations. Accordingly, plaintiff is entitled to, and demands, punitive damages of $6,637,275 against defendant CBN, and, if and to the extent that punitive damages may be awarded under the Act against defendant Nigeria, likewise against the latter defendant.

PRAYER FOR RELIEF

WHEREFORE plaintiff demands judgment against both defendants, jointly and severally, for $6,637,275 in compensatory damages, together with the amount of plaintiff's liabilities to S. A. Tudela Veguin and to shipowners under charter parties entered into by or on behalf of plaintiff, with interest from October 1, 1975, and for exemplary or punitive damages against defendant CBN, and if and to the extent available under the Foreign Sovereign Immunities Act of 1976, also against defendant Nigeria, of $6,637,275, the costs and disbursements of this action, and plaintiff's reasonable attorneys' fees; and for such

other, further, and different relief as may be just and proper upon the facts proven.

Dated: New York, N.Y.
January 4 , 1978.

Yours, etc.,

BAILEY MARSHALL HOENIGER & FREITAG
Attorneys for Plaintiff

By: Berthold H. Hoeniger
Berthold H. Hoeniger

345 Park Avenue
New York, N.Y. 10022
Tel.No.: (212) 826-2305

ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REALE INTERNATIONAL, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

Index No. 78 Civ. 0023 (CSH)

ANSWER

Defendants Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank) by their attorneys, Kissam, Halpin & Genovese, answer the Complaint of plaintiff Reale International, Inc. (Reale), on information and belief, as follows:

1. Deny the allegations contained in paragraph 1 of the Complaint.

2. Deny the allegations contained in paragraph 2 of the Complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint.

4. Deny the allegations contained in paragraph 4 of the Complaint, except admit that Nigeria is a foreign state located on the continent of Africa and functions as such; and admit that Nigeria is a "foreign state" as defined in Section 1603 of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C., Section 1602, et seq. (Immunities Act).

5. Deny the allegations contained in paragraph 5 of the Complaint, except admit that Central Bank is a department of the Government of Nigeria established under the Central Bank of Nigeria Act of 1958; that Central Bank is an "agency or instrumentality of a foreign state" as defined in Section 1603 of the Immunities Act; and that during the time relevant to this action, Central Bank has maintained an account at Morgan Guaranty Trust Company of New York, 23 Wall Street, New York, N.Y. (Morgan Guaranty).

6. Deny the allegations contained in paragraph 6 of the Complaint, except admit that on or about March 8, 1975 the Federal Ministry of Defence of Nigeria entered into an agreement with plaintiff which provided for the purchase by Nigeria of 240,000 metric tons of cement at a price of $59.50 per ton. C.I.F. Lagos/Apapa (the cement contract) and respectfully refer the Court to the cement contract for a full and accurate statement of its terms.

7. Deny the allegations contained in paragraph 7 of the Complaint, except admit that the Federal Ministry of Defence of Nigeria, in 1975, contracted for the purchase of quantities of cement in additional to that which is the subject of plaintiff's cement contract; deny that the allegations contained in paragraph 7 of the Complaint fully and accurately set forth the terms of the cement contract and respectfully refer the Court to the cement contract for a full and accurate statement of its terms.

8. Deny the allegations contained in paragraph 8 of the Complaint; except admit that in April 1975, pursuant to the cement contract, Central Bank established an irrevocable transferable documentary letter of credit in favor of plaintiff, identified as credit number CBN/BO/75/89 (the letter of credit), and respectfully refer the Court to the letter of credit for a full and accurate statement of its terms; admit that during the time relevant to this action, Central Bank maintained an account at Morgan Guaranty; admit that Central Bank communicated with Morgan Guaranty with respect to the letter of credit and respectfully refer the Court to these communications for a full and accurate statement of their contents.

9. Deny the allegations contained in paragraph 9 of the Complaint; except aver that pursuant to its terms the letter of credit was subject to The Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce Brochure No. 222 (UCP 1962 Revision) and that pursuant to UCP 1962 Revision, Morgan Guaranty was a paying bank under the letter of credit; and admit that during the time relevant to this action, Central Bank maintained an account at Morgan Guaranty.

10. Deny the allegations contained in paragraph 10 of the Complaint; except admit that Morgan Guaranty communicated with plaintiff and Banco de Bilbao with respect to the establishment of the letter of credit and respectfully refer the Court to these communications for a full and accurate statement of their contents.

11. Deny the allegations contained in paragraph 11 of the Complaint; except admit that in 1975 the Federal Ministry of Defence of Nigeria contracted for the purchase of quantities of cement in addition to that which is the subject of plaintiff's cement contract.

12. Deny the allegations contained in paragraph 12 of the Complaint and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein with respect to action taken by plaintiff or as to its performance of the cement contract.

13. Deny the allegations contained in paragraph 13 of the Complaint, except aver that since 1966 the Heads of State of the Government of Nigeria have been Messrs. Yakubu Gowon, Muritala Rufai Mohammed and Olusegun Obasanjo, respectively.

14. Deny the allegations contained in paragraph 14 of the Complaint and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein as to the loading of vessels or as to the movements of those vessels; except admit that in September and October 1975 Morgan Guaranty transmitted to plaintiff the text of cables and telexes received from Central Bank relating to the imposition by the Government of Nigeria of a ports embargo, regulations concerning the ports embargo and payments under the letter of credit; and respectfully refer the Court to these communications for a full and accurate statement of their contents.

15. Deny the allegations contained in paragraph 15 of the Complaint.

16. Deny the allegations contained in paragraph 16 of the Complaint, except admit that in the Fall of 1975 the Government of Nigeria imposed an embargo on all shipping into Nigerian ports including the shipping of cement, and established regulations with respect to the embargo, and that Morgan Guaranty communicated with plaintiff and with Banco de Bilbao with respect to cables and telexes received from Central Bank concerning the ports embargo and payments under the letter of credit and respectfully refer the Court to Morgan Guaranty's communications to plaintiff and Banco de Bilbao for a full and accurate statement of their contents.

17. Deny the allegations contained in paragraph 17 of the Complaint, except admit that by letter dated November 14, 1975 Morgan Guaranty transmitted to plaintiff a document which purported to report a press conference by the Nigerian Commissioner for Transport held October 29, 1975; deny that the report of this conference is admissable as evidence or probative with respect to the issues presented by the Complaint, and respectfully refer the Court to Morgan Guaranty's letter to plaintiff dated November 14, 1975 and the enclosure thereto for a full and accurate statement of their contents.

18. Deny the allegations contained in paragraph 18 of the Complaint; deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein with respect to the location of or cargo loaded on the vessels referred to or to the alleged actions of Banco de Bilbao or S. A. Tudela Veguin or as to plaintiff's economic or financial situation; except admit that in late 1975 defendants invited plaintiff and other cement suppliers to meet in Lagos with respect to the ports embargo and their cement contracts, and that plaintiff accepted defendants' invitation.

19. Deny the allegations contained in paragraph 19 of the Complaint, except admit that plaintiff met with defendants in Lagos in 1975 to discuss the release and settlement of mutual obligations under the cement contract and letter of credit and as a result of these negotiations plaintiff and defendants entered into agreements of release and discharge dated December 17, 1975 and respectfully refer the Court to these agreements of discharge for a full and accurate statement of their contents.

20. Deny the allegations contained in paragraph 20 of the Complaint, except admit that plaintiff executed a document dated December 18, 1975 and headed "Cement Contracts Negotiating Committee", which sets forth the substance of the settlement negotiations between plaintiff and defendants and that plaintiff executed two documents both dated December 17, 1975 and headed "Agreement of Discharge", one document executed by Nigeria with respect to the cement contract and the other executed by Central Bank with respect to the letter of credit; and respectfully

refer the Court to the three above-referenced documents for a full and accurate statement of their terms.

21. Deny the allegations contained in paragraph 21 of the Complaint.

22. Deny the allegations contained in paragraph 22 of the Complaint.

23. Deny the allegations contained in paragraph 23 of the Complaint.

24. Deny the allegations contained in paragraph 24 of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

25. This Court is without jurisdiction of the subject matter of the claims alleged in the complaint.

Second Affirmative Defense

26. This Court is without jurisdiction of the defendants Nigeria and Central Bank with respect to the claims alleged in the complaint.

Third Affirmative Defense

27. The claims alleged in the complaint arise out of purely governmental acts of the Government of Nigeria; i.e., the imposition and implementation of a ports embargo in the Fall of 1975. Plaintiff seeks a redress of alleged grievances by virtue of these governmental acts. An adjudication of the claims alleged will require the Court to inquire into and pass upon the validity of or motive for governmental acts of Nigeria. The

act of state doctrine is applicable to the claims alleged and renders the claims nonjusticiable.

Fourth Affirmative Defense

28. On or about December 17, 1975 plaintiff entered into agreements of discharge with Nigeria and Central Bank with respect to the cement contract and the letter of credit at issue herein.

29. Pursuant to the agreements of discharge, plaintiff agreed to release and discharge Nigeria and Central Bank from all claims relating to the cement contract or the letter of credit.

30. By virtue of the agreements of discharge, plaintiff has released Nigeria and Central Bank with respect to the claims alleged in the complaint.

Fifth Affirmative Defense

31. Nigeria and Central Bank repeat and reallege the allegations contained in paragraphs 28 and 29 above.

32. By virtue of the agreements of discharge, plaintiff has waived its rights with respect to the claims alleged in the complaint.

Sixth Affirmative Defense

33. Nigeria and Central Bank repeat and reallege the allegations contained in paragraphs 28 and 29 above.

34. By virtue of the agreements of discharge, plaintiff is estopped from seeking recovery with respect to the claims alleged in the complaint herein.

Seventh Affirmative Defense

35. Nigeria and Central Bank repeat and reallege the allegations contained in paragraphs 28 and 29 above.

36. Pursuant to the agreements of discharge, plaintiff acknowledged the impossibility of performance with respect to cement not delivered to Nigeria.

37. Performance of the cement contract with respect to cement not delivered to Nigeria is excused by virtue of impossibility of performance.

Eighth Affirmative Defense

38. Nigeria and Central Bank repeat and reallege the allegations contained in paragraphs 28 and 29 above.

39. Pursuant to the agreements of discharge, plaintiff agreed to indemnify Nigeria and Central Bank against all claims, demands, actions, proceedings, costs, losses, damages and expenses that might be brought against or incurred by Nigeria or Central Bank as a result of the cement contract or the letter of credit.

40. Plaintiff has thereby discharged Nigeria and Central Bank with respect to the claims alleged in the complaint.

Ninth Affirmative Defense

41. The complaint fails to state a claim upon which relief may be granted.

WHEREFORE, defendants Nigeria and Central Bank demand judgment against plaintiff Reale International, Inc. dismissing the complaint, and for such other and further relief as is deemed just and proper by this Court.

New York, New York
December 12, 1978

KISSAM, HALPIN & GENOVESE

By: James B. Kissam
A Member of the Firm
Attorneys for Defendants
Federal Republic of Nigeria
and Central Bank of Nigeria
120 Broadway
New York, New York 10005
(212) 962-2000

STIPULATION AND ORDER PROVIDING THAT DETERMINATION BY JUDGE PIERCE OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION IN THE EAST EUROPE, NIKKEI AND CHENAX ACTIONS SHALL BE DEEMED IN ALL RESPECTS APPLICABLE TO THIS ACTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

REALE INTERNATIONAL INC.,

Plaintiff, : 78 Civ. 0023

-against- : (C.S.H.)

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, : STIPULATION AND ORDER

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

WHEREAS, in the following three actions presently consolidated before the Hon. L.W. Pierce of this Court, which actions also relate to cement contracts and letters of credit, defendants herein have moved to dismiss the complaints and seek summary judgment on the grounds that this Court is without jurisdiction under the Foreign Sovereign Immunities Act of 1976 and that the act of state doctrine renders the claims alleged nonjusticiable:

East Europe Import-Export, Inc. v.
Federal Republic of Nigeria and
Central Bank of Nigeria
77 Civ. 2809 (LWP)

Chenax Majesty, Inc. v.
Same
77 Civ. 3045 (LWP)

Decor by Nikkei International, Inc. v.
Same
77 Civ. 2348 (LWP);

and

WHEREAS defendants have advised this Court and plaintiff's counsel herein that they intend to make the same motion in this action, and whereas the Court and counsel for both sides desire to avoid unnecessary and duplicative effort on the part of this Court and on their part;

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the District Court's decision of defendants' aforesaid motion in East Europe, Chenax Majesty, and Nikkei shall be deemed in all respects applicable to this action, as if indentical moving and opposing papers had been submitted herein and this Court had made a disposition of said motion herein identical to that to be made by the District Court in East Europe, Chenax Majesty, and Nikkei with respect to the defendants' motions to dismiss and for summary judgment in those three actions.

Dated: New York, New York
May 16, 1978

BAILEY MARSHALL HOENIGER & FREITAG
Attorneys for Plaintiff

By Berthold H. Hoeniger
Berthold H. Hoeniger

345 Park Avenue
New York, New York 10022
Tel.No.: (212) 826-2305

KISSAM, HALPIN & GENOVESE
Attorneys for Defendants

By James G. Simms
James G. Simms

120 Broadway
New York, New York 10005
Tel.No.: (212) 962-2000

SO ORDERED: 5/18/78

S/
Charles S. Haight, Jr., U.S.D.J.

AFFIDAVIT OF BERTHOLD H. HOENIGER, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION FOR ORDER STRIKING DEFENDANTS' AFFIRMATIVE DEFENSES RELATING TO JURISDICTION

(FOLLOWING PAGE)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REALE INTERNATIONAL, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

Index No.: 78 Civ. 0023 (CSH)

SUPPORTING AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BERTHOLD H. HOENIGER, being duly sworn, deposes and says:

1. I am a member of Bailey, Marshall, Hoeniger & Freitag, attorneys for plaintiff herein.

2. I am thoroughly familiar with the facts and circumstances of this action, having been in charge of the same from its inception.

3. I make this affidavit in support of plaintiff's motion under F.R.Civ.P. 12(f) to strike four (4) of the affirmative defenses in defendants' answer, dated December 12, and served on us December 14, 1978, on the ground that said four (4) defenses were previously raised by the defendants by motion under F.R.Civ.P. 12(b) and 56, and determined adversely to defendants.

4. On May 16, 1978, plaintiff and defendants entered into a stipulation, So Ordered by this Court on May 18, 1978,

annexed hereto as Exhibit A, which provides that it shall be deemed that defendants here have made the same motion to dismiss and for summary judgment as they had previously made in the action pending before Judge Pierce entitled "East Europe Import-Export, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria," 77 Civ. 2809 (LWP). Said motion was referred by Judge Pierce to Magistrate Sol Schreiber to report and recommend. Magistrate Schreiber, by report and recommendation dated September 19, 1978 (Exhibit B) recommended that defendants' motion be in all respects denied. Two typographical errors in his report and recommendation were corrected by letter from the Magistrate dated September 25, 1978 (Exhibit C). Judge Pierce adopted the Magistrate's report and recommendation, and formally denied the defendants' motion to dismiss and for summary judgment, by order dated November 6, 1978 (Exhibit D). Thus, the defendants' defenses of lack of subject matter jurisdiction, failure to state a claim on which relief can be granted, sovereign immunity and act of state were all determined adversely to defendants.

5. On December 14, 1978, defendants finally served their answer (Exhibit E). The answer contains nine (9) affirmative defenses, four (4) of which raise the self-same objections as were made by defendants on motion and determined adversely to them. These defenses are obviously insufficient, having already been determined against defendants, and should be stricken. This is hornbook law, as demonstrated in the accompanying memorandum of law.

Accordingly, I respectfully pray that the annexed motion be in all respects granted, and the First, Second, Third, and Ninth affirmative defenses in defendants' answer be stricken pursuant to F.R.Civ.P. 12(f).

Berthold H. Hoeniger

Sworn and subscribed to before me
this 21st day of December, 1978.

Notary Public

EXHIBIT C TO HOENIGER AFFIDAVIT - SEPTEMBER 25, 1978 LETTER OF MAGISTRATE SCHREIBER TO ATTORNEYS IN EAST EUROPE, NIKKEI AND CHENAX ACTIONS

(FOLLOWING PAGE)

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
UNITED STATES COURT HOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

SOL SCHREINER
MAGISTRATE

September 25, 1978

Berthold H. Hoeniger, Esq.
Bailey, Marshall, Hoeniger & Freitag
345 Park Avenue
New York, NY 10022

Lewis S. Sandler, Esq.
620 Fifth Avenue
New York, NY 10020

James G. Simms, Esq.
Kissam, Halpin, & Genovese
120 Broadway
New York, NY 10005

Re: East Europe Import-Export, Inc., Chenax Majesty, Inc., and Decor by Nikkei International, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria, 77 Civ. 2809 (LWP), 77 Civ. 3045 (LWP) and 77 Civ. 2348 (LWP)

Dear Counsel:

I have received a letter dated September 21, 1978 from Mr. Hoeniger indicating that there were two typographical errors in my recommendation, dated September 19, 1978, in the above-captioned case.

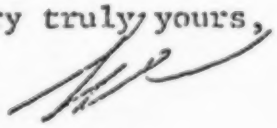
The opinion will be amended to make the following changes:

On page 17, line 5, "nonjustifiable" should be "nonjusticiable."

On page 18, line 12, the words "The instant suit" should be "Defendants' instant motion."

Please make these changes on your copies, as the original opinion in the Clerk's Office will be so amended.

Very truly yours,



Sol Schreiber
United States Magistrate

SS:ka

EXHIBIT D TO HOENIGER AFFIDAVIT - ORDER OF JUDGE PIERCE ADOPTING MAGISTRATE SCHREIBER'S RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS IN EAST EUROPE, NIKKEI AND CHENAX ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

v. 77 Civ. 2809

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

CHENAX MAJESTY, INC.,

Plaintiff,

v. 77 Civ. 3045

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

DECOR BY NIKKEI INTERNATIONAL, INC.,

Plaintiff,

v. 77 Civ. 2348

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

ORDER

No timely objections having been filed and the Court having reviewed the Magistrate's report and recommendations, the Court hereby denies defendants' motion to dismiss and the cross-motions for summary judgment for the reasons stated in the Magistrate's report.

SO ORDERED.

Dated: New York, New York
November 6, 1978

LAWRENCE W. PIERCE
U. S. D. J.

MEMORANDUM OPINION AND ORDER OF JUDGE HAIGHT STRIKING DEFENDANTS' AFFIRMATIVE DEFENSES RELATING TO JURISDICTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

REALE INTERNATIONAL, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

78 Civ. 23-CSH

MEMORANDUM OPINION AND ORDER

- x

HAIGHT, District Judge:

Pursuant to a stipulation and order of May 16, 1978, the parties to this action agreed to be bound by the decision of District Judge Pierce with respect to defendants' motions for dismissal or summary judgment in three actions pending before Judge Pierce and bearing docket numbers 77 Civ. 2809, 77 Civ. 3045 and 77 Civ. 2348. The motions asserted lack of subject matter jurisdiction, lack of jurisdiction over the defendants, sovereign immunity, non-justiciability by virtue of the Act of State doctrine, and failure to state a claim upon which relief may be granted. By order of November 6, 1978, Judge Pierce denied defendants' motions.

Subsequent to Judge Pierce's decision, defendants filed an answer in this case asserting as their first, second, third and ninth affirmative defenses, the grounds previously rejected by Judge Pierce. Plaintiff has now moved for an order, pursuant to F.R.Civ.P. 12(f), striking the above-mentioned affirmative defenses.

Defendants represent that they are not attempting to relitigate the issues raised by these affirmative defenses, but rather are acting to insure that the defenses are preserved for appellate review in this case. Defendants have accomplished this by virtue of their answer. However, pursuant to the parties' stipulation, Judge Pierce's decision constitutes the law of this case with respect to the matters raised in these affirmative defenses. Accordingly, plaintiff's motion is granted. Defendants' first, second, third and ninth affirmative defenses are hereby stricken.

It is So Ordered.

Dated: New York, New York
January 19, 1979

CHARLES S. HAIGHT, JR.
U. S. D. J.

DEFENDANTS' LETTER TO JUDGE HAIGHT DATED JUNE 24, 1980

KISSAM, HALPIN & GENOVESE
120 BROADWAY
NEW YORK, N. Y. 10005
212-962-2000
CABLE "LEKISSAM"
TELEX 424039 LEX UI

BY HAND

June 24, 1980

Hon. Charles S. Haight, Jr.
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Re: Reale International Inc. v.
Federal Republic of Nigeria
and Central Bank of Nigeria,
78 Civ. 0023 (CSH)

Dear Judge Haight:

We are the attorneys for defendants in the above-captioned action, and respectfully submit this letter, pursuant to your Honor's general instructions with respect to motion practice, to request a conference to consider defendants' application, pursuant to F.R.Civ.P. Rule 12(h)(3), to dismiss this action for lack of subject matter jurisdiction.

Defendants Federal Republic of Nigeria (Nigeria) is a foreign sovereign state; defendant Central Bank of Nigeria (Central Bank) is an agency of Nigeria. Plaintiff Reale International Inc. (Reale) has brought this action pursuant to the Foreign Sovereign Immunities Act of 1976 (Immunities Act) to recover damages for the alleged anticipatory breach by defendants of a contract for the sale of cement and of a documentary letter of credit which was established as the means of payment for the cement.

Defendants present request is prompted by the determinations made in two recent cases, in each of which plaintiff had asserted jurisdiction pursuant to the same provisions of the Immunities Act which are relevant to the jurisdictional issues herein. The Courts in both actions dismissed the complaints for lack of subject matter jurisdiction. The two opinions, copies of which are Exhibit 1 and 2 hereto respectively, were rendered in:

1. Harris v. VAO Intourist, Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979), by U.S. District Judge J. Weinstein; and

2. Verlinden B.V. v. Central Bank of Nigeria, 79 Civ. 1150, S.D.N.Y., decided by U.S. District Judge E. Weinfeld on April 21, 1980; not yet officially reported.

Defendants respectfully submit that a present review by your Honor of the jurisdictional issues herein is timely and appropriate. The parties are coming to the end of discovery proceedings; U.S. Magistrate N. Gershon, to whom your Honor assigned this case for pretrial preparation, has scheduled a tentative date in mid-August 1980 for the submission of a pretrial order in accordance with your Honor's instructions for the preparation of a pretrial order. If this Court is without subject matter jurisdiction of Reale's claim, as defendants contend, a review of the issue at this time will result in a saving to the Court and the parties of time, effort and expense.

Prior Jurisdictional Ruling Herein

This action was commenced in January 1978. A copy of the Reale complaint is Exhibit 3 hereto. When Reale filed its complaint, Nigeria and Central Bank were defending against three similar actions, wherein claims of anticipatory breach were alleged with respect to cement contracts and letters of credit substantially identical to the cement contract and letter of credit before your Honor in this action. The three actions were consolidated before U.S. District Judge L. W. Pierce of this Court. Each action was brought pursuant to the Immunities Act. Prior to the commencement of this action by Reale, Nigeria and Central Bank had moved to dismiss the three consolidated actions for lack of subject matter jurisdiction and personal jurisdiction over the defendants. Nigeria and Central Bank intended to make substantially the same motion herein. By virtue of the similar questions of law and fact and to avoid duplicative effort by this Court in considering two substantially identical motions, our firm entered into a stipulation with B. H. Hoeniger, Esq., attorney for Reale, on May 16, 1978, whereby we agreed that Judge Pierce's determination of the motion to dismiss in the three consolidated actions would be deemed applicable to this action. Your Honor so ordered the stipulation on May 18, 1978, and a copy thereof is Exhibit 4 hereto.

Judge Pierce had referred defendants' motion to dismiss to U.S. Magistrate Sol Schreiber for consideration and recommendation. Magistrate Schreiber, in a written recommenda-

tion dated September 19, 1978, a copy of which is Exhibit 5 hereto, denied defendants' motion to dismiss. By order of November 6, 1978, Judge Pierce adopted Magistrate Schreiber's recommendation. Your Honor's order of January 19, 1979 herein (Exhibit 6 hereto), noted this disposition by Judge Pierce and also granted Reale's application to strike certain affirmative defenses alleged by defendants in their answer which related to the jurisdictional issues. Your Honor held that defendants' jurisdictional defenses had been preserved for appellate review.

The three consolidated cases were tried before Judge Pierce in September 1979. To date, Judge Pierce has not rendered his decision therein. At trial and in the post-trial submissions to Judge Pierce, both plaintiffs and defendants reasserted their respective positions with respect to jurisdiction pursuant to the Immunities Act. The Harris and Verlinden decisions were rendered after the trial of the consolidated actions. In a separate post-trial submission to Judge Pierce. Nigeria and Central Bank discussed the importance of the determinations in Harris and Verlinden to the question of jurisdiction in the three consolidated actions.

By virtue of Harris and Verlinden, Nigeria and Central Bank respectfully submit that Judge Pierce will be compelled to dismiss the three consolidated actions for lack of jurisdiction. Such a dismissal may not necessarily result in a jurisdictional dismissal of the instant action. We note that Mr. Hoeniger, Reale's attorney herein, is also the attorney for one of the plaintiffs in the cases before Judge Pierce. Mr. Hoeniger has informed our firm informally that should Judge Pierce dismiss the consolidated actions, Reale would not consider that ruling binding herein, in part because Reale views the stipulation herein of May 16, 1978 (Exhibit 4 hereto), to relate solely to Judge Pierce's determination of defendants' pretrial motion to dismiss in the consolidated cases, and not to any subsequent ruling in those cases, even if the effect of the subsequent ruling were to negate Judge Pierce's initial jurisdiction determination.

Nigeria and Central Bank respectfully submit that independent of the ultimate determination on jurisdiction in the three cases before Judge Pierce, and the scope of your Honor's order of January 19, 1978 (Exhibit 6 hereto), F.R.Civ.P., Rule 12(h)(3) requires this Court to dismiss an action whenever it appears that the Court is without subject matter jurisdiction. Defendants respectfully submit further that the recent holdings in Harris and Verlinden with respect

to the same provisions of the Immunities Act as are pertinent herein provide substantial and compelling reasons for a review of subject matter jurisdiction herein. We discuss below the similarities between the facts before Judge Weinfeld in Verlinden and those in the instant case and respectfully submit that the same result is required - a dismissal for lack of subject matter jurisdiction.

Jurisdiction Pursuant to the Immunities Act

The jurisdiction of the United States Federal Courts with respect to claims against foreign states or agencies thereof - both subject matter jurisdiction and personal jurisdiction - is defined in 28 U.S.C. Section 1330(a) and (b):

> "§ 1330. Actions against foreign states
>
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."

Clearly, there is no subject matter jurisdiction of Reale's claims unless one of the exceptions to sovereign immunity defined by Section 1605-1607 applies, and there is personal jurisdiction of Nigeria and Central Bank only if such an exception to immunity is found and the defendants have been properly served.

Harris and especially Verlinden contain detailed analyses of the same exceptions to immunity defined in Section 1605(a) as are asserted by Reale herein as a basis for subject matter jurisdiction.

The Relevant Facts

The parties herein have conducted substantial discovery. A principal source of information with respect to Reale's claims

has been the deposition testimony of Mr. Antonio Reale, Reale's principal executive officer and the individual who acted for and on behalf of Reale with respect to the cement contract and letter of credit at issue. Defendants will promptly provide excerpts from the transcripts of Mr. Reale's deposition testimony should Reale, in opposing this application, take issue with the accuracy of the facts described below.

Reale's claim against Nigeria relates to the agreement between Reale and the Federal Ministry of Defense of Nigeria dated March 8, 1975 (Exhibit 7 hereto) which required Reale to ship to Nigeria a total of 240,000 metric tons of bagged cement from the ports of Gijon or Musel in Spain to Lagos, Nigeria. The agreement was negotiated, made and to be performed entirely outside the United States. The cement contract, at paragraph 2, provides that: "The construction, validity and performance of this contract shall be governed by the Laws of Nigeria . . .". The agreement at paragraph 1(v) provides that payment for the cement would be made by virtue of a documentary letter of credit to be established by Central Bank in favor or Reale "through Banco de Bilbao of Oviedo, Spain."

Pursuant to the terms of the cement contract, Central Bank on May 1, 1975 established its documentary letter of credit No. CBN/BO/75/89 in favor of Reale (Exhibit 8 hereto). The Reale letter of credit contains the same provisions as are stated in the cement contract with respect to monthly shipments of cement from the two ports in Spain, and notes Reale's request that the letter of credit be advised through Banco de Bilbao, Oviedo, Spain. Central Bank designated its correspondent bank, Morgan Guaranty Trust Company of New York (Morgan Guaranty), as the paying bank on the letter of credit and the bank through which all advices and instructions with respect thereto would be transmitted to Reale and to Reale's bank in Spain.

The letter of credit provides, at page 2, that it is subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce, Brochure No. 222 (UCP, 1962 Revision). UCP, 1962 Revision, defines the functions and responsibilities of "paying" and "advising" banks with respect to the operation of documentary letters of credit. Judge Weinfeld in Verlinden found that the functions performed by Morgan Guaranty, which were identical with respect to the Verlinden letter of credit as they were with respect to the Reale letter of credit, were strictly ministerial and that Morgan Guaranty was not an agent of Central Bank in the United States; see, Verlinden, pages 20-30.

In his deposition testimony, Mr. Reale stated that he had designated Banco de Bilbao in Oviedo, Spain as his advising bank on the letter of credit, because at the time the cement contract was made, he intended to acquire the cement in Spain and ship the cement from the two Spanish ports designated in the cement contract and letter of credit. After executing the cement contract, Mr. Reale entered into an agreement with a cement mill in Spain for the cement and an agreement with a shipping company in Spain for the vessels necessary to transport the cement to Nigeria. In addition, Mr. Reale made arrangements at Banco de Bilbao in Oviedo, Spain to have the proceeds of Central Bank's letter of credit assigned, in appropriate amounts, to the Spanish cement mill and Spanish shipping company in payment for the cement and ships. Reale made six shipments of cement from Spain prior to the imposition by Nigeria of its ports embargo in 1975. The payments made pursuant to the Reale letter of credit with respect to these shipments were, in every case, transmitted by Morgan Guaranty directly to Reale's account at Banco de Bilbao in Oviedo, Spain. No payments whatever were made to Reale in the United States.

Relevant Provisions of the Immunities Act

This Court is without subject matter jurisdiction of Reale's claims against Nigeria and Central Bank, unless one of the exceptions to sovereign immunity exists as defined by the Immunities Act, 28 U.S.C. Sections 1605-1607, or an international agreement provides for such jurisdiction. No such international agreement exists between Nigeria and the United States, and Reale does not contend otherwise.

The exceptions to immunity which Reale alleges in its complaint relate solely to those defined by Section 1605(a)(1) and (2):

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United

> States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

These provisions of Section 1605(a) were the specific focus of Judge Weinstein's opinion in Harris and of Judge Weinfeld's opinion in Verlinden. In the three consolidated cases before Judge Pierce, plaintiffs therein also argued that one or more of the exceptions defined by Section 1605(a)(1) and (2) applied; and the parties briefed the jurisdictional issue with respect to these provisions. Magistrate Schreiber recommended that only the third situation defined in Section 1605(a)(2) - commercial activity by the foreign sovereign abroad having a direct effect in the United States, was applicable; and Judge Pierce adopted Magistrate Schreiber's recommendation and sustained jurisdiction in the three consolidated cases solely on that ground.

In Verlinden, Judge Weinfeld made a finding which is particularly relevant to Reale's action. Judge Weinfeld held that the cement contract bound only Nigeria, and that the letter of credit was a separate agreement which bound only Central Bank; Verlinden, pages 39-40. In the instant case, Reale alleges a claim of anticipatory breach against Nigeria with respect to its cement contract, and a separate but similar claim against Central Bank with respect to its letter of credit.

In addition, it is important to note that in Verlinden, there was before Judge Weinfeld a constitutional issue not present herein, i.e., whether there is constitutional authority to permit United States federal courts to entertain a common law claim between aliens for breach of a documentary letter of credit. Verlinden is a citizen of the Netherlands (Reale is incorporated and does business in the state of Connecticut). Pursuant to the U.S. Constitution, there is no diversity jurisdiction in the United States courts with respect to suits between aliens. In Verlinden, Central Bank argued that neither was there a federal question presented, since neither federal law, the United States Constitution nor a treaty defined any substantive right with respect to Verlinden's claim of anticipatory breach of the letter of credit; and the Immunities Act was solely a procedural statute. Judge Weinfeld discussed this

issue in Point I of his opinion, pages 6-17, and held that United States courts have constitutional authority at least to determine whether or not there is sovereign immunity with respect to such a claim. Judge Weinfeld then discussed the exceptions to immunity which Verlinden alleged existed and found as to each that it did not apply. Therefore, pursuant to 28 U.S.C. Section 1330(a), the dismissal in Verlinden was for lack of subject matter jurisdiction.

Defendants discuss briefly each of the provisions of Section 1605(a)(1) and (2) with respect to Reale's separate claims against Nigeria (under the cement contract) and Central Bank (under the letter of credit).

Section 1605(a)(1) - Express or Implied Waiver

Express Waiver

There has been no express waiver of immunity by either Nigeria or Central Bank. To the contrary, Nigeria's Ambassador to the United States has specifically asserted sovereign immunity on behalf of Nigeria and Central Bank as to any claim alleged pursuant to the cement contracts and letters of credit of which the Reale agreements are a part. The Ambassador's affidavit was submitted by Nigeria and Central Bank in the three consolidated cases and, by virtue of the stipulation herein dated May 16, 1978 (Exhibit 4 hereto), the affidavit is deemed to have been submitted herein. Further, Reale does not argue that either of the defendants has expressly waived its immunity.

Implied Immunity

A. As to Nigeria - In the three consolidated actions, the plaintiffs argued that the inclusion of an arbitration clause in the cement contracts and the designation in some of the cement contracts of a law other than that of Nigeria as governing, constituted an implied waiver of immunity by Nigeria. The Reale cement contract (Exhibit 7 hereto) contains a similar arbitration clause - arbitration before the International Chamber of Commerce, Paris; however, the law of Nigeria, not that of a foreign country, is designated as governing the Reale contract.

In Verlinden, the cement contract contained the same arbitration clause and designated the laws of the Netherlands as governing. Judge Weinfeld at pages 37-43 of the Verlinden opinion, analyzes Section 1605(a)(1) and the Legislative History with respect to implied waiver, and found that even with the

designation of a foreign law (the Netherlands) in the Verlinden cement contract, there could be no implied waiver of sovereign immunity with respect to a claim against Nigeria brought in the United States courts. The defendants respectfully submit that Judge Weinfeld's careful analysis of the ambiguous discussion in the Legislative History with respect to implied waiver is correct and that his Honor has properly limited the scope of this provision of the Immunities Act.

The terms of the Reale cement contract provide an even more compelling basis for concluding that Nigeria did not impliedly waive its sovereign immunity by including the arbitration clause in the Reale cement contract.

B. As to Central Bank - The Reale letter of credit contains neither a designation of foreign law as governing nor an agreement to submit disputes to arbitration. As noted above, in Verlinden Judge Weinfeld held that the letter of credit bound only Central Bank and that the letter of credit was a separate and distinct transaction from the cement contract which bound only Nigeria; so that even if there had been an implied waiver of immunity by Nigeria, such waiver would have no effect with respect to a claim against Central Bank under the letter of credit. For the same reasons, defendants respectfully submit that there has been no implied waiver by Central Bank with respect to Reale's claim of anticipatory breach of its letter of credit.

Section 1605(a)(2) - Commercial Activity

This provision of the Immunities Act defines three different situations which constitute exceptions to immunity, and all three relate to commercial activity by the foreign state or agency thereof:

1. Commercial Activity Conducted in the United States -

Both Harris and Verlinden correctly note that for this situation to apply, the foreign state or agency must have conducted commercial activity in the United States, and plaintiff's claim must be based upon that particular commercial activity; see, Harris at page 1061; and Verlinden at pages 20-30. Jurisdiction pursuant to this provision of the Immunities Act does not exist if other commercial activity, unrelated to plaintiff's claim, may have been conducted in the United States by the foreign state or agency thereof.

A. As to Nigeria - Reale's claim against Nigeria relates to the cement contract. No act was performed by Nigeria in the United States with respect to the cement contract. The agreement was wholly negotiated, executed and to be performed outside the United States. The Reale complaint (Exhibit 3 hereto) at paragraph 4, makes broad allegations as to the purported large-scale commercial activity of Nigeria in the United States. However, there is no allegation that any activity relating to the Reale cement contract was performed by Nigeria in the United States; and indeed there was none. Harris and Verlinden are authority for the finding that other commercial activity by Nigeria in the United States, if any, does not confer jurisdiction pursuant to this provision of the Immunities Act with respect to the claims relating to the Reale cement contract.

B. As to Central Bank - The Reale letter of credit was established by Central Bank in Nigeria; the letter of credit was advised through and made payable at Morgan Guaranty; the credit was, at Reale's request, also advised through Banco de Bilbao in Oviedo, Spain; all payments under the letter of credit were to be made, and were made, to Reale's account at Banco de Bilbao in Oviedo, Spain. In Verlinden, at pages 20-30, Judge Weinfeld discussed the functions and responsibilities of Morgan Guaranty as an advising and paying bank pursuant to UCP, 1962 Revision. His Honor held that the activities of Morgan Guaranty were strictly ministerial and did not constitute commercial activity in the United States by Central Bank within the meaning of this provision of the Immunities Act. Defendants respectfully submit that Judge Weinfeld's analysis is correct and that the identical activity by Morgan Guaranty with respect to the Reale letter of credit (solely as a paying and advising bank) is not a basis for sustaining jurisdiction pursuant to this provision of the Immunities Act with respect to Reale's claim against Central Bank.

2. An act performed in the United States in connection with commercial activity elsewhere -

This second situation requires that plaintiff's action be based upon a particular act or acts performed in the United States by the foreign state or agency thereof. The acts which Reale alleges gave rise to its claims of anticipatory breach are identified at paragraph 14 of the Reale complaint (Exhibit 3 hereto); i.e., notifications to Reale of the imposition by Nigeria of a ports embargo and of the embargo regulation requiring all vessels sailing to Nigeria to obtain from Nigerian authorities two months advance permission for sailing. None of these acts

of notification were performed by Nigeria or Central Bank in the United States, and Reale does not contend otherwise. The acts were performed in Nigeria; the embargo was imposed and implemented in Nigeria, and the notes thereof, which Reale complains constituted acts of anticipatory breach, were sent to Reale from Nigeria. Central Bank's advice to Reale of how the embargo regulations would necessarily affect presentments for payment under the Reale letter of credit, was transmitted through Morgan Guaranty, in the same way that all advices with respect to the Reale letter of credit were transmitted through Morgan Guaranty.

In Verlinden, at pages 30-31, Judge Weinfeld held with respect to the identical notices transmitted by Central Bank to Verlinden through Morgan Guaranty, that such activity did not occur in the United States and, therefore, did not satisfy the requirements of this second situation of Section 1605(a)(2).

3. An action based upon a commercial act outside the United States having a direct effect in the United States -

This third situation defined in Section 1605(a)(2) requires that the act of the foreign state or agency which gives rise to plaintiff's claim be performed outside the United States, and, in addition:

(a) be commercial activity; see, Legislative History of the Immunities Act as quoted by Judge Weinstein in Harris at page 1062; and

(b) have a direct and substantial effect in the United States; Harris, pages 1061-1065; Verlinden, pages 30-36.

The acts which Reale alleges gave rise to its claims were acts that were a part of the imposition and implementation by Nigeria and Central Bank of the ports embargo in 1975.

Defendants respectfully submit that these acts were governmental activity of Nigeria and Central Bank, not commercial activity.

In National American Corp. v. Nigeria and Central Bank, 448 F.Supp. 622 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979), wherein judgment was rendered in favor of Nigeria and Central Bank with respect to almost identical claims of anticipatory breach as are alleged herein, Judge Goettel of this Court found

that the imposition by Nigeria of its ports embargo, effected through a Government Notice in August 1975 and a decree in December 1975, was governmental activity by Nigeria; Id., at pages 639-640.

Magistrate Schreiber, in his jurisdictional recommendation to Judge Pierce on the motion to dismiss made by Nigeria and Central Bank in the three consolidated cases, likewise found that the activity by Nigeria in imposing the embargo was governmental activity. At page 5 of his recommendation (Exhibit 5 hereto), Magistrate Schreiber stated:

> "To enforce the embargo, Nigeria declared that all suppliers must henceforth give two months' advance notice of sailing and receive Nigerian permission for departure. Central Bank then cabled instructions to Morgan Guaranty Bank in New York, which in turn informed plaintiffs, that no letters of credit would be honored with respect to vessels transporting cement to Nigeria unless the letters of credit were accompanied by documents showing that Nigeria had been given two months' advance notice of the departure of each vessel and had approved the ship's departure. Plaintiffs contend that these instructions were a unilateral, unauthorized amendment of the terms of the letters of credit and therefore an anticipatory breach of the letters of credit and cement contracts."

Defendants respectfully submit that these findings by Judge Goettel and Magistrate Schreiber are directly relevant to the Reale action, as they were made with respect to the same acts which Reale cites as the basis for its claims herein.

A. As to Nigeria - Defendants respectfully submit that jurisdiction of Reale's claim against Nigeria does not exist pursuant to the third situation defined in Section 1605(a)(2). Reale cites only governmental activity by Nigeria as the basis for its claim.

In Verlinden, at pages 31-36, Judge Weinfeld held with respect to this third situation in Section 1605(a)(2), that the locus of the injury should determine the jurisdictional issue. In Harris, at pages 1061-1065, Judge Weinstein held that collateral effects in the United States do not sustain jurisdiction where the act in question has a substantial and direct effect elsewhere.

In the instant case, Mr. Reale has testified in detail that all of his arrangements with respect to the performance of the cement obligations to Nigeria were made in Spain, including the financial arrangements for payments to be made to the cement mill and shipper. The Reale cement contract and letter of credit contain provisions for the payment by Nigeria of any demurrage that might accrue on vessels detained in Nigerian ports. Mr. Reale testified that by virtue of his arrangements with the Spanish shipper, Reale would receive no part of any payment made by Nigeria for demurrage; all payments once received at Banco de Bilbao would be transmitted directly to the Spanish shipping company. As noted above, all payments under the letter of credit, whether for cement or demurrage, were, at Reale's request, to be made in Spain. Defendants respectfully submit that even if the acts by Nigeria of which Reale complains were commercial activity, the direct and substantial effect of those acts were realized in Spain, not the United States.

B. As to Central Bank - Defendants respectfully submit that the notification by Central Bank to Reale of the embargo regulations concerning advance permission for sailings to Nigeria, described in the Reale complaint (Exhibit 3 hereto) at paragraph 14, were an integral and necessary part of the governmental activity in imposing and implementing the embargo. The announcement of the embargo alone would have had no effect unless the embargo regulations were communicated to those entities, such as Reale, who were sending vessels to Nigerian ports.

In Verlinden, at pages 31-36, Judge Weinfeld found that, by virtue of the fact that payments under the Verlinden letter of credit were to be made in the Netherlands at the Amsterdam bank designated by Verlinden, the direct and substantial effect of the acts of Central Bank (the same acts of which Reale complains herein) took place in the Netherlands, not the United States. Judge Weinfeld's findings are directly relevant to Reale's claim against Central Bank herein. All payments made or to be made under the Reale letter of credit were or would have been transmitted directly to Banco de Bilbao in Oviedo, Spain pursuant to Reale's own instructions.

For all the foregoing reasons, Nigeria and Central Bank respectfully submit that this Court is without subject

matter jurisdiction of Reale's claims and consequently without personal jurisdiction of the defendants.

Respectfully submitted,

KISSAM, HALPIN & GENOVESE

By James G. Simms
James G. Simms
Attorneys for Defendants

JGS/sl
#2836

cc: B. H. Hoeniger, Esq.
Attorney for Plaintiff

U.S. Magistrate N. Gershon

EXHIBIT 7 TO DEFENDANTS' LETTER - PLAINTIFF'S CEMENT AGREEMENT WITH MINISTRY OF DEFENSE OF NIGERIA DATED MARCH 8, 1975

THIS AGREEMENT is made the 8th day of March, 1975, BETWEEN IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria (hereinafter called "the buyer") of the one part

A N D

Reale International Inc, of 508, Folland Street, East Hartford, C.T. 06108, U.S.A.,

represented in Nigeria by

Chief [illegible]

whose registered place of business is

Nos. 8-10, Yakubu Gowon Street, Lagos, Nigeria

(hereinafter called "the seller")

of the other part.

WITNESSETH AS FOLLOWS:

1. The Buyer agrees to buy from the seller and the seller agrees to sell to the buyer cement on the terms and conditions hereinafter expressed.

(i) DESCRIPTION: The cement shall be Portland Cement conforming to B.S.S.12/1958 or B.S.S. 12/1971.

(ii) QUANTITY: 240,000 metric tons, plus or minus 10% at seller's option.

(iii) PRICE: The price shall be $ U.S. 59.50 ..... per metric ton C.I.F. Lagos/Apapa Free Out (Incoterms 1953), making a total sum of $.U.S. 14,280,000.00 ....., plus or minus 10%.

(iv) PACKING: In 6-Ply kraft paper bags each containing 50 kgs G/W. Also 3-Ply empty spare bags, to be supplied free of cost, equal to 3 per cent of total number of filled bags comprising each consignment.

(v) TERMS OF PAYMENT: By virtue of a revolving Performance Bond, in the sum of $ U.S. 35,700.00 (representing one-twelfth of 3% of the total purchase price) already deposited by the seller with the Central Bank of Nigeria, Lagos, the buyer undertakes to establish, within twenty-one (21) days from the date hereinbefore mentioned, an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Banco de Bilbao ..... of Oviedo, Spain. .....

.....

Drafts drawn under the Letter of Credit shall be payable at sight, on presentation to the bank designated above of Invoices, Clean on Board Bills of Lading and Insurance Certificates.

(vi) SHIPMENT: Shipment to commence within 30 days after receipt of the Letter of Credit in Oviedo, Spain, by the seller. Delivery shall be at the rate of .....20,000..... metric tons per annum, plus or minus 10% at seller's option.

(vii) INSURANCE: Insurance by the seller shall be from .....Gijon and/or Musel..... ..... to the Lagos/Apapa Quays. The buyer shall insure the goods against all risks during discharge at the Lagos/Apapa Quays, and therefrom to his warehouse.

(viii) UNLOADING: The buyer shall arrange the discharge of the cement from the carrying vessel at the port of destination at his own risk and expense. The buyer shall also be responsible for clearing the goods from Customs and complying with all necessary formalities, and shall pay all clearance charges,

Customs duties, and harbour and anchorage dues.

(ix) DEMURRAGE: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons, or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbourmaster, whether the vessel is berthed or not), demurrage not exceeding $ U.S. 4,100.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each such consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the bank designated in sub-clause (v) above of time-sheets and statements of facts duly certified as correct by the ship's master, and by the ship's agents in Lagos.

2. The construction, validity and performance of this contract shall be governed by the Laws of .....Nigeria,..... and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient.

IN WITNESS WHEREOF IBRAHIM M. DAMCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria has hereunto set his hand and seal, and .....ANTONIO RIVA..... for and on behalf of .....Reale International Inc..... has set his hand and seal the day and year first above appearing.

SIGNED SEALED AND DELIVERED by the said IBRAHIM M. DANCIDA, Permanent Secretary, Ministry of Defence, Lagos, for and on behalf of the Federal Military Government of the Federal Republic of Nigeria.

In the presence of ..... C. G. LALIN-SMITH

SIGNED SEALED AND DELIVERED

by ..... ANTONIO REALE

for and on behalf of ..... Reale International Inc.

in the presence of ..... Chief A. M. A. AKINLOYE

EXHIBIT 8 TO DEFENDANTS' LETTER - CENTRAL BANK OF NIGERIA'S DOCUMENTARY CREDIT ESTABLISHED IN FAVOR OF PLAINTIFF

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos 000036
PRIVATE MAIL BAG 1231 : CABLES : CENBANK :
TELEPHONE CONFIDENTIAL

PLTF EXBT 8/24/79 for Ident.
DEFT EXBT 28 I. LESSER

Date: 1 MAY 1975

DOCUMENTARY CREDIT

Confirmation of Telex of: 29 APR 1975

The President,
Morgan Guaranty Trust Co.,
23, Wall Street,
New York.
U. S. A.

(Correspondent Bank)

CREDIT NO.
CBN/DC/75/89

Dear Sirs,

We hereby request you to advise our irrevocable/transferable/~~irrevocable~~ abroad divisible ~~indivisible~~ Documentary Credit in favour of Reale International Inc. 503 Tolland Street, East Hartford, CT.06108 U. S. A.

for U. S. $.14,280,000.00

Fourteen million, two hundred and eighty thousand American Dollars
(Amount in words)

available by their draft(s) at ..... SIGHT ..... for 100 %
(No. of days)

of the CIF/FOR Invoice drawn on yourselves accompanied by the following documents (at least in duplicate unless otherwise indicated).

Commercial Invoice in quadruplicate

~~[illegible]~~

#6 ~~Insurance [illegible]~~ Certificate in duplicate covering ALL RISKS as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%.

Full set clean-on Board Bills of Lading made out to order and endorsed in blank. ~~[illegible]~~ "Freight Prepaid/~~[illegible]~~" dated latest 15th June, 1976 Claused "notify The Permanent Secretary, Ministry of Defence, Lagos"

#9 Covering [illegible] Cement plus or minus ten per [illegible] at U.S./59.50 per metric ton [illegible] of [illegible] metric tons of Portland [illegible] conforming to B.S.S.12/1958 or B.S.S.12/1971 [illegible] overleaf)

#10 From United States of America ..... to ..... Apapa/Lagos Port 000037

Part shipment is ~~[illegible]~~/Permitted

CONFIDENTIAL

Transhipment is Prohibited/~~[illegible]~~

This credit is valid in .... United States of America ..... until 30th June, 1976 (date) ..... for presentation for payment in accordance with the conditions endorsed hereon.

Draft(s) presented must be drawn under this letter of credit (stating its number and date), and the amount(s) entered thereon must be endorsed by the correspondent bank.

We undertake that all drafts drawn in compliance with the terms of this credit will be honoured on receipt of the agreed shipping documents. The correspondent bank is required to send the original documents to us by Express Registered Airmail (duplicate by following airmail).

Please advise beneficiary (without adding your confirmation) of our authority given to you to pay on sight of documents.

Additional Instructions:

Part payments allowed.

Credit to be advised through Banco de Bilbao, Ex Oviedo, Spain.

All documents to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos.

Special Instructions:

Please see attached Appendix.

Except otherwise stated this credit is subject to uniform customs and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222.

Yours faithfully,

Bill[illegible]anager.

30/4/75

Countersigned:

Asst. Chief of Bo[illegible] Operations.

CENTRAL BANK OF NIGERIA, LAGOS.

C00038

CONFIDENTIAL

A P P E N D I X

In Respect of Letter of Credit No. CBN/BO/75/89

Special Instructions:

(1) Packing: Packing shall be in 6-Ply Kraft paper bags each containing 50 kgs G/W and also 5-ply empty spare bags to be supplied, free of cost, equal to 3% of total number of filled Bags comprising each consignment.

(2) Shipment: Shipment to commence within 30 days after receipt of the Letter of credit in Oviedo, Spain by the seller. Delivery shall be at the rate of 20,000 metric tons per monsem plus or minus 10% at seller's option.

(3) Insurance: Insurance by the seller shall be from Gijon and/or Nugel to the Lagos/Apapa Ports. The buyer shall insure the goods against all risks during discharge at Lagos/Apapa Ports and therefrom to his warehouse.

(4) "Demurrage: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour Master, whether the vessel is berthed or not), demurrage not exceeding U.S.$4,100.00 per diem shall be for the account of the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit on presentation of statements of facts duly certified as correct by the Ship's master and by the Ship's agents in Lagos."

CENTRAL BANK OF NIGERIA

PLAINTIFF'S LETTER TO JUDGE HAIGHT DATED JULY 15, 1980.

OFFICE COPY

BERTHOLD H. HOENIGER
ATTORNEY AT LAW
505 PARK AVENUE
NEW YORK, N.Y. 10022
(212) 838-5324

Rec'd by hand
SERVED 7-16-80
FILED
DOCKET 7-16-80
DIARY

July 15, 1980

Hon. Charles S. Haight, Jr., U.S.D.J.
United States Courthouse
Foley Square
New York, New York 10007

Re: Reale International, Inc. v.
Federal Republic of Nigeria
and Central Bank of Nigeria
78 Civ. 0023 (CSH)

Dear Judge Haight:

I am the attorney for plaintiff, Reale International, Inc. Your law secretary, Richard L. Klein, Esq., has advised that Your Honor is treating Mr. Simms letter dated June 24, 1980 as a motion to dismiss the action for lack of subject matter jurisdiction, and that plaintiff's opposing submission might likewise take the form of a letter, with appropriate exhibits annexed. This letter constitutes the plaintiff's opposition to the defendants' (renewed) motion to dismiss for lack of subject matter jurisdiction

I.

By Memorandum Opinion and Order dated January 19, 1979 (Exhibit A hereto), this Court struck from defendants' answer the affirmative defenses of lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, non-justiciability by virtue of the act of state doctrine, and failure to state a claim upon which relief may be granted. The decision embodied in that Memorandum Opinion and Order constitutes the law of the case, and may not now be reopened at the District Court level. Molesphini v. Bruno, 26 F. Supp. 595 (E.D.N.Y. 1939); Phoenix Hardware Co. v. Paragon Paint & Hardware Corporation, 1 F.R.D. 116, 118 (E.D.N.Y. 1939); Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500 (E.D.N.Y. 1975); Riss & Co., Inc. v. Association of Western Railways, 162 F. Supp. 69, 71-72 (D.C. 1958).

RTHOLD H. HOENIGER

Defendants contend that the usual law of the case rule does not apply to the defense of lack of subject matter jurisdiction, and point for support to F.R.Civ.P. 12(h)(3), which provides:

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Nothing in Rule 12(h)(3) indicates that any "suggestion" should be entertained by the Court after such issue has been decided and become the law of the case. Assuming, without concluding, that a "suggestion" of lack of subject matter jurisdiction under Rule 12(h)(3) may be renewed even after that issue has already once previously been determined adversely to defendants, nevertheless such "suggestion," applies only to subject matter, not to personal, jurisdiction. O'Connor v. Western Freight Association, 202 F. Supp. 561 (S.D.N.Y. 1962); Zelson v. Thomforde, 412 F.2d 56 (3d Cir. 1969).

Defendants, themselves, recognize this crucial distinction. They strain to persuade this Court that Judge Weinfeld's dismissal in Verlinden was really based on subject matter rather than personal jurisdiction. The very opposite of what defendants contend was found by Judge Weinfeld, namely that there was subject matter jurisdiction, but that there was not personal jurisdiction, in Verlinden. Judge Weinfeld's own words leave no doubt on this score. Judge Weinfeld said:

> "We hold that the presence of aliens on both sides of this dispute does not deprive the Court of subject matter jurisdiction.
>
> II
>
> That determination, however, does not end inquiry. There remains for consideration the defendant's further motion to dismiss the complaint for lack of in personam jurisdiction.
>
> (Verlinden opinion, p. 17; footnotes omitted.)

* * *

> The motion of the defendant [Central Bank of Nigeria] to dismiss the complaint for lack of personal jurisdiction under the Foreign Sovereign Immunities Act is granted."
>
> (Verlinden opinion, p. 44; emphasis supplied.)

However much defendants attempt to obscure Judge Weinfeld's plain words, the Verlinden dismissal was unequivacally for lack of personal jurisdiction. Judge Weinfeld expressly found that subject matter jurisdiction did exist. Since a Rule 12(h)(3) suggestion is limited to subject matter jurisdiction, and since the normal law of the case rule applies to questions of personal jurisdiction, defendants may not now reopen that settled question. In accordance with defendants' stipulation herein, the determination of Judge Pierce in the East Europe/Nikkei/Chenax cases became the law of this case, and was so adopted by this Court in its Memorandum Opinion and Order of January 19, 1979 (Exhibit A hereto).

II.

Verlinden was an action by a Dutch corporation, not doing or qualified to do business in the United States, against Central Bank of Nigeria. The Federal Republic of Nigeria itself was not named a defendant. Judge Weinfeld's decision of dismissal, based on lack of personal jurisdiction, is now on appeal. Contrary to the broad remedial purpose of the Foreign Sovereign Immunities Act of 1976, Judge Weinfeld found lack of personal jurisdiction under a fact pattern which clearly would have supported quasi-in-rem jurisdiction, based on attachment of Central Bank's funds in New York, under pre-Act law, and under Shaffer v. Heitner standards. See National American Corp. v. Nigeria and Central Bank, 448 F. Supp. 622 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979); Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977); Lime International Corp. v. Bank in Liechtenstein A.G., 77 Civ. 5499 (CSH), opinion filed by Your Honor on June 29, 1978. Here, it would be inappropriate to attack Judge Weinfeld's Verlinden opinion. Rather, we are content here to point out the most crucial distinctions between Verlinden and the instant case -- distinctions which, for the most part, Judge Weinfeld himself expressly noted in his opinion.

1. Verlinden B.V. is a Dutch corporation; Reale International, Inc., a United States (Connecticut) corporation. Judge Weinfeld found this distinction crucial. His opinion states:

> "None of the many other lawsuits brought in the aftermath of the Nigerian cement crisis (22) and cited by plaintiff is parallel to this action. In all but one of those brought in United States courts the

(22) See, e.g., National American Corp. v. Federal Republic of Nigeria, 420 F.Supp. 954 (S.D.N.Y. 1976); id., 425 F.Supp. 1365 (S.D.N.Y. 1977); id. 448 F.Supp. 622 (S.D. N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979); East Europe Import-Export, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria, No. 77 Civ. 2809 (S.D.N.Y.) (consolidating three cases) (decision pending); Reale International, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria, No. 78 Civ. 23 (S.D.N.Y.) (decision pending). (Footnote by Judge Weinfeld.)

plaintiff was a domestic corporation allegedly injured by Nigeria's breach of the cement contract. (Opinion, p. 12; emphasis supplied.)

* * *

Plaintiff's task is burdened by the fact that the underlying activity which gave rise to its claim of anticipatory breach of the letter of credit occurred outside the United States. The parties are foreigners. Plaintiff, a Dutch corporation, negotiated and executed the cement contract in Nigeria. (Opinion, p. 21; emphasis supplied.)

* * *

In urging jurisdiction under the third commercial exception [of §1605(a)(2)], plaintiff relies principally upon two decisions, neither of which is dispositive here. First, Verlinden points to Judge Goettel's observation, made in a case with facts quite different from those of the instant action, that '[t]he breach of a letter of credit having a New York beneficiary, advised by and payable through New York banks, would appear to satisfy the last [of the three] criteria of 28 U.S.C. §1605(a)(2) ....(74) Apart from the fact that this is dictum, recognized as such by Judge Goettel, the plaintiff, the named beneficiary in the letter of credit, was a New York corporation. New York was the final destination for payment under that credit, the locus of the injury occasioned by the alleged breach of the credit, and the home state of the beneficiary. Thus, the act of anticipatory repudiation had a direct effect in New York. None of those factors obtains here. Although Judge Goettel's holding in that case actually was based upon pre-Immunities Act law, his dictum is consistent with those subsequent cases, already discussed, in which courts have held that the locus of the injury is crucial in determining whether jurisdiction exists under the third 'commercial activity' exception of the Act. (75)" (Opinion, p. 34; emphasis supplied.)

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(74) National American Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 639 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979).

(75) See note 68, supra.

(Footnotes by Judge Weinfeld.)

BERTHOLD H. HOENIGER

2. In Verlinden, suit was brought only against Central Bank, for repudiation and anticipatory breach of its irrevocable letter of credit. That letter of credit, unlike the cement contract, contains neither a stipulation of the governing law nor an International Chamber of Commerce ("ICC") arbitration clause. Judge Weinfeld held that these clauses in the Nigeria-Verlinden cement contract did not carry over to the Central Bank letter of credit issued pursuant to, and as the means of payment under, the cement contract. (Opinion, pp. 39-40.) Hence, he concluded that there had been no implicit waiver of sovereign immunity by Central Bank under 28 U.S.C. §1605(a)(1). That holding rendered superfluous any further discussion of implicit waiver of sovereign immunity by Central Bank.

However, Judge Weinfeld nonetheless went on to state that in any event, he would not consider either the stipulation of Dutch law or the clause for arbitration of all disputes by "the International Chamber of Commerce, Paris, France," in the cement contract, as an implicit waiver of immunity by Nigeria to suit in American courts. (Opinion, pp. 40-43.) Judge Weinfeld recognized that his reading of §1605(a)(1) in this respect is in direct conflict with that of Judge Gasch in Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.C. 1978). (Opinion, pp. 41-42.) Judge Weinfeld read the ICC arbitration clause in the cement contract as a stipulation by the parties that such arbitration should occur in France, and that the ICC Court of Arbitration was "a forum" or a "tribunal" in and of France. (Verlinden opinion, p. 43.)

Here, in Reale, suit is brought both against Central Bank on its irrevocable letter of credit, and also against Nigeria on the underlying cement contract. The same mimeographed form of contract apparently was used in all 68 or more 1975 cement contracts which led to the Nigerian cement fiasco, including the contracts with National American, Ipitrade, Verlinden, East Europe, Nikkei and Chenax. The Reale cement contract is annexed as Exhibit B. The arbitration clause provides that

> " ... all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce,

BERTHOLD H. HOENIGER

Paris, France, in accordance with its Rules at the date thereof. The parties hereto agree that service of any notices in the course of such arbitration at their addresses as given in this contract shall be valid and sufficient." (Emphasis supplied.)

The ICC Secretariat is located at 38, Cours Albert Ier, Paris, France. Contrary to Judge Weinfeld's reading, the phrase "the International Chamber of Commerce, Paris, France," in the foregoing clause does not indicate an intent that the arbitration shall occur in France, but is merely an indication of where the ICC's world headquarters is located. Annexed hereto as Exhibit C are the outside cover page, inside cover page, page 16 and outside back cover of the Rules for the ICC Court of Arbitration. Article 12 of the Rules provides:

"Place of arbitration.

The place of arbitration shall be fixed by the Court, unless agreed upon by the parties."

Annexed hereto as Exhibit D are the relevant portions of an ICC brochure entitled "ICC arbitration". Page 22 of this explanatory booklet states, under the heading "Place of arbitration":

"The place where the proceedings take place before the arbitrators can be fixed by the parties or the Court anywhere in the world.

It is entirely independent of the place where the Court meets and wnere its Secretariat is located."
(Emphasis supplied.)

We submit that Nigeria, an English-speaking country, contracting with Reale, a U.S. corporation, under a contract in English, not stipulating French law, and having no contact with France, did not intend to provide that the ICC arbitration itself should take place in France, and, indeed, would have no reason for picking France as the place of arbitration. Certainly Reale did not so intend. Any doubt on this score must be resolved against Nigeria, which prepared this form contract of adhesion.

BERTHOLD H. HOENIGER

Thus, the contract calls for ICC arbitration, but does not specify where the arbitration is to take place (like two-thirds of all contracts containing ICC arbitration clauses; see Exhibit D). Under the ICC Rules, the place of arbitration is left to the ICC arbitrator(s). Such an arbitration clause is clearly an implicit waiver of sovereign immunity under §1605(a)(1). In Libyan American Oil Company v. Socialist People's Libyan Arab Jamahirya, 482 F.Supp. 1175, 1178 (D.C. 1980), the Court said:

> "A recent case in this Court also supports this view. In Ipitrade Int'l, S.A., v. Federal Republic of Nigeria, 465 F.Supp. 824 (D.D.C. 1978), an action for enforcement of an arbitral award based on breach of contract, the Court held that the foreign sovereign's 'agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by arbitration under International Chamber of Commerce rules constitute[d] a waiver of sovereign immunity under the Act.' 465 F.Supp. at 826. As in the present case, the award was granted in a foreign jurisdiction but sought to be enforced here. In the case at bar, the arbitration clause agreed to by Liamco and Libya was a special amendment to the original concession. The 1955 agreement had provided that any eventual arbitration should take place in Libya's capitol, Tripoli. The clause that LIAMCO proposed in 1966, however, provided that arbitration should take place either where the parties agreed, or where the arbitrators might agree. Libya agreed to this provision. Although the United States was not named, consent to have a dispute arbitrated where the arbitrators might determine was certainly consent to have it arbitrated in the United States.
>
> Libya thus waived its defense of sovereign immunity for the purposes of § 1330(a) and because there is no suggestion that the requirements of notice under § 1330(b) have not been met, this Court has jurisdiction to recognize and enforce the award."
>
> (Emphasis supplied.)

BERTHOLD H. HOENIGER

III.

Defendants also invoke Harris v. VAO Intourist, Moscow, 481 F.Supp 1056 (E.D.N.Y. 1979), in support of their "suggestion" of lack of subject matter jurisdiction here. The gist of Harris is pithily summarized by Judge Jack B. Weinstein in the first two sentences of his opinion as follows, 481 F.Supp. at 1057:

> "Raymond DeJongh, an American tourist, died as a result of a fire in the Moscow National Hotel where he was a guest. Alleging that 'one or more of the defendants owned, leased, operated, managed, maintained and controlled' the National Hotel negligently, plaintiff's testator seeks damages."

Harris is a classic example of a non-commercial, negligence action for personal injuries and death of an American tourist in Moscow.

Section 1605(a)(5) of the Immunities Act governs such actions for non-commercial torts. That section grants courts of the United States jurisdiction over, and denies sovereign immunity as to, claims

"for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state ...". (Emphasis supplied.)

The Act makes no provision whatever for non-commercial torts which occur outside the United States. As the House Report shows at pages 20-21, the section was aimed primarily at traffic accidents in the United States caused by diplomatic or consular vehicles and personnel of foreign states. Judge Weinstein did not discuss §1605(a)(5). Yet it is obviously that section which governs Harris-type claims, and which denies sovereign immunity only if the personal injury or property damage occurred in the United States. For the Court's convenience, a copy of the Immunities Act is annexed as Exhibit E, and a copy of the House Report, which constitutes the legislative history, as Exhibit F.

In short, and with great deference, we submit that Judge Weinstein came to the right result in Harris -- the result compelled by §1605(a)(5) -- on the basis of the wrong reasons, namely his analysis of §1605(a)(2), which deals strictly with claims arising out of "commercial activity" and does not even purport to govern non-commercial torts such as that involved in Harris. Hence, Judge Weinstein's discussion of §1605(a)(2) is at best complete dictum, unnecessary and irrelevant to the actual decision of the case, which is governed by §1605(a)(5).

IV.

There has never been any prior occasion to present jurisdictional facts herein to this Court. It is, therefore, appropriate to summarize a few of these key jurisdictional facts now.

BERTHOLD H. HOENIGER

1. During and prior to 1974, Reale had, as a subcontractor, supplied cement to the State of Lagos, a political subdivision of Nigeria, and also to a private business entity in Nigeria. In both cases, Reale obtained this cement from a Spanish cement mill, S.A. Tudela Veguin. Reale was also engaged in, or negotiating, other projects in Nigeria, including the supply and erection of prefabricated concrete housing for a Nigerian governmental housing agency

2. In or about December 1974, Reale and Nigeria's Ministry of Defense first discussed a possible cement contract, and such contract was executed on March 8, 1975 (Exhibit B).

3. On March 26, 1975, Central Bank requested Morgan Guaranty to furnish credit information on Reale. Morgan Guaranty responded by letter of April 15, 1975 to Central Bank (Exhibit G).

4. On or about April 29, 1975 Central Bank cabled Morgan to advise Reale that an irrevocable letter of credit for $14,280,000, plus an open-ended amount for demurrage, had been opened in Reale's favor. Under date of 29th April 1975 Central Bank wrote Morgan, confirming said cable and forwarding to Morgan the letter of credit (Exhibit H). This Central Bank letter to Morgan states in part:

> "In consideration of your advising the credit, please debit our account and advise us accordingly with the amounts of payment effected thereunder together with your commissions and charges on receipt of relevant shipping documents." (Emphasis supplied.)

Thus, the letter of credit was to be paid out of funds maintained by or at the disposal of CBN in the United States, and specifically in New York.

5. In the 1975-76 period, Nigeria maintained balances ranging between $500,000,000 and $1,000,000,000 with the Federal Reserve Bank of New York. Morgan Guaranty had the right to draw on these Federal Reserve balances as required to replenish Central Bank's account, originally with a daily drawing limit of $1,000,000, later raised to a daily limit of $5,000,000, and finally changed to an unlimited amount. See testimony of George W. Ryan at the National American trial before Judge Goettel,

an official of the Federal Reserve Bank of New York, trial minutes 308-332, annexed hereto as Exhibit I. Mr. Ryan's testimony further shows that these Nigerian funds at the Federal Reserve Bank of New York, often reaching or exceeding $1,000,000,000, were maintained in the name and account of Central Bank of Nigeria in New York until February 1976, when the name of the account was changed to Federal Republic of Nigeria, but without any substantive change in its operation or in Morgan's drawing rights thereto. Mr. Ryan's testimony is confirmed by the National American trial testimony of Paul Winston Fitzpatrick, Morgan Guaranty's vice president in charge of the African region, trial minutes pp. 209-231, annexed hereto as Exhibit J.

6. To return to our chronological exposition of a few key jurisdictional highlights: As we have seen from Exhibit H, Central Bank specifically instructed Morgan that payment under the Reale letter of credit for $14,280,000, plus an open-ended amount for demurrage, were to be made out of the Central Bank funds at Morgan or at the Federal Reserve Bank of New York, as to which Morgan had unlimited drawing rights, and which often aggregated $1,000,000,000 or more. There can be no question that Central Bank thus knowingly and intentionally availed itself of the protection of New York and American law in keeping these huge funds in New York and in providing that the payments under the Reale letter of credit, 13 other cement letters of credit also advised by Morgan for Central Bank, and other letters of credit so advised by Morgan for Central Bank, were to be made out of Central Bank's funds in New York.

This deliberate choice by Central Bank to avail itself of the protection of New York and United States law is highlighted by the fact that the cement contract (Exhibit B) called for the letter of credit to be advised through Banco de Bilbao, Spain, and that defendants' "insertion and use of Morgan Guaranty as the advising and paying bank were solely the defendants' unilateral decision and act, ... had not been requested by or discussed with plaintiff, and, upon information and belief, were done as a matter of convenience to defendants in pursuance of their practice to use their U.S. correspondent and agent, Morgan Guaranty, as the advising and paying bank for all letters of credit issued under cement contracts with U.S. suppliers." (Complaint, ¶9, which must be taken as true for purposes of the defendants' present "suggestion" to dismiss.) See Justice Stevens' concurring opinion in Shaffer v. Heitner, 433 U.S. 186 at 219 (1977), quoted

by Your Honor in Feder v. Turkish Airlines, supra, 441 F.Supp. 1271 at 1278.

7. By letter dated May 8, 1975 (Exhibit K), Morgan advised Reale of the establishment of this irrevocable letter of credit. The penultimate sentence reads in relevant part:

> "Your drafts must indicate that they are drawn under the aforementioned Irrevocable Credit ..., and must be presented to our Commercial Credits Department, 15 Broad Street, New York, N.Y. 10015 with specified documents ...". (Emphasis supplied.)

Thus, payments under this letter of credit could only be made by and at Morgan Guaranty, in New York, out of Central Bank's New York funds held by Morgan or held by Federal Reserve subject to Morgan's unlimited drawing rights.

8. Further, although the letter of credit states that it is subject to the Uniform Customs and Practice for Documentary Credits ("UCP"), the parties are agreed that the UCP does not govern issues of breach or damages, and that, with respect to those issues, the plaintiff's claim against Central Bank in this action is governed by New York law. See Mr. Simms' representations to Judge Pierce at the trial of the East Europe/Nikkei/Chenax actions, trial minutes 9-16, 536-541, and defendants' second trial memorandum at said trial, collectively annexed hereto as Exhibit L.

9. The cement contract and letter of credit provided for Reale's sale and Nigeria's purchase of 240,000 tons of cement at a price of $59.50 per ton cif Lagos/Apapa, so that Reale had to provide the cement, the transport to Lagos, and insurance. With respect to the cement, Reale once again contracted with Tudela Veguin for said 240,000 tons at an F.O.B. Spain cost of $31.25 per ton. Reale likewise entered into a contract of affreightment with Romualdo Alvargonzalez, SA to transport said cement to Spain at a cost of $19.60 per ton. Reale arranged with the Firemen's Fund Insurance Company, a U.S. company, for Open Policy No. 12459 to cover all of said shipments of cement; one of the certificates issued under said Open Policy is annexed hereto as Exhibit M. This left Reale a profit of $8.65 per ton,

BERTHOLD H. HOENIGER

or an aggregate of $2,034,000, as the differential between the F.O.B. cost of cement and cost of transporting it to Nigeria and the agreed purchase price of $14,280,000.

10. Reale, Tudela Veguin and Romualdo Alvargonzalez entered jointly into an arrangement with Banco de Bilbao, pursuant to which Reale transferred the entire letter of credit to Banco de Bilbao with instructions from the three entities that out of each payment received, $31.25 per ton was to be remitted to Tudela Veguin, $19.60 to Romualdo Alvargonzalez, and $8.65 held for the account of Reale and ultimately remitted to Reale in the United States. There can thus be no question that the locus of the injury to Reale was the United States, where it should have received its profit of $8.65 per ton aggregating some $2,034,000, but were Nigeria's breach and CBN's repudiation prevented that profit on more than three-quarters of the cement contract and letter of credit from being earned and received.

11. Finally, while it is true that Morgan Guaranty was and is the correspondent bank for Central Bank -- indeed the sole commercial correspondent in the United States --, it is not true that Morgan was only a correspondent bank. Some of the many activities, including the regular and systematic training of Central Bank personnel, which Morgan carried on for Central Bank, are already suggested by Mr. Fitzpatrick's testimony, Exhibit J hereto. A further glimpse of the great variety and scope of these activities may also be gathered from a random sampling of documents from Morgan's files, obtained through subpoena, and collectively annexed as Exhibit N.

12. In short, we are dealing here with an irrevocable letter of credit which (a) defendants unilaterally caused to have advised through and to be made payable at Morgan Guaranty in New York, although the underlying contract called for the same to be advised and made payable through a Spanish bank; (b) was to be payable solely out of the enormous funds kept by CBN in New York; (c) was payable in U.S. dollars, (d) to a U.S. beneficiary, (e) at Morgan Guaranty's Commercial Credits Department, 15 Broad Street, New York, New York, and nowhere else; (f) is governed as to breach and damages -- the issues presented by this action as regards Central Bank -- by New York law; and (g) was issued as the payment term of a contract between Reale

BERTHOLD H. HOENIGER

and Nigeria which calls for arbitration of "all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract" before the ICC, headquartered in Paris, France, pursuant to ICC Rules which, since no specific place of arbitration is designated, leaves the choice of place to the ICC arbitrator(s), thus constituting a clear implicit waiver by Nigeria of its sovereign immunity to suit in U.S. courts with respect to any such disputes -- which, we submit, includes not only the plaintiff's instant claim against Nigeria for breach of cement contract, but also the plaintiff's claim herein against Nigeria's agency and instrumentality, Central Bank, for repudiation of the payment term of that contract, i.e., the letter of credit.

13. There can be no question that the contacts here with the United States are overwhelmingly greater than those in J. Zeevi & Sons v. Grindlays Bank (Uganda) Ltd., 37 N.Y. 2d 220, 371 N.Y.S. 2d 892, cert. den., 423 U.S. 866 (1975), in which the New York Court of Appeals unanimously held that the repudiation by an Ugandan bank of an irrevocable letter of credit in favor of Israeli nationals, which the Ugandan bank had caused to be advised and made payable through its New York correspondent bank, and had then repudiated, pursuant to orders of the Ugandan government, was governed by New York law, that the New York courts had jurisdiction, and that the defense of act of state was unavailable. Although Judge Weinfeld, in his Verlinden opinion, questions that Zeevi still represents New York law, and also differs with the unanimous New York Court of Appeals as to what the public policy and interest of New York are, Zeevi was twice cited with approval by the New York Court of Appeals in Ehrlich-Bober & Co. v. University of Houston, ___ N.Y. 2d ___ (April 3, 1980), New York Law Journal, April 23, 1980, annexed hereto as Exhibit O. Indeed, Zeevi has been consistently followed by the New York courts; see, e.g., Mirabella v. Banco Industrial de la Republica Argentina, New York Law Journal, April 13, 1979 (Sup. Ct., N.Y. Co.; not officially reported), annexed hereto as Exhibit P.

In Zeevi, the beneficiary of the letter of credit was Israeli; here, it is an American corporation. Thus, what was said in Zeevi applies a fortiori here. In both cases, defendants' wrongful breach and repudiation of legally irrevocable obligations converted New York, and the United States, from the agreed

BERTHOLD H. HOENIGER

place of payment into the locus of repudiation.

V.

Defendants, in Mr. Simms' letter of June 24, 1980, suggest that the defendants' breach and repudiation did not arise in the context of commercial activity. Re-examination of this Court's prior ruling, pursuant to the parties' stipulation, dismissing the defense of the act of state doctrine, is no longer open; the act of state doctrine does not go to subject matter jurisdiction and is, therefore, not even arguably covered by F.R.Civ.P. 12(h)(3).

Even if not precluded by the law of the case, the suggestion that plaintiff's claims do not arise out of defendants' breaches and repudiation in the context of commercial activity is too patently specious to require extended comment. As Judge Weinfeld said at page 4 of his Verlinden opinion:

> "It can hardly be questioned -- and the parties do not seriously dispute the fact -- that these unilateral amendments [by Central Bank] to the irrevocable letter of credit constitute violations of the Uniform Customs and Practice for Documentary Credits the terms of which, by stipulation of the parties, are applicable."

See also Judge Weinfeld's brief discussion of "commercial activity" at page 20 of his Verlinden opinion; obviously, unless Judge Weinfeld had found that Verlinden's claim against Central Bank arose out of commercial activity, the entire discussion following page 20 would have been superfluous.

VI.

In Verlinden, Judge Weinfeld found that the claim of Verlinden, a Dutch corporation, in the courts of the United States, was not covered by any exception to the doctrine of sovereign immunity provided by the Immunities Act, that hence

BERTHOLD H. HOENIGER

Central Bank was entitled to sovereign immunity, and hence was not subject to in personam jurisdiction by this Court, although subject matter jurisdiction exists.

Judge Weinfeld is the only tribunal to have reached such conclusion, either in the United States (see cases hereinbefore cited) or in the United Kingdom, West Germany, or Switzerland. Annexed hereto as Exhibit Q is the decision of Great Britain's Court of Appeal in Trendtex Trading Corporation v. Central Bank of Nigeria (1977). By letter dated June 11, 1980, I was advised by Mr. Simms that the apparently identical result -- denial of sovereign immunity -- was also reached by the Court of Appeal in Hispano-American Mercantile, S.A. v. Central Bank of Nigeria, and that Central Bank has taken an appeal to the House of Lords.

Annexed hereto as Exhibit R is the decision of the Landgericht (District Court) of Frankfurt, West Germany, dated 25 August 1976 in Yousef M. Nada Establishment v. Central Bank of Nigeria, likewise denying sovereign immunity and awarding plaintiff, a Liechtenstein organization, damages of almost $13,000,000, plus interest, for Central Bank's repudiation of its irrevocable letter of credit which it advised and made payable through, but which was not confirmed by, a West German bank.

Annexed hereto as Exhibit S is the award of Dr. Max Brunner, a Swiss lawyer, in the ICC arbitration between Ipitrade and Nigeria. Dr. Brunner, applying Swiss law, likewise found that Nigeria was not entitled to sovereign immunity. (Dr. Brunner's award subsequently gave rise to Judge Gasch's decision in the United States District Court for the District of Columbia, previously cited.)

It remains to be seen whether the Second Circuit, and perhaps the Supreme Court, will ultimately agree with Judge Weinfeld's reading of the Immunities Act when the plaintiff is a foreign corporation not doing business in the United States. However, as Judge Weinfeld expressly recognized, the Verlinden facts are wholly different from the facts here. Neither Verlinden nor Harris affords any bona fide basis for the defendants renewed "suggestion" of lack of subject matter jurisdiction herein.

BERTHOLD H. HOENIGER

The suggestion should be rejected summarily, so that this action, arising out of events which occurred in 1975, may at last be tried on the merits.

Respectfully yours,

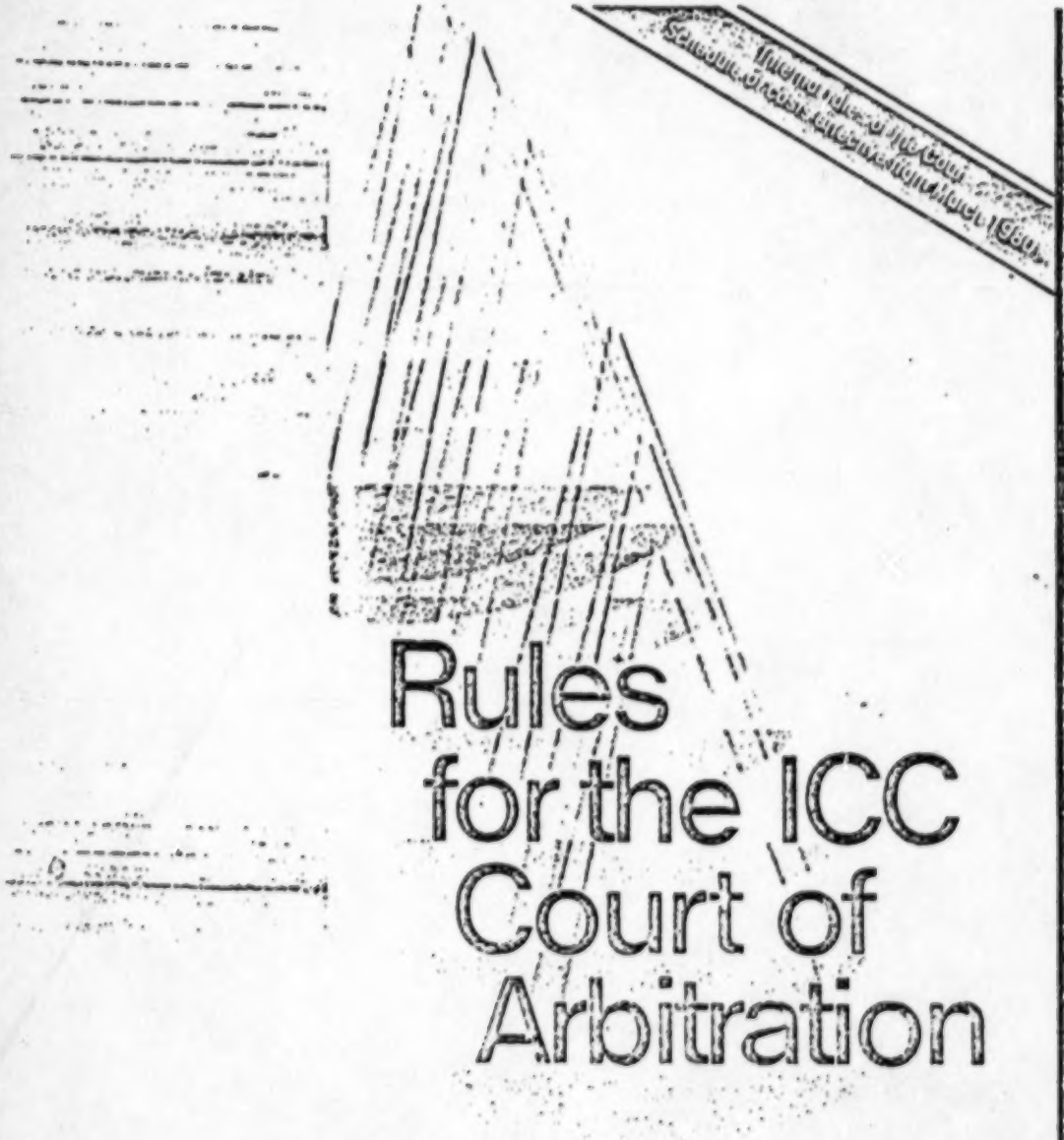
/S/

Berthold H. Hoeniger

BHH:rho
Enclosures.

CC: James G. Simms, Esq.
Mitchell M. Bailey, Esq.

EXHIBIT C TO PLAINTIFF'S LETTER - EXTRACTS FROM INTERNATIONAL CHAMBER OF COMMERCE BROCHURE SETTING FORTH RULES FOR THE ICC COURT OF ARBITRATION



C

The Rules of the ICC Court of Arbitration were first published in April 1975 as Publication 291. The text of the Rules remains unchanged in the present edition but a new section called "the Internal Rules of the Court" has been added to it. "The schedule of costs" has also been revised.

N° 291
Published in March 1980 by
the International Chamber of Commerce
38 Cours Albert-1er 75008 Paris

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of the whole or part of the deposit to the International Chamber of Commerce.

4 When the Terms of Reference are communicated to the Court in accordance with the provisions of Article 13, the Court shall verify whether the requests for deposit have been complied with.

The Terms of Reference shall only become operative and the arbitrator shall only proceed in respect of those claims for which the deposit has been duly paid to the International Chamber of Commerce.

Article 10

Transmission of the file to the arbitrator.

Subject to the provisions of Article 9, the Secretariat shall transmit the file to the arbitrator as soon as it has received the Defendant's Answer to the Request for Arbitration, at the latest upon the expiry of the time limits fixed in Articles 4 and 5 above for the filing of these documents.

Article 11

Rules governing the proceedings.

The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.

Article 12

Place of arbitration.

The place of arbitration shall be fixed by the Court, unless agreed upon by the parties.

Article 13

Terms of reference.

1 Before proceeding with the preparation of the case, the arbitrator shall draw up, on the basis of the documents or in the presence of the parties and in the light of their most recent submissions, a document defining his Terms of Reference. This document

The ICC Court of Arbitration
is the leading body in international
commercial arbitration.
Founded to settle business
disputes of an international character,
its strict impartiality
is recognized everywhere.

Countless thousands of business contracts
(including many where one party
is a government body)
now refer to the ICC Rules
of Conciliation and Arbitration.

This edition of the Rules contains the
internal rules of the Court
of Arbitration as well as the new schedule
of conciliation and arbitration costs
effective from March 1980.

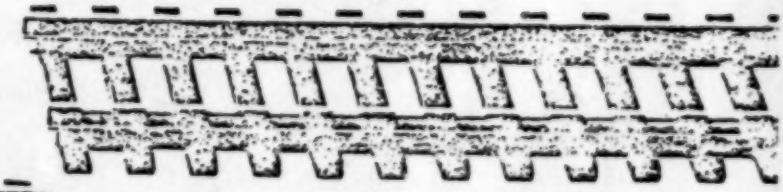
Imp Blanchard - 92350 Le Plessis-Robinson - Maquette couverture Claude Chauvy

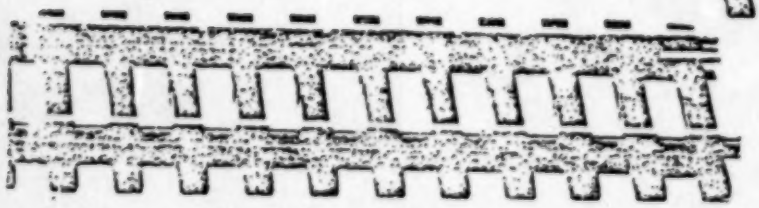
The International Chamber of Commerce
the world business organization
38 Cours Albert 1er 75008 Paris

N° 291

EXHIBIT D TO PLAINTIFF'S LETTER - EXTRACTS FROM INTERNATIONAL CHAMBER OF COMMERCE PAMPHLET ENTITLED ICC ARBITRATION - THE INTERNATIONAL SOLUTION TO INTERNATIONAL BUSINESS DISPUTES

The international solution to international business disputes





ICC arbitration

"ICC arbitration: the solution way to international business disputes" was first published in October 1977 as ICC Publication 301. It complements the ICC Rules of Conciliation and Arbitration (Publication 291) and replaces the former "Guide to ICC Arbitration" first published in 1963 and revised in 1972 (Publication 72–1).

This publication also exists in a French language edition. Editions in other languages are planned.

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(Telephone 261-85-97, Telex 65 0770,
Telegrams Incomere Paris)

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3 Place of arbitration

A distinctive feature of the ICC system is complete liberty given to the parties as regards choice of the place of arbitration (with most national arbitration centres, the place of arbitration is normally the place where the centre is located).

In practice the place of arbitration is only stipulated in the contract or the arbitration agreement in about a third of the cases that come before the Court. The contracting parties generally prefer to leave the Court to settle this point in the event of a dispute arising, particularly since they sometimes have difficulty in agreeing on a place at the time the contract is concluded.

The place where the proceedings take place before the arbitrators can be fixed by the parties or the Court anywhere in the world.

It is entirely independent of the place where the Court meets and where its Secretariat is located.

Agreement on a place

If the parties fix the place of arbitration, they should bear in mind the difficulties which may be involved by choosing certain countries due to the mandatory provisions of those countries' procedural laws.

Such provisions must be observed if the award is to be valid in the place where it is made. Parties in doubt about this point are advised to check with the Secretariat of the Court.

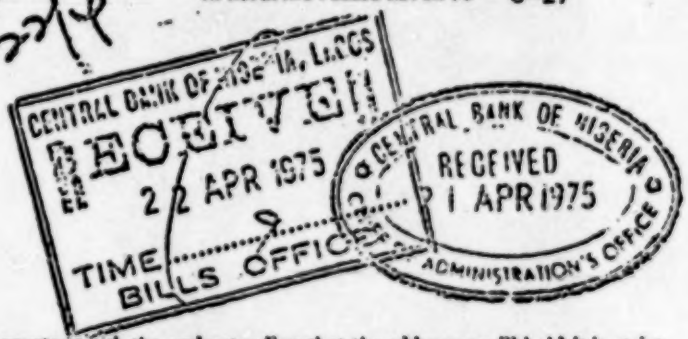
Where the parties have made no stipulation the Court of Arbitration generally chooses as the place of arbitration the country of the sole arbitrator or of the Chairman of the arbitral tribunal. This is not however an invariable principle, and the Court is able to choose any country in view of the circumstances of the case.

EXHIBIT G TO PLAINTIFF'S LETTER - APRIL 15, 1975
LETTER FROM MORGAN GUARANTY TRUST COMPANY OF NEW YORK TO CENTRAL BANK OF NIGERIA

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
23 WALL STREET, NEW YORK, N.Y. 10015

New York April 15, 1975

IN REPLYING PLEASE REFER TO C-27



Central Bank of Nigeria
Tinubu Square
PMB 12194
Lagos, Nigeria

Dear Sirs:

This letter has been written as a business courtesy with the understanding that the addressee will hold it in strict confidence, divulging neither its source nor its content. The information and any expression of opinion contained herein have been obtained from sources deemed reliable, but neither this Company nor its Officers or Agents vouch for any such information or join in any such expression of opinion in any way.

This letter is in response to your cable of March 26, 1975 and will confirm our cable of April 3, 1975, concerning:

Reale International Ltd.
502 Tolland Street
East Hartford, Connecticut 06108

with respect to the supply of $14,400,000 worth of cement.

Published information dated December 17, 1974 lists Reale International Ltd., which was incorporated under Connecticut laws on November 14, 1974, as an importer and exporter of construction materials. The company's principals are:

Antonio Reale	Manager
Teresa Ramirez	President and Treasurer
Rose Greene	Secretary

The published source does not provide either a trade survey or financial statement. They do list several affiliated companies, the primary one being M. & R. Development Co., East Hartford, Connecticut which acts as a realty holding, and management company.

An East Hartford, Connecticut bank reports that they have had an account from Reale International Ltd. for several months. However, they report having a satisfactory experience with the principal, Antonio Reale, and his business ventures, for many years. They explained that he is reputable and well established in the construction industry, but that he has recently been faced with difficulties due to the softening of

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK

the market in construction. Because of this, he has attempted to diversify his operations by forming the subject company, which will be active as an importer and exporter of construction materials.

Checking account balances in their account from Reale International Ltd. are averaging in the low four figures, and the bank describes the account as satisfactory.

The bank source has had no credit experience with Reale International Ltd. but they have had substantial credit experience with Antonio Reale and his business ventures. Currently outstanding is a $250,000 short term personal loan, which has just turned past due. The loan had been unsecured, but the bank is currently negotiating to renew the loan with the provision that some collateral be pledged by the subject. The bank reports that although this facility is past due, their relationship with Mr. Reale continues to be amicable. The security which will be pledged will most likely be the assignment of a second mortgage on some of the subject's property. The bank describes their past experience with Mr. Reale as satisfactory, and, in general, payments have been as agreed, and the subject has handled his facilities in a proper manner.

The bank does not have any recent financial statements for Antonio Reale, but they reported that a December, 1973 personal financial statement showed his net worth to be $8,240,000. His holdings were primarily in real estate, and the statement indicated that his property assets aggregated $22,800,000; the mortgage liability on this property was stated as $15,000,000. The bank source estimated that the mortgage liability on the properties has been reduced during the past 15 months and should currently stand between the high seven and very low eight figures. They reported a high regard for Antonio Reale, and, based on their satisfactory experience with him, they felt that he should prove responsible for his normal business commitments. In addition, they felt that he has access to the cement mentioned in your inquiry.

We hope the above information will be of assistance to you.

Very truly yours,

Michael J Heffernan
Assistant Treasurer

E/le

EXHIBIT H TO PLAINTIFF'S LETTER - APRIL 29, 1975
LETTER FROM CENTRAL BANK OF NIGERIA TO MORGAN GUARANTY TRUST COMPANY

CENTRAL BANK OF NIGERIA
Tinubu Square
Lagos
PRIVATE MAIL BAG 12921 : CABLES : CENBANK :
TELEPHONE .....

Our Ref. CBN/BO/75/89

29th April, 1975.

The President,
Morgan Guaranty Trust Co.,
23, Wall Street,
New York, U.S.A.

Dear Sirs,

Letter of credit for U.S.$14,280,000.00 i.f.o.
Neale International Inc., 508 Tolland Street,
East Hartford CT.06108, U. S. A.

We confirm our cable of today and forward herewith our irrevocable documentary credit No. CBN/BO/75/89 opened in favour of the above named beneficiary.

In consideration of your advising the credit, please debit our account and advise us accordingly with the amounts of payments effected thereunder together with your commissions and charges on receipt of relevant shipping documents.

Please attach the original of our letter of credit to your advise to the beneficiary.

Yours faithfully,

[illegible]

Countersigned:

Asst. Chief of Banking Operations.

[illegible] TO IDENTIFY SIGNATURE

H

EXHIBIT I TO PLAINTIFF'S LETTER - TESTIMONY OF G.W. RYAN, OFFICER OF FEDERAL RESERVE BANK OF NEW YORK GIVEN AT TRIAL OF NATIONAL AMERICAN ACTION; AT PAGES 308-332 OF TRIAL MINUTES THEREIN

(FOLLOWING PAGE)

Q Do you have any knowledge concerning an arrangement which was entered into beginning somewhere around 1973 where the Morgan Guaranty Trust Company had a right to draw on Federal Reserve funds standing to the credit of the Government of Nigeria or its central bank?

A Yes.

Q When did that custom, practice or procedure originate?

A I am not sure, but I would say it is prior to 1974.

Q Was that pursuant to a written agreement?

A Between ourselves and the central bank of Nigeria and I presume with Morgan Guaranty as well.

Q Do you recollect that there was such a written agreement?

A Between ourselves and the central bank.

Q At the time of the inception of that arrangement giving Morgan the right to draw funds out of the Federal Reserve for the benefit of Nigeria and from its account in New York, what was the ceiling, if there was one, on the amount that Morgan could withdraw on any one day?

A One million dollars.

Q For what length of time was Morgan precluded from drawing down any more than one million from the

Federal Reserve to meet the obligations of Nigeria?

A That I don't know off the top of my head.

Q Do you recollect from the recesses of your memory if there came a time when the one million dollars ceiling was escalated to a higher amount?

A Yes.

Q When did that come?

A I would say some time in 1974, but I am not sure.

Q Do you recollect what the next stepped-up level was concerning Morgan's right to withdraw funds of Nigeria out of the Federal Reserve Bank of New York to meet Nigeria's obligations through Morgan Guaranty?

A The next increment?

Q Yes, sir.

A Three million dollars, I believe.

Q And to your knowledgewas it ever increased above three million dollars?

A Yes.

Q When was that?

A I believe in November of '75.

Q What was the ceiling, if there was one, which was imposed in November of '75?

A No ceiling.

Q Unlimited, right. In 1974 and 1975, do you recollect that the Morgan Guaranty Trust Company regularly drew funds out of the Federal Reserve from the account of the Government of Nigeria or the Central Bank of Nigeria?

A I would say that's correct, but again without looking at the records.

Q Mr. Ryan, have you ever testified before?

A No, no.

Q If you know something precisely, of course, you can tell us that. If you may not have a to the last cent recollection or precise day, just tell us to the best of your recollection. Within that context, was it the daily and customary practice of Morgan Guaranty to draw funds of Nigeria from the Federal Reserve to meet Nigeria's obligations?

MR. KISSAM: I object to the use of the word "obligations." The testimony was that if Morgan Guaranty was honoring a letter of credit for something, they would use the funds in the bank, and I gather that on certain occasions if the funds were inadequate, that additional funds would be supplied. But I don't think it's an obligation. I think it's carrying out a contract.

THE COURT: All right. Just rephrase the word "obligation."

Q Fine. How frequently did Morgan call upon the Federal Reserve to supply it with funds to meet Nigeria's needs through Morgan Guaranty in New York?

A I believe it was frequent, but whether it was daily I don't know.

Q And when they did call, what were the general sizes of the drawdowns?

A You mean subsequent to November of '75?

Q Yes.

A That I really don't know.

Q Was it in the millions?

A I would presume it was.

Q Mr. Ryan, in 1975, what was the amount of money held by the Federal Reserve in New York belonging to the Government of Nigeria?

MR. KISSAM: I object to that, if your Honor please, as irrelevant.

THE COURT: I will allow it, except that 1975 is a long period. You can have a maximum and minimum during that time.

Q Give me the average amount of money held in the Federal Reserve for the Government of Nigeria or its Central Bank.

MR.KISSAM: If your Honor please, I don't really see the necessity of publicising these facts unless the facts are useful to the question at hand.

THE COURT: They could be.

MR.KISSAM: What difference does it make if the amount is X or Y?

THE COURT: I would say a hundred million is more, it's a hundred times one million.

MR. KISSAM: That is correct, but the process is still there.

THE COURT: Well, unfortunately some cases talk in terms of volume. I think we are dealing with volume so great here that it makes it unimportant, but I don't want to presuppose that.

MR. KISSAM: I would like to record an objection because I don't think the disclosure of this type

of information is proper unless absolutely necessary, and I don't see how it's necessary.

THE COURT: Your objection is noted.

Do you recall the average balances during '75?

THE WITNESS: No, I do not.

THE COURT: Can you give us a range?

THE WITNESS: I really can't. I mean, not from my recollection.

Q If you can't, I am going to ask for the documents which I have subpoenaed. While you may not be able to give us to the last million, can you give us some idea of the size of those deposits maintained at the Federal Reserve in the name of Nigeria or its Central Bank in 1975?

THE COURT: Did they run in excess of a billion dollars?

THE WITNESS: They may have.

THE COURT: Were they certainly in excess of $100,000,000?

THE WITNESS: Yes, yes.

THE COURT: All right, we are in a six to -- excuse me, let's count that -- we are in a nine to ten figure range.

MR. GRUTMAN: Yes.

THE COURT: Or as the bankers like to say, a high nine figure, possibly ten figure.

mbp5 Ryan-direct

MR. GRUTMAN: Who used to say that?

THE COURT: Bankers.

MR. GRUTMAN: Bankers, yes, not the lawyers.

Q Mr. Ryan, did the funds in addition to those that were drawn down by Morgan come into the bank, into the Federal Reserve Bank in 1975 and 1976 for the credit of Nigeria?

A Yes.

Q Do you know what the sources of those funds were?

MR. KISSAM: That is objected to, if your Honor please.

THE COURT: Overruled. The question is, does he know.

A Commercial banks and central banks, other central banks.

Q Those were the entities on whose paper the funds came in, but I'd like to go a little further than that with you as a manager of foreign credits in the Federal Reserve. From the knowledge which you have, Mr. Ryan, do you know whether or not those deposits that were made to Nigeria or Central Bank's account in the Federal Reserve were as a result of commercial transactions between Nigeria and private companies in the United States?

MR. KISSAM: I object to that, if your Honor

please.

THE COURT: Overruled.

MR. KISSAM: The witness has shown no qualifications.

THE COURT: He has been asked if he knows. If he doesn't know, he doesn't know. If he does know, you can pursue how he knows.

MR. KISSAM: I was hoping you'd hear my objection.

THE COURT: I heard it.

MR. KISSAM: I mean the witness.

A I have no way really of knowing what the underlying transaction is.

Q In your job as manager of foreign activities of the Federal Reserve, how closely do you have contact with the business of Nigeria and the Federal Reserve?

A Fairly close, but that doesn't mean that we would look into the underlying transaction.

Q Do you know whether or not Nigeria receives substantial deposits from American oil companies?

A I believe they do.

Q Would Exxon be such a company?

A It could be.

Q Mobil?

A Again, I'd hazard a guess, yes.

nbp7 Ryan-direct

Q Are these deposits made to the account of Nigeria made in New York from those oil companies?

A I guess they are. I am not sure, though.

Q And again without precisely giving us the digits, would it be fair to say that we are dealing with deposits in that area in the eight and nine figure category?

A Certainly in the seven-figure category.

Q That was so in 1975?

A That's correct.

Q And so in 1976?

A That's correct.

Q And from such contact as you have had with those deposits, can you say whether or not you have any knowledge about the underlying transactions and their -- withdrawn.

Have you looked into the activities of Nigeria in the United States from a commercial standpoint?

A No, we have not.

Q Have you ever seen whose accounts the funds were drawn on that were deposited into Nigeria's account other than the bank out of which they originated?

A I may have if they are -- if a question ever arose.

THE COURT: Let me see if I can understand this process a bit better. I would assume that foreign nations

who maintain credit balances with the Federal Reserve System, generally speaking, have two sources of income. One would be foreign credit transactions where moneys either from their own country or from other countries are transferred directly into the Federal Reserve from abroad, and the second would be those generated within the United States, which would usually be from sales of their products within the United States. Would you agree with that analysis?

THE WITNESS: Yes.

THE COURT: I am sure there ban be lesser sources, but I guess those are the two main areas of funds flowing in from foreign nations' accounts to the Federal Reserve. In the case of Nigeria, do you know whether most of its deposits originated domestically or came from foreign transfers?

THE WITNESS: I don't know.

Q Isn't it a fact that most of the money which is on deposit with Nigeria doesn't originate in Nigeria from funds that are transferred from Nigeria to the Federal Reserve in New York, but are as a result of transactions within the United States, and the funds are deposited here and don't leave here?

MR. KISSAM: Excuse me. May we have that

question?

MR. GRUTMAN: The question is a little rough, your Honor.

Q Is it not a fact that most of those deposits, those very large deposits standing to the credit of Nigeria are as a result of commercial transactions conducted in the United States?

MR. KISSAM: That question was asked before, objected to, I believe.

THE COURT: No, he indicated he didn't know before, but maybe he knows it as restated.

Do you know the answer to that?

MR. KISSAM: If he didn't know it before, I don't know why he would know it now.

MR. GRUTMAN: Watch, Mr. Kissam.

THE COURT: Do you know the answer to that question?

THE WITNESS: I would say, generally speaking, that we have noted some deposits by oil companies. Whether there are other transactions that might be construed by you as others are commercial transactions, that I really don't know.

THE COURT: Are you familiar with whether or not Nigeria a favorable credit balance with the United States?

THE WITNESS: No, I am not.

THE COURT: We will take a 10-minute recess at this time.

(Recess.)

BY MR. GRUTMAN:

Q By and large, would I be correct, Mr. Ryan, if I suggested to you that the money which is on deposit generated in the United States standing to the credit of Nigeria remains in the Federal Reserve?

MR. KISSAM: Just a minute, please.

THE COURT: I don't understand that question.

Q The money that Nigeria makes from the sales of oil to American corporations produces dollar credits. Those dollar credits are not transferred back to Nigeria, they remain in the United States?

THE COURT: Well, I don't know how he can tell which credits go where. Ask the first question:

Do you ever transfer Nigerian funds back to Nigeria?

THE WITNESS: We have.

Q But by and large, of the funds that come into the bank, do most of them remain here or most of them go back to Nigeria, or how would you describe what disposition is made of the funds?

A I can't.

Q You don't know?

A I really don't know.

Q The moneys that Nigeria accumulates on the books of the Federal Reserve, to your knowledge, are any of those funds invested in the United States?

A Yes.

Q What kind of investments are made in the United States with the funds that come into the Federal Reserve?

MR.KISSAM: I object, if your Honor please.

THE COURT: Overruled.

MR. KISSAM: Does he now want to know the names of the particular companies and so forth?

MR. GRUTMAN: Please.

THE COURT: Answer the question as best you can.

A Primarily in U.S. Government securities.

Q Such as?

A Treasury Bills, Treasury Notes.

Q Could you give us some idea of the quantified magnitude of what those investments in the United States are for the Government of Nigeria, or what they were in '75 and '76?

MR. KISSAM: I object on the ground

of no relevancy whatever.

THE COURT: I have a doubt that putting money into government funds is doing business in the sense that these cases deal with it, but there is no need to worry about that now. I will allow him to answer the question.

MR. KISSAM: Does the volume count?

MR. GRUTMAN: It sure does.

THE COURT: I would guess if it's important, the volume counts. I am not sure it is.

Q Would you tell us?

A Would you rephrase the question or restate the question?

MR. GRUTMAN: Mr. Birmbaum, would you oblige us with the question being reread?

(Question read.)

A I would say over that period that the greatest percentage were in U.S. Government securities.

Q How much dollars?

A In terms of dollars, I don't know without going to the records.

Q Was it in thousands, millions, tens of millions, hundreds of millions?

A Probably in '75 and maybe even in '76 hundreds of millions.

Q What was the rate of interest that they were earning on hundreds of millions of dollars invested in United States securities? I know it fluctuated, butgive me an average.

A For the period '75-'76?

Q Correct.

A Anywhere from probably 6 to 6-1/2 per cent.

THE COURT: Is it a common thing for foreign governments to buy U.S. Government securities?

THE WITNESS: Yes, very common.

THE COURT: And in the samevolume that Nigeria is buying them, hundreds of millions?

THE WITNESS: No, obviously that would vary from country to country. Percentages might be somewhat similar.

THE COURT: Are there many countries who hold more U.S. Government securities than Nigeria holds?

THE WITNESS: Yes.

Q But of the 180 or so customers of the Federal Reserve investing in United States securities in the United States, where would you rank Nigeria?

THE COURT: I understood it to be 135.

MR. GRUTMAN: 135, sorry, your Honor. 180 is the U.N.

THE COURT: A separate organization.

MR. GRUTMAN: Separate.

A What time period?

Q If we were doing a Fortune list of largest holders of United States securities from the customers of the Federal Reserve Bank who are foreign countries, where would Nigeria rank in '75 and '76?

A I would say fairly high in '75. '76 I would say that probably they slipped down a bit.

Q Would they be among the top 10 in '75?

A I would make it maybe the top 20.

Q That is respectable, isn't it? And when they slipped in '76, how far down did they go?

MR. KISSAM: Is this really important, your Honor?

THE COURT: Well, no, but I am hoping we will get over it soon.

MR. GRUTMAN: Judge, if Mr. Kissam would stipulate that his client --

THE COURT: You know his problem. Just get over this rapidly.

MR.GRUTMAN: Very well.

THE COURT: When they slipped in '76, how far back did they go, top 30?

THE WITNESS: I would say that might be correct.

Q If I gave you the names of certain companies with whom Nigeria did business in the United States, would you be able to say whether or not deposits were made in the Federal Reserve from transactions between Nigeria and those companies?

MR. KISSAM: I object to that question. There is no testimony that doing business in that sense is incorporated in his question.

THE COURT: Revising the question, can you give the names of companies who made payments to the Federal Reserve on behalf of Nigeria, American companies?

THE WITNESS: Nothing other than what I said before in response to his question about Exxon and Mobil. I acknowledge that there were some oil companies that made payments to Nigeria, but any other companies I really don't know, and that's really on a generic basis.

Q So you wouldn't know about engineering, processing and manufacturing, pharmaceutical, shipping?

THE COURT: I think you have got it backwards. That is when they were making purchases, not selling things. In that instance Morgan Guaranty made the outgoing payments.

MR. GRUTMAN: Thank you, your Honor. Your Honor is correct, and I forgot about that.

Q When Nigeria would make purchases of United States Treasury Bills or other securities, who would make the purchase for them?

A The Federal Reserve Bank of New York.

Q How would that instruction to make the purchase and debit their account be communicated to you?

A We have an automatic -- what we call an automatic investment program for them which they have given us certain guidelines with respect to the types of investments that we are allowed to acquire for them.

Q Did you have a discretionary account of a certain specified dollar amount which you could invest for them in securities of your choice?

A Basically, it was a program whereby funds, any excess funds above a certain level would be invested in accordance with the written instructions that we had received from them.

Q Besides Treasury Bills and such securities, did you ever purchase for them other kinds of securities?

MR. KISSAM: If your Honor please,what is the relevance of this?

THE COURT: Overruled.

A I don't believe so.

Q But you are not sure?

A I am not positive.

Q Did you maintain a custodial account for the Nigerian Government or the Central Bank of what we might call commercial securities such as stocks, bonds, debentures, or things of that sort, commercial notes?

MR. KISSAM: There has been no testimony that such purchases were ever made.

MR. GRUTMAN: We will find out.

THE COURT: Overruled.

A We do maintain a custodial account, but I don't recall that any of those instruments that you have mentioned were ever deposited in that custodial account.

Q What is in the custodial account?

A Currently, it would be obligations of institutions such as the World Bank obligations, dollar denominated obligations of foreign governments.

Q Where are they purchased?

A They can be purchased in this market.

Q So there is --

A They could be.

Q There is a kind of securities market in banking securities and governmental notes and obligations, and the Federal Reserve acts on behalf of Nigeria in buying and selling those for the account of Nigeria?

A No, the Federal Reserve would hold them in custody for the Government of Nigeria.

Q Who would buy them for the Government of Nigeria, if you know?

A They could go to anyone to buy them in this country.

Q And did Morgan ever buy them for them?

A I have no idea.

Q Mr. Ryan, have you exhausted for us all of the activities which the Federal Reserve performed in 1975 and 1976 for the Government of Nigeria?

A That's a pretty broad question.

Q If there is something that you haven't yet touched upon that might be germane, I am asking you to tell his Honor what other things did the Federal Reserve do for the Government of Nigeria or its Central Bank other than those kinds of activities which you specifically referred to in answering questions previously posed.

A We may have provided them with some technical advice with respect to such things as, again this is just from recollection, for example, such things as currency destruction.

Q Currency destruction?

A Destruction.

Q What else?

A Many central banks come to us for information similar to that. We may have provided some training programs for some of their staff people.

Q Nigerians?

A Employees of the Central Bank of Nigeria.

Q And when the Central Bank employees came here for what length of time would they stay?

A I really don't know.

Q When they came, who paid them?

A They paid their own way.

Q What else? Anything else?

A Well, we may have bought foreign exchange for them, for Central Bank.

THE COURT: What do you mean by buying foreign exchange?

THE WITNESS: They may have need for French francs or marks, Swiss francs, whatever. They may come to us to buy that exchange.

Q As a matter of fact, you know that certain people engage in buying foreign exchange as a business in and of itself; isn't that true?

A That's correct.

Q When the Nigerians sent people to you for

training, how frequently would they come?

A Well, I don't know. I mean, I know they have --

Q Besides training, would they come over here themselves to deal with you on any --

A They might periodically.

Q How frequently ?

A I don't know. I mean, I take them in the class of all the other visitors we have from Central Banks, and I really can't single out how frequent.

Q The way in which you list the Nigerian funds in your bank, would you give us how its titled? What is the name of the account?

A The Federal Government -- presently?

Q Yes.

A The Federal Government of Nigeria.

Q What was it in '75 and '76?

A In '75 it was in the name of the Central Bank of Nigeria.

Q And in '76?

A I believe in February of '76 the account in the name of the Federal Government of Nigeria was established.

Q When in 1976 you transferred funds from the Federal Reserve to Morgan, did you transfer funds out of

the Federal Republic of Nigeria for the account of the Central Bank of Nigeria as it was maintained at Morgan?

A Assuming it was after February?

Q Yes.

A It would have been out of the Federal Government account on our books, and I don't know whether it went to the Central Bank account or what account it was in Morgan, if in fact there were accounts.

Q Other than the change in the name from Central Bank to the Federal Republic of Nigeria, were both of those accounts ostensibly the same?

A Yes.

THE COURT: What purpose was served by changing the name of the account, if you know?

THE WITNESS: I don't know. I mean, I can speculate but I don't know.

Q Over at the building that the Federal Reserve maintains here in the financial district, you keep bullion, do you not, gold?

A That's correct.

Q But all the money that is accumulated there, that is not all physically present, is it?

A That's correct.

Q With respect to the Government of Nigeria,

for example, of the assets that were recorded as being held by you, were some of those assets simply book-keeping entries which you maintained in various records of your bank?

A That's correct.

EXHIBIT J TO PLAINTIFF'S LETTER - TESTIMONY OF P.W. FITZPATRICK, OFFICER OF MORGAN GUARANTY TRUST COMPANY AT TRIAL OF NATIONAL AMERICAN ACTION; AT PAGES 209-231 OF TRIAL MINUTES THEREIN

(FOLLOWING PAGE)

THE COURT: Your witness is excused for the rest of the day.

MR. RINGSMUTH: Will the examination be conducted in the same order?

THE COURT: I don't know. He is from the Federal Reserve Bank.

(Discussion off the record)

(Spectators leave courtroom.)

MR. GRUTMAN: Now that the courtroom is cleared, I want to restate for the record that I don't believe that was required.

Am I under any secrecy instructions from the Court?

THE COURT: Yes. The information imparted by this witness at this time will be used only in this case.

MR. GRUTMAN: All right.

BY MR. GRUTMAN:

Q Mr. Fitzpatrick, when did Nigeria become a customer of Morgan?

A 1974.

Q At that time when they first became a customer you had responsibility for African affairs, did you not?

A Yes.

Q Between 1974 and 1975, was there an increase in

the volume of business which was transacted by Morgan for Nigeria?

MR. KISSAM: I object to this. It's irrelevant.

THE COURT: I will allow it.

Q You may answer, sir.

A Yes.

Q Were you in charge of the African Affairs Department before the cement contracts were issued?

A Yes.

Q In the year preceding that in which the cement contracts were issued, what was the volume of business that Nigeria did with Morgan, sir?

MR. KISSAM: Objection, your Honor. What relevancy?

THE COURT: If you know.

Do you have that figure in mind?

THE WITNESS: No, your Honor.

Q Mr. Fitzpatrick, I have deferred asking you to bring documents at the request of your counsel. While you may not have the figures here, as the vice president in charg., I would be happy to take from you an approximate -

A Very little; very slight.

Q In 1975, when the cement contracts were let, did Morgan handle letters of credit for Nigeria for those

cement contracts?

A Yes.

Q Would you tell his Honor what was the gross amount of the cement contract letters of credit handled by Morgan in 1975 for Nigeria?

MR. KISSAM: Objection, your Honor. We are concerned with one case.

THE COURT: Yes. While I have great doubts about this doing business, particularly if it is limited to banking transactions, I will let him make his record and rule on it at the end of the trial.

Overruled.

A I would say 400 million.

Q Of the 400 million, how many of them were confirmed letters of credit?

A About 60.

(Continued on next page)

Q Could you give us an approximation, Mr. Fitzpatrick of what the gross dollar volume was of the sixty confirmed letters of credit?

THE COURT: Only sixty letters?

THE WITNESS: Sixty million were confirmed.

Q When Morgan issues a confirmed letter of credit, does Morgan charge its customer a fee or commission for confirming rather than advising on a letter of credit?

A Absolutely.

Q Let's say on a $14 million letter of credit, what would be the commission or charge that Morgan would make to its customer Nigeria for confirming such a letter of credit?

A 1/20th per cent per quarter.

THE COURT: By quarter, you mean that if the letter of credit is outstanding for more than three months an additional 1/20th per cent is charged for each successive three months?

THE WITNESS: If the credit is open and has a validity date one year from the date it was opened, you charge for four quarters. If the credit expires within two years, you charge for eight quarters.

THE COURT: I follow you. What you are saying in effect is you are charging a fifth of a per cent a year.

If it is a shorter period of time, it can be as little as 1/20th of a per cent if payable within three months?

THE WITNESS: That is right.

Q Of the $400 million in confirmed letters of credit --

A They were not confirmed.

Q Of the $4 million of letters of credit handled by Morgan for Nigeria in 1975, how many of them were involved with cement contracts?

A All of those. There were others.

Q I understand that. There were $400 million of cement contracts on letters of credit for Nigeria passing through Morgan in 1975, of which you say 60 million were confirmed; right?

A Yes.

Q In addition to the letters of credit in 1975 which Morgan serviced for Nigeria for the cement contracts aggregating around $400 million, were there other areas of credit which Morgan furnished on behalf of its customer Nigeria for 1975?

MR. KISSAM: I object.

A Very few.

THE COURT: I will take it subject to connection.

Q Of the customers which Morgan had in 1975

originating out of Africa, did you have a more important client than Nigeria?

MR. KISSAM: Objection.

THE COURT: I do not like the phrase more important.

Did you have another African country that produced a larger volume?

THE WITNESS: Not for letters of credit.

Q Of Morgan's foreign customers out of Africa, what is the largest income-producing customer that the bank has?

MR. KISSAM: I object to that.

A Right now?

MR. KISSAM: What does that have to do with this litigation?

THE COURT: He is showing that Nigeria is important to Morgan. That does not mean Morgan is important to Nigeria.

MR. GUTMAN: We will come to that.

THE COURT: It is a fact that Nigeria is your greatest revenue-producing African country?

THE WITNESS: Now it is; yes.

THE COURT: When did it become the biggest?

THE WITNESS: Maybe in 1975, 1976, not necessarily

with the cement.

Q Of all your foreign customers, European, African, Asiatic or Arctic, does the Morgan Guaranty Trust Company have a more lucrative customer than Nigeria?

A I am sure.

MR. KISSAM: I object.

THE COURT: I overrule the objection. You will probably like the answer.

A France, Britain, Saudi Arabia, probably Kwait.

Q How much money did Morgan make from Nigeria in 1975?

MR. KISSAM: I do not know whether the witness is qualified to say.

MR. GRUTMAN: He is in charge.

THE COURT: I will let him give his best estimate.

A That's about $600,000.

Q I beg your pardon?

A $600,000.

Q That is the total amount of money that Morgan made from Nigeria?

A Yes. That is a lot of money, $600,000.

Q How much did you make from France is that year?

A I don't know.

MR. KISSAM: I object. Why doesn't he ask for salaries of executives?

THE COURT: I will sustain it.

Q Did Nigeria have in 1975 concerning these letters of credit a line of credit with Morgan?

A No.

Q So that on the letters of credit on which you advised $400 million were in cement contracts, that money was all Nigeria's own money, wasn't it?

A The $400 million were advised letters of credit.

THE COURT: Only the 60 million is confirmed that they hold the assets on.

Q The 60 million confirmed, that was Morgan's money that they had to pay out on those, is that correct?

A If Nigeria didn't have the money we would have had to pay.

Q Of the 400 million that were merely advised and not confirmed, the money used to pay out that $400 million through your bank was Nigeria's own money, wasn't it?

THE COURT: There you have an objection, Mr. Kissam, because there has been no evidence that the 400 million was paid out.

MR. KISSAM: I assumed your Honor had looked at that rule which says you do not have to make an objection

any more.

THE COURT: You have to make objections. You do not have to note exceptions. They are quite different things.

Let me put it to the witness. Of the $400 million in letters of credit, do you have any idea as to approximately what percentage was in fact paid through your bank?

THE WITNESS: No.

THE COURT: Would it be more than 100 million or less than 100 million?

THE WITNESS: More.

THE COURT: More than 200 million or less?

THE WITNESS: About 200 million. I really don't know.

THE COURT: Somewhere in the middle figure?

THE WITNESS: Yes.

THE COURT: Since you were only the advising bank, was it necessary for Nigeria to keep funds in its account with you in order to pay those or could it simply make a transfer of funds at the time the payment became due?

THE WITNESS: That is right. We would pay the beneficiary and we would get the money that was needed from the Federal Reserve Bank. They did not have to keep the money with us.

Q How much money did Nigeria of its own keep with you on the average in 1975?

A Two and a half million dollars.

Q When you needed more money to pay the obligations of Nigeria than was actually on deposit in Morgan's own coffers, did you have an arrangement whereby you could call on the Federal Reserve and use funds of Nigeria from the Federal Reserve to meet Nigeria's commercial obligations?

MR. KISSAM: Is this addressed to 1975?

MR. GRUTMAN: 1975.

A Yes, we did.

Q Was there, Mr. Fitzpatrick, an agreement in writing between Morgan, Nigeria and the Federal Reserve concerning this practice?

A Yes. When the account opened we had no business. We had a $1,000 deposit in nothing. Then when one credit came in it was confirmed and then another. Then we got up to 60 million and nothing else happened. At the beginning they said you may draw one million dollars.

Q From the Federal Reserve?

A Per day.

Q Right.

A But then they started asking us to make payments

to different entities, companies and so forth, whatever they needed for their own transaction.

Q Did you use the word transaction?

A Payments to their embassies, for example. We made payments to all their embassies, to students. A million dollars was not enough because more than that was being paid. They upped it to two million and then five million. Now it is unlimited.

THE COURT: Let's stop a second. What is the nature of the holdings of Nigeria in the Federal Reserve System? Are they Treasury notes or what sort of obligations?

THE WITNESS: I don't really know. I would imagine that is what they are.

Q Do not imagine.

A I don't know.

THE COURT: In any event, they have --

THE WITNESS: Very liquid.

THE COURT: -- certain business transactions with our Federal Reserve Bank of which they are a creditor and have substantial reserves there which they can pledge to you to cover their commercial obligations which are honored by you by letters of credit?

THE WITNESS: They do not pledge them. They let us draw.

MR. KISSAM: Did your Honor use the word pledge?

THE COURT: I did and he corrected me. They can be drawn against.

Q When you started out with a very modest deposit and no money and in short order you reached a point where you had to have a capability of meeting the obligations and so this system was set up with the Federal Reserve, right?

A Yes.

Q Was the Federal Reserve put on notice of your right to withdraw the use of five million or whatever the sum was?

A Yes.

Q In 1975 was there a writing which established a ceiling on the amount per day that you could draw down from Nigeria funds in the Federal Reserve?

A Yes. It started when the account opened it with a million. Then it went to two and a letter was written to us saying you may now draw two. I suppose they must have sent a similar letter to the Federal Reserve saying we could draw two. When it got to five-- and I do not remember the dates -- it said we may draw five and then one, that you may draw as much as you wish.

Q Was it the practice of Morgan in 1975 to make

these daily drawings from the Federal Reserve to meet Nigeria's obligations?

A Yes.

Q Do you recollect in 1975 that there were ever occasions when on a daily basis Morgan was drawing down from the Federal Reserve out of Nigeria's reserve more than five million dollars?

A There may have been.

Q Earlier in your testimony when you talked about requests or services performed by Morgan, you said that you were asked to pay for various transactions. You said the Embassy and students. Do you remember telling Judge Goettel that?

A Yes.

Q If I use a phrase called "money transfers," does that phrase mean anything to you?

A Money transfers is what they are.

Q When I use the term "money transfers," does that mean to you that on behalf of your customer Nigeria you paid their obligations?

A Some of them.

Q Do you besides paying embassies and students ever pay American corporations with Nigerian money?

A Yes.

Q Are these as a result of various commercial transactions in which Nigeria is involved?

A Some of them are benefiaries of letters of credit. We pay that.

Q Whether it is a letter of credit or whatever, I am speaking of the underlying nature of the commercial activity. For example, do you know whether Nigeria is a substantial petroleum producing country?

A Yes.

Q Of the petroleum producers of the world, do you know how large it is?

A Fifth or sixth.

Q Do you know the total amount of revenue generated annually by Nigeria as a result of this petroleum revenue?

MR. KISSAM: Where are we going?

THE COURT: I do not know.

This sort of service that you were rendering to Nigeria, is it a unique sort of service or do you do this for other foreign countries?

THE WITNESS: Other foreign countries. This is routine for them.

THE COURT: This is a routine service to a foreign country?

THE WITNESS: Routine banking service.

THE COURT: How many countries do they do it for?

THE WITNESS: For their central banks, twelve in Africa, the Bank of England, the Bank of France, the Russians, the Belgians, the Italians, the Swedes.

THE COURT: You just confirmed what I thought was the case.

Q Do you ever pay money to American corporations like Exxon, Texaco, RCA, Mosler's Safe, and the like?

A For the French.

Q For the Nigerians.

A I don't know. We do make payments, yes, to corporations.

Q For what we could call commercial transactions?

MR. KISSAM: I object to that.

THE COURT: What you believe to be commercial transactions?

THE WITNESS: Yes. Whatever the transactions may be, we make the payment; yes.

Q Are you the only bank in the United States that performs that service for Nigeria?

A We are the only correspondent in the United Stat

Q The answer is yes?

A Yes.

Q So that if you did not do that service for Nigeria of paying those obligations, which you do pay, Nigeria would have to pay it itself, correct?

MR. KISSAM: I object to it.

Q Or they could go to another bank?

A They could open another account or have the Federal Reserve do it.

(Continued on next page.)

T 5pm

Q But if a bank like you didn't do it, Nigeria would have to do it itself or get somebody else to replace you?

A They'd have to get -- they could do it through the Federal Reserve, as they did before we became their correspondent.

Q Beside the letters of credit that you told me about and the money transfers in meeting commericial obligations of Nigeria which are paid to American corporations in the United States, would you tell us whether or not in 1975 Morgan made investments in the United States through its trust department for Nigeria?

A No.

MR.KISSAM: That is objected to, if your Honor please.

A No, we didn't.

THE COURT: His answer is no, so I don't think it causes any problem.

Q Do you know whether or not Morgan gave Nigeria any investment advice?

A No, we didn't.

MR.KISSAM: Same objection.

Q I beg your pardon?

A No, we didn't.

Q You say flatly it did not?

A Absolutely.

Q And does Morgan have a trust department?

A Yes.

Q Does it have an investment advisory service?

A Yes.

Q And do you say that in 1975 or '76 it gave no advice and performed no services for Nigeria?

A Performed services, but gave no advice.

Q What services did those departments perform?

A We had the -- Central Bank had a custody account.

Q Of what?

A Of bonds, stocks.

Q Coupons on those bonds?

A Yes.

Q Who clipped them?

A We did probably.

Q And in doing that, did you act as an agent for Nigeria?

A We were just --

MR.KISSAM: I renew my objection.

Q Beg your pardon?

THE COURT: Overruled.

Q Did you, sir?

A Yes, we were acting the way we do for anybody else

that has a custody account. We were acting as their bank.

Q As a banker, which you say is your occupation, do you have any idea of how much money of Nigeria's passes through your bank annually?

A Annually?

Q Yes.

MR. KISSAM: That is objected to, if your Honor please.

THE COURT: I will allow it for purposes of making a record, but I do want to talk to both of you when court adjourns.

A Well, I'd say probably 3 or 4 hundred million dollars a year. I mean that's -- but really, I mean, I don't know.

Q Besides the 3 or 4 hundred million dollars a years that passes through the Morgan Guaranty Trust Company, do you know whether or not Nigera maintains deposits in the United States in bills?

MR. KISSAM: Just a minute. He said he didn't know whether it was 3 or 4 hundred million, and you incorporated it in your question as if he had stated that, which I think is entirely improper.

MR. GRUTMAN: You may be right.

THE COURT: In any event, do you know how much

they have at the Federal Reserve System?

THE WITNESS: No, your Honor, I don't.

Q No idea at all?

A No.

MR. KISSAM: No guessing.

Q Have you ever made a statement, Mr. Fitzpatrick, that Nigeria in New York has more money than Morgan, Chase, First National City, and Mannie Mannie?

A Oh, no, heavens no.

Q You say they don't or they do?

A They don't.

Q They don't?

A I mean I don't imagine. If they do, that would be an awful lot of money.

Q In the letter of credit department in 1975 and 1976, was there any other customer providing more business to Morgan other than Nigeria in letters of credit?

MR.KISSAM: I object, your Honor.

A I don't know.

MR. KISSAM: Just a minute, please.

THE COURT: He said he doesn't know, so there is no need to press the objection.

Q Of the African countries it was surely the largest, was it not?

A. Yes.

Q Beside the various things which you told us about so far, from time to time were there every employees of the Central Bank of Nigeria who worked here in New York City at the Morgan Guaranty Trust Company and received training here?

MR.KISSAM: Same objection, your Honor.

THE COURT: I will allow it.

MR. KISSAM: Wherever they buy their clothes --

THE COURT: I will allow it nevertheless.

A We had representatives of the Central Bank trained in New York. We have two seminars a year. There were representatives from the Central Bank, but they were from thirty other banks.

Q Forget the others. Central Bank of Nigeria is my only interest.

A That's right. It was special --

Q Were there officers that came here to receive training and education?

A They were officers, yes, at various levels.

Q When they came and performed the services for however long they were here --

A They didn't perform any services.

Q When they did what they did on behalf of the

Central Bank of Nigeria in acquiring education on your premises in New York City, were they paid by Central Bank or by Morgan?

A By Central Bank.

Q And for what length of time did any of these people stay on the premises of Morgan Guaranty Trust Company receiving training or indoctrination or education?

A Well, the Central Bank seminar lasts three weeks. The ones that came to that stayed three weeks. There is one for -- on American banking practices that lasts, I think, a month; so those stayed a month. The first guy that ever came stayed a month on his own, and after that some of them would stay two or three days, some would stay one day. It depended what they wanted to learn.

Q I have just a few more questions this afternoon, Mr. Fitzpatrick, and I shall not detain you long, I hope, tomorrow morning. I hope that is encouraging to you.

A Very.

Q May I ask you, as a banker, sir, do you from time to time act as an agent on behalf of various customers?

A Not in my department, no.

Q In letters of credit, do you act as an agent

as an agent on behalf of customers?

A We act as a correspondent bank.

Q I asked you whether you act as an agent.

A I don't know what an agent is.

Q Is the language principal and agent a series of terms with which you have become professionally familiar in the years that you have been a working banker in New York City?

A An agent -- we act on their behalf, yes.

Q So that agent and principal are terms known to you in banking?

A Sure. We are not the principal.

Q Are they also terms which are known to you in the handling of letters of credit?

A I suppose,yes, yes.

MR. GRUTMAN: Could this document be marked for identification, please?

MR. KISSAM: Your Honor, could I have that last answer? I couldn't hear it.

THE WITNESS: I said yes, I suppose.

(Plaintiff's Exhibit 3 marked for identification.)

Q I show you a document, Mr. Fitzpatrick, which

EXHIBIT K TO PLAINTIFF'S LETTER - MAY 8, 1975 LETTER FROM MORGAN GUARANTY TRUST COMPANY TO PLAINTIFF ADVISING OF ESTABLISHMENT OF LETTER OF CREDIT BY CENTRAL BANK OF NIGERIA

(FOLLOWING PAGE)

142a-1

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

FORM 11-4-9 14D

May 8, 1975

Reale International Inc.
508 Tolland Street
East Hartford, Ct. 06108

On all communications please refer to
OUR REFERENCE NUMBER
A 08940

This refers to our advice of April 29,1975 and our Telex of today thru Banco de Bilbao, Oviedo, Spain

Dear Sirs:

We are instructed to advise you of the establishment by Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria of their IRREVOCABLE Credit CBN/BO/75/89 in your favor

For U.S.$14,280,000.00(FOURTEEN MILLION TWO HUNDRED EIGHTY THOUSAND U.S.DOLLARS)------

available upon presentation to us of your drafts at sight on us for 100% of the C.I.F. invoice value, accompanied by:

Commercial Invoice in quadruplicate - describing the merchandise as indicated below

Insurance Certificate in duplicate, covering ALL RISKS as per Institute Cargo Clauses including War Risks and S.R.C.C. for Invoice Value plus at least 10%. Insurance by the seller shall be from Gijon and/or Musel to the Lagos/Apapa Port. The buyer shall insure the goods against all risks during discharge at Lagos/Apapa Ports and therefrom to his warehouse.

Full set (2/2) clean on board bills of lading, issued to order blank endorsed, marked notify The Permanent Secretary, Ministry of Defence, Lagos, marked Freight Prepaid, dated latest June 15, 1976.

Evidencing shipment C.I.F. value of 240,000 Metric Tons of Portland Cement plus or minu ten percent conforming to B.S.S.12/1958 or B.S.S.12/1971 at U.S.$59.50 per Metri Ton, from United States of America to Apapa/Lagos Port. Packing shall be in 6-P Kraft paper bags each containing 50 kgs G/N and also 3-Ply empty spare bags to b supplied, free of cost, equal to 3% of total number of filled bags comprising each consignment.(and documents must so indicate). Shipment to commence within 30 days after receipt of the Letter of Credit in Oviedo, Spain, by the seller (and the credit is subject to amendment). Delivery shall be at the rate of 20,0 metric tons per month plus or minus 10% at seller's option.

Partial shipments and payments permitted Transhipment prohibited

This credit is issued in your favor and/or transferees. This credit is transferable to second beneficiaries including abroad. Should you desire to transfer same, such transfer will be subject to the return to us of this advice together with your written instructions on either of the enclosed forms and your assuming our usual transfer charge and a certificate of your bankers as indicated on the attached forms.

All documents to be made and addressed to The Permanent Secretary, Ministry of Defence, Lagos.

continued

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK
INTERNATIONAL BANKING DIVISION
23 WALL STREET, NEW YORK, N. Y. 10015

FORM 11-4-946D

May 8, 1975

On all communications please refer to
OUR REFERENCE NUMBER
A 08940

Reale International Inc.
508 Tolland Street
East Hartford, Ct. 06108

Our principals state:" Demurrage: Unloading of each consignment of cement shall be completed within ten days where such consignment is of 10,000 metric tons or pro rata in the case of any greater or lesser quantity. At the elapse of such period (which shall commence from the start of the next working period after the ship's master has reported his readiness to discharge to the Chief Harbour Master, whether the vessel is berthed or not), demurrage not exceeding U.S.$4,100.00 per diem shall be for the accountof the buyer, provided that the seller shall have given due notice to the buyer of the departure from the port of loading of each consignment. Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit on presentation of statements of facts duly certified as correct by the Ship's master and by the Ship's agents in Lagos".

Except as otherwise expressly stated herein, this advice is subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce, Brochure No.222.

Your drafts must indicate that they are drawn under the aforementioned Irrevocable Credit No. CBN/BO/75/89/ dated May 1 1975 of the Central Bank of Nigeria, Tinubu Square, Lagos, Nigeria, and must be presented to our Commercial Credits Department, 15 Broad Street, New York, N.Y. 10015 with specified documents, not later than June 30, 1976 on which date this advice expires.

THIS LETTER IS SOLELY AN ADVICE AND CONVEYS NO ENGAGEMENT BY US.

Yours very truly,

Authorized Signature

HILDRED KOPSEL

EXHIBIT L TO PLAINTIFF'S LETTER - PAGES 9-16 AND 536-541 OF TRIAL MINUTES IN EAST EUROPE/NIKKEI/CHENAX ACTIONS AND DEFENDANTS' SECOND TRIAL MEMORANDUM SUBMITTED THEREIN

only made available to counsel at the end of last week. I hand these up at this time.

Your Honor, we will have available for the Court, I'd like to note at this time, a transcript of the deposition to be utilized during the course of the plaintiffs' case of an expert witness, Daniel Richard, an expert on Swiss law. Defendant already has a copy.

I make reference to it at this point because it has not been set forth as a deposition intended to be used and described in the pretrial order.

THE COURT: Mr. Sandler, perhaps this is a good time to ask you and Mr. Simms if there is agreement that as far as Chenax is concerned Swiss law is considered to be applicable as far as each of you are concerned.

MR. SANDLER: Only with regard to the contract, and not with regard to the letter of credit. There is no agreement at this time.

THE COURT: Where does that leave us then? You say as to the contract, yes, but as to the letter of credit, no. Is that your position?

MR. SANDLER: That is correct.

THE COURT: What do you say as to what law is applicable to the letter of credit?

MR. SANDLER: The letter of credit is

(L)

by its terms governed by the International Chamber of Commerce Customs and Practices for commercial or for documentary credits.

THE COURT: And therefore?

MR. SANDLER: I believe New York law would apply with respect to it.

THE COURT: Do you agree with that?

MR. SIMMS: No, your Honor, I agree that the cement contract by its terms applies -- that the law of Switzerland is to govern. I agree that the letter of credit by the terms of the Customs and Uses for documentary credits of the International Chamber of Commerce brochure is to apply by the terms of the letter of credit.

Your Honor, argument has previously been made by plaintiffs in this case that because the letter of credit was made payable in New York that as a choice of law question the law of New York should apply.

Now, the Uniform Commercial Code in New York, Article 5, states that with regard to any letter of credit which by its terms is to be governed by Uniform Customs and Practices either in whole or in part, then Article 5 of the Uniform Commercial Code does not apply.

So, therefore, at this point I would say,

then, that the law that would apply to the letter of credit would be Uniform Customs and Practices. However, only to the extent that the provisions of Uniform Customs and Practices meet the situation which is at issue before your Honor on these letters of credit.

As to issues not covered by the Uniform Customs and Practices, and I believe that your Honor agrees on choice of law question that New York law applies, then you must look to the Uniform Commercial Code provisions applicable to letters of credit, and this point, your Honor, is significant because on the issue of an anticipatory breach of irrevocable letter of credit, which is the claim that plaintiffs have made both with respect to the letter of credit, and the cement contract, the Uniform Customs and Practices has no provision.

In other words, if you look at the International Chamber of Commerce brochure on Uniform Customs and Practices you will see defined therein many matters, but nothing with regard to anticipatory breach. However, the Uniform Commerce Code Section 5-1152 specifically addresses the problem of anticipatory breach of a letter of credit and states therein that in a situation like that the beneficiary of the letter of

credit would have the same rights as a seller of goods in a situation where there has been an anticipatory breach, those rights being defined in the Uniform Commercial Code under Section 2-610. That in regard to the claims that are before your Honor for anticipatory breach of the cement contract and letters of credit on East Europe and Nikkei, the contracts by their terms are governed by laws of the United States, so that the Uniform Commercial Code would apply to those claims.

In Chenax you have the law of Switzerland applying to the rights and obligations under the contract. Under all three letters of credit, your Honor, however, it would be our position that the Uniform Customs and Practices applies to the extent that those provisions cover the situation before the Court, and in any situation where it does not, and in particularly as to what happens when you have an anticipatory breach by the issuer of the letter of credit, then we would contend, your Honor, that the Uniform Commercial Code, Section 5115 applies and the significance of that, your Honor, is that the code provision 5115 and the practice commentary to that code provision makes it clear that with an anticipatory breach of the letter of credit the beneficiary being put in the same position

as a seller of goods in a case of anticipatory breach with respect to his remedies it is the defendants' contention that the plaintiffs' burden of proof on their claims arising under the cement contracts and the letters of credit are the same and that is with an anticipatory breach, while if in fact there has been a breach the law would excuse the plaintiffs from performing any futile act by way of further performance to the contract, it does not excuse the plaintiffs when they seek to collect damages on those contracts to prove that they have the ability to perform those contracts fully, and so that part of the burden of proof of plaintiffs of their claims, whether they arise under the letters of credit or under the cement contract, is that they demonstrate that they were ready, willing and able to provide the cement and transport it to Nigeria under the terms of the contract.

I particularly address your Honor's attention to the practice commentary by Henry Hartfield, an attorney who is a member of Sherman & Sterling, as to Section 5115-2 of the Uniform Commercial Code wherein Mr. Hartfield's comments are particularly pertinent to the situation which you have before you on these claims. I have an extract of that if it would be helpful to your

Honor, and when we respond in part to the preliminary matters that have been raised by plaintiffs I can hand up to you a short memorandum that explains the point that I have just been referring to with respect to what law applies on the claims under the letter of credit.

But you would find Mr. Hartfield explaining quite clearly that while a letter of credit is a transaction in documents and not a transaction in merchandise where a letter of credit relates to an underlying transaction in merchandise, as is the case in each of the claims presented by plaintiffs, and if in fact there has been an anticipatory breach of the letter of credit by the issuing bank, the obligation by the particular plaintiff to collect any damages under the letter of credit is that he show that he could have provided the documents required to be produced under the letter of credit.

THE COURT: All right.

Mr. Sandler.

MR. SANDLER: Going back to the original question, what law applies, and addressing myself to the letter of credit, there is a doctrine which holds that if there is no nexus between the transaction and the law in the contract on occasion the courts will not apply the law designated in the contract. In the

Chenax contract Swiss law was designated. However, there was no nexus between Switzerland and these transactions. But I'm willing to say that for the purposes of the cement contract as opposed to the letter of credit we will accede to Swiss law.

However, when you get to the letter of credit and the fact there was no nexus between the letter of credit in Switzerland, I would agree with Mr. Simms that the Customs and Practices only go so far. They don't go into the issue of damages. When we come to the issues of damages you don't throw back to Switzerland. You throw back to a jurisdiction that had some connection with this transaction and the jurisdiction that had the most transaction with payment under the letters of credit was New York, and there is a case that we will be citing I think quite frequently, the Zeevi case -- it is a New York Court of Appeals case -- where you had an almost identical situation. It was where a New York repudiated paying a non-confirmed letter of credit, and the New York Court of Appeals stated that it would apply New York law and it was a letter of credit issued by a Ugandan bank, I believe.

MR. HORNIGER: It seems that you have gotten a very long answer to a pretty simple question.

It seems to me that plaintiffs and defendants are in agreement that all three letters of credit are governed insofar as the issues of repudiation and breaching -- that these, having been consented to by the beneficiaries, constitute a repudiation and breach that is governed by the Uniform Customs so that I think we are all agreed that the Uniform Customs do not contain any provisions as to what happens when there is a repudiation or a breach or a dishonor of presentment, and I think we are all agreed that at that point we have to look to New York law, which is the UCC, and then we are in violent disagreement as to what the substance of that is. But I think that is the answer to your question. I was speaking only of the letters of credit, of course.

THE COURT: Mr.Bailey, among the various things you handed up, none has addressed this question; correct?

MR. BAILEY: That's correct.

THE COURT: You intend to address this question on behalf of various plaintiffs, I take it?

MR. BAILEY: I would expect that that would be part of a memorandum either during the course of the tria or in conclusion.

THE COURT: And, Mr. Simms, you would likewise submit?

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Decor by Nikkei International, Inc.,
vs.
Federal Republic, et al.
77 Civ. 2348 (LWP)

East Europe Import-Export, Inc.,
vs.
Federal Republic, et al.
77 Civ. 2809 (LWP)

Chenax Majesty, Inc.,
vs.
Federal Republic, et al.
77 Civ. 3045 (LWP)

New York, New York
September 13, 1979--10:20 a.m.

tkl (Trial resumed)

THE COURT: We have some matters to conclude.

With reference to Chenax, I understand there are some areas of agreement as to what law governs. It is already on the record that the parties agree with respect to Nikkei's claim and East Europe's claim that both under the cement contract and under the letter of credit, New York law governs or is applicable. That is, New York's Uniform Commercial Code in particular is applicable.

As far as Chenax is concerned, under the cement contract claim is there agreement as far as liability is concerned that New York law governs?

Plaintiffs?

MR. SANDLER: Under the cement contract, no, there is not agreement.

THE COURT: Is there agreement that Swiss law governs?

MR. SANDLER: Under the cement contract I believe Swiss law would govern with respect to the issue of liability.

THE COURT: Agreed?

MR. SIMMS: Yes, your Honor.

THE COURT: The cement contract will be under Swiss law.

How about the cement contract as far as damages is concerned?

MR. SANDLER: I believe that New York law would apply.

THE COURT: Agreed?

MR. SIMMS: I don't agree, your Honor.

If you are talking about the cement contract, by its terms all disputes are to be governed by the law of Switzerland; liability and damages are to be governed by the law of Switzerland.

MR. SANDLER: I believe under the cement contract we would be thrown into the letter of credit, which was the document pursuant to which payments were

to be made and from which damages would ensue, and if there were a breach of the letter of credit that would throw us into New York law, because New York was the place where payment was to be made under the letter of credit.

THE COURT: How about it -- if you get past liability on the cement contract using Swiss law and you get over into the area of damages, are you not automatically over into the question of the letter of credit and is not New York law then applicable?

MR. SIMMS: Your Honor, I think that the claim is for breach of the cement contract. The letter of credit was a means of payment, but I think the claim of anticipatory breach if basically the obligation of the cement contract to purchase cement and I still believe that the issue of damages would also have -- damages as alleged by plaintiff are a result of that breach, and that the Swiss law would apply.

At plaintiffs' request, your Honor, prior to trial, Mr. Sandler deposed his Swiss law expert and the issue of damages was raised by Mr. Sandler in that deposition as to what the law of Switzerland was as to

damages arising by virtue of the breach of the cement contract.

THE COURT: We will have to consider that open. I will await further submissions from the parties on that narrow question.

Chenax claim, letter of credit. First, liability.

MR. SANDLER: That would be under the ICC, Uniform Customs and Practices, and damages would be under --

THE COURT: One at a time.

Do you agree with that, Mr. Simms?

MR. SIMMS: On the issue of liability?

THE COURT: Yes.

MR. SIMMS: I don't know that you will find an applicable provision in the Uniform Customs and Practices on the liability issue.

THE COURT: And therefore?

MR. SIMMS: Pursuant to our submission in our second trial memorandum, if your Honor adopts on the choice of law a question that New York law applies because it was the place of payment, then the Uniform Commercial Code would apply.

THE COURT: Agreed?

mds

MR. SANDLER: I agree with that.

THE COURT: As to damages, the same?

MR. SANDLER: Exactly, your Honor.

THE COURT: Agreed?

MR. SIMMS: Yes, your Honor.

It is particularly Section 5-115 that talks about anticipatory repudiation of a letter of credit.

THE COURT: Of the UCC?

MR. SIMMS: Yes, your Honor.

THE COURT: Moving to the bill of lading question that arose around N19 for identification, who will speak first?

MR. SANDLER: Mr. Bailey will speak.

MR. BAILEY: I think there has been submitted to your clerk copies, and we made available to counsel -- as a matter of fact, counsel for defendant, I'm sure, has uncovered -- there it is all the time; you don't have to uncover it -- UCC1-202, prima facie evidence by third-party documents, and I think that that section of the Code is applicable by its terms not only to bills of lading but to almost any commercial document contemplated and required by agreement, specifically including -- I'll read it into the record.

THE COURT: Before you do, Mr. Simms, what is your statement on the matter? The issue was whether or not N19 for identification could be received for the truth of what was asserted therein, more particularly to demonstrate --

MR. SIMMS: The fact of loading.

THE COURT: Yes.

MR. SIMMS: Your Honor, as we indicated last evening when we recalled this provision of the Uniform Commercial Code and notifed your Honor's chambers of it, on its face it does state that a document such as a bill of lading in due form is prima facie of authenticity and genuineness and of the facts stated therein.

I think our position with respect to N19 is that while it states it is a bill of lading, the question is is it in due form. The copy marked indicated a copy not negotiable.

I think we still have to have some further foundation for its introduction as a bill of lading in due form.

An argument was made yesterday by Mr. Hoeniger that this document or the original of this document may have been presented to Morgan Guaranty

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 2348 (LWP)

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 2809 (LWP)

CHENAX MAJESTY, INC.,

Plaintiff,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

77 Civ. 3045 (LWP)

DEFENDANTS' SECOND TRIAL MEMORANDUM

Defendants Federal Republic of Nigeria and Central Bank of Nigeria, in their first trial memorandum, set forth authorities on the issue of plaintiffs' burden to plead and prove their ability to perform all their obligations under the cement contracts and letters of credit at issue, and to prove that their subcontractors were ready, willing and able to perform that part of the cement contract delegated to them by plaintiffs. See, Points 2 and 3 of Defendants' First Trial Memorandum.

The following authorities support: (A) that plaintiffs' burden of proof was not changed by the adoption in New York of the Uniform Commercial Code; and (B) that plaintiffs' burden of proof is the same with respect to any claims for anticipatory breach of their letters of credit.

A.

East Europe/Nikkei/Chenax v. Nigeria
Addendum to Defendants' First Trial Memorandum

The obligation of a plaintiff to plead and prove that it was ready, willing and able to perform its obligations under a sales contract, when suing for an anticipatory breach of that contract, was not changed by the Uniform Commercial Code.

N.Y., U.C.C., Section 2-610 (McKinney 1964) is entitled "Anticipatory Repudiation" and sets forth the rights of the aggrieved party in the event of an anticipatory breach.

The New York Annotations to this section state:

> "This section is consistent with the New York cases recognizing the doctrine of anticipatory repudiation. (citations omitted)* . . . The right of the aggrieved party to suspend performance is supported by DeForest Radio T. & T. Co. v. Triangle Radio S. Co., 243 N.Y. 283, 153 N.E. 75 (1926)." (page 538)

In the DeForest case, an action for anticipatory repudiation of a contract for the sale of radios, the New York Court of Appeals held:

> "Where one party to a contract repudiates it and refuses to perform, the other party by reason of such repudiation is excused from further performance, or the ceremony of a futile tender. He must be ready, willing and able to perform, and this is all the law requires." (emphasis added)
>
> 243 N.Y. 283, page 293.

B.

Damages For Anticipatory Breach Of Letters of Credit

1. The Cement Letters of Credit, by their terms, were made subject to the Uniform Customs and Practice for Documentary Credits 1962, Revision, International Chamber of Commerce brochure no. 222 (UCP, 1962 Revision).

2. The New York Uniform Commercial Code, Article 5, deals with Letters of Credit. Sec. 5-102 (4) provides that Article 5 does not apply to Letters of Credit subject in whole or in part to UCP. However, UCP does not provide for every situation arising; e.g. the anticipatory breach of an irrevocable Letter of Credit. If Plaintiff's Letters of Credit are to be governed by the Law of New York because they were made payable in New York (as the Plaintiffs' argue) then a New York court applying New York law on Letters of Credit governed by UCP must apply UCP to the extent that UCP provisions deal with Plaintiffs' claims. However, where UCP does not provide a rule for determination of Plaintiffs' claims, the New York court must apply the general Law of New York.

3. UCP makes no provision for anticipatory breach of the Letter of Credit; New York Uniform Commercial Code Sec. 5-115 (2) does govern such a situation. Therefore, Sec. 5-115 (2) is applicable to Plaintiffs' claims.

4. UCC Sec. 5-115 (2) states that a wrongful repudiation of a Letter of Credit by the issuing bank gives the beneficiary the rights of a seller after anticipatory repudiation by the buyer under UCC Sec. 2-610 (which requires the seller to show he was ready, willing and able to perform before the seller can recover damages).

5. The Practice Commentary to UCC Sec. 5-115 was written by Henry Harfield, Esq., a partner of Shearman & Sterling. The Practice Commentary confirms that the UCP has no comparable provision relating to anticipatory breach.

6. Harfield's commentary also confirms that while normally a Letter of Credit is a transaction in documents separate and apart from the underlining transaction in merchandise, where there has been an anticipatory breach by the issuing bank of the Letter of Credit, the beneficiary/seller has the same obligations of proof that a seller would have for anticipatory repudiation of the underlining transaction in merchandise. See example stated in Practice Commentary pages 693-694:

(See next page for Harfield's statement and example)

610. The beneficiary is excused from the obligation to procure and present documents in accordance with the terms of the repudiated credit,—but this simple statement does not eliminate the problems which will arise.

The contractual obligation repudiated by the issuer was an obligation to pay against documents and not against merchandise. The right which the affronted beneficiary has acquired is a mercantile right to identify merchandise under the "contract". But there is no contract with respect to merchandise,—only with respect to documents. If the beneficiary procures documents in conformity with the terms of the repudiated credit, he is entitled to the price, that is to say the amount specified as available for a drawing under the credit; if he does not procure the documents but relies upon the right of a seller under U.C.C. § 2—610, he will, presumably, have to prove that the merchandise he identifies or salvages in fact meets the requirements of the documents specified in the credit. For example, if the credit calls for an invoice evidencing sale of first grade Superior Supersonic Wizbangs as per buyer's procurement No. XYZ234, the beneficiary will be entitled to payment against delivery of his invoice reciting those specifications, and without regard to the character, or even the existence of the merchandise. If, on the other hand, the credit is wrongfully repudiated in time for the beneficiary "reasonably to avoid procurement of the required documents", one of these documents being a bill of lading and another an insurance certificate, in addition to the commercial invoice, then it would appear that to recover against the unfaithful issuer, the beneficiary would have to prove by a reasonable preponderance of evidence that the merchandise he had identified to the contract or salvaged was in fact first grade Superior Supersonic Wizbangs conforming to the specifications of the designated buyer's procurement order No. XYZ234.

Subsec. (2) of this section would present a myriad of problems if a situation arose in which it became applicable. As a practical matter, it means, in essence, that in the case of anticipatory breach, the issuer can no longer rely upon the principle that a letter of credit is a transaction in documents and not in merchandise. This is so because if the repudiation is brought home to the beneficiary "in time reasonably to avoid procurement of the required documents", the beneficiary then has the rights customarily given to a seller of merchandise against a buyer of merchandise under U.C.C. § 2—

Respectfully submitted,

KISSAM, HALPIN & GENOVESE

By _____
Attorneys for Defendants
120 Broadway
New York, New York 10005
(212) 962-2000

Of Counsel:

Leo T. Kissam
James G. Simms
Laurence May

EXHIBIT M TO PLAINTIFF'S LETTER - CERTIFICATE # 820980 ISSUED BY FIREMEN'S FUND INSURANCE COMPANY

(FOLLOWING PAGE)

165a-1

CERTIFICATE

FIREMAN'S FUND INSURANCE COMPANY

(A MEMBER OF FIREMAN'S FUND AMERICAN INSURANCE COMPANIES)
ATLANTIC MARINE REGIONAL OFFICE, 110 WILLIAM STREET, NEW YORK, N. Y. 10038

S

REFERENCE NO. 820980

This is to Certify, that on the 10th day of August 19 75 this Company insured under Open Policy No. 12459 for Reale International, Inc., 508 Tolland Street, East Hartford, Conn. 06108

for the sum of (Not exceeding One Million Dollars - U. S.
US$ 654,500.00 (Seiscientos cincuenta y cuatro mil quinientos con 00/) Dollars,
on Cement in bags (10,400 ton a $ 59,50 más 10 %)
200,000 bags of cement valued at declared
laden on board the Vessel "MARINE GLORY"
at and from Gijón/Musel (España) to Lagos, Nigeria

It is understood and agreed that in case of loss the same is payable to the order of

Permanent Secretary, Ministry of Defence, Lagos on surrender of this Certificate, which conveys the right of collecting any such loss as fully as if the property were covered by a special Policy direct to the holder hereof, and free from any liability for unpaid premiums. This Certificate is subject to all the terms of the Open Policy, provided, however, that the rights of a bona fide holder of this Certificate for value shall not be prejudiced by any terms of the Open Policy which are in conflict with the terms of this Certificate.

CONDITIONS	MARKS AND NUMBERS
Per Institute FPA Clauses (FPA-EC)- ALL RISKS. WARRANTED - including loading at port of origin, however, excluding unloading at destination WARRANTED - shipped vic approved steamers per Endorsement No. 1	

This insurance is subject to the following American Institute Clauses:
Amended F. C. & S. Warranty (October, 1959) War Risk Insurance — Form 3-S (March 1971)
[illegible] S. R. & C. C. Endorsement — Form No. 6-A (July, 1961)

THIS INSURANCE PLACED THROUGH Central Insurance Agency, Inc.

This insurance attaches from the time the goods leave the Warehouse and/or Store at the place named herein for the commencement of the transit and continues during the ordinary course of transit (including customs transhipment, if any, until the goods are discharged overside from the overseas vessel at the final port. Thereafter the insurance continues whilst the goods are in transit and/or awaiting transit until delivered to final warehouse at the destination named herein or until the expiry of 15 days (or 30 days if the destination to which the goods are insured is outside the limits of the port) whichever shall first occur. The time limits referred to above to be reckoned from midnight of the day on which the discharge overside of the goods hereby insured from the overseas vessel is completed. Held covered at a premium to be arranged in the event of transhipment, if any, other than as above and/or in the event of delay in excess of the above time limits arising from circumstances beyond the control of the Assured.

NOTE: It is necessary for the Assured to give prompt notice to Underwriters when he becomes aware of an event for which he is "held covered" under this certificate and the right to such cover is dependent on compliance with this obligation.

Where goods are shipped under a bill of lading containing the so-called "Both to Blame Collision" Clause these assurers agree, as to all losses covered by this insurance, to indemnify the assured for any amount (up to the amount insured) which the assured may be legally bound to pay to the shipowner under such clause. In the event that such liability is asserted the assured agrees to notify the assurers who shall have the right, at their own cost and expense to defend the assured against such claim.

Provision Required by Law — This Certificate is issued by a Stock Corporation.

IMPORTANT. To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate, it must be stamped within ten days after its receipt in the United Kingdom.

This Certificate is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are made a part of this Certificate, together with such other provisions, stipulations and conditions as may be endorsed hereon, or added hereto as herein provided.

IN WITNESS WHEREOF, the said Company has caused these Presents to be signed by its duly authorized Officers in the City of San Francisco, but this Certificate shall not be valid unless countersigned by an authorized representative of this Company or the Assured.

Richard P. J. Conroy
Secretary

President

Countersigned:

At West Cowes the 11th day of August 19 75

ISSUED IN DUPLICATE ONE OF WHICH BEING ACCOMPLISHED, THE OTHER TO BE VOID.

EXHIBIT N TO PLAINTIFF'S LETTER - DOCUMENTS FROM FILES OF MORGAN GUARANTY TRUST COMPANY

12th February, 1975.

Mr. Ralph J. Bunche, Jr.,
Assistant Treasurer,
Morgan Guaranty Trust Company
of New York,
23 Wall Street,
New York, N.Y. 10015.

Dear Sir,

IRREVOCABLE LETTERS OF CREDIT ISSUED BY THE C.B.N.: CONFIRMATION OF

We have been receiving requests from beneficiaries of Irrevocable Letters of Credit issued by the Central Bank of Nigeria, asking for confirmation. We wish to make it clear that our irrevocable letters of credit require no further confirmation by our correspondents as these credits are definite undertakings on our part to the beneficiaries and bona fide holders of drafts drawn or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credits will be duly fulfilled provided that all terms and conditions of the credits are complied with.

As our correspondent, you have our authority to pay beneficiaries of letters of credit on presentation of relevant documents. As the Central Bank of Nigeria, with a very good image to protect, no suppliers should have any cause to doubt our ability to pay our bills promptly. Any sceptical beneficiary could call for a status report on us which we expect you to give.

You should, therefore, when advising beneficiaries' bankers of our Letters of Credit, assure them of our ability to honour our obligations on due date.

Yours faithfully,

Chief of Banking Operations

MG 84

CENTRAL BANK OF [illegible]
ACCOUNT SERVICES FOR
YEAR ENDED 12/31/75

OPERATIONAL SERVICES RENDERED		ACTIVITY
CHECKS PAID		
INDIVIDUAL FOREIGN		19
	GROUP TOTAL:	19
DEPOSITS		
REGULAR DEPOSITS		1
	GROUP TOTAL:	1
CHECKS COLLECTED - CITY		
CITY CHECKS		1
	GROUP TOTAL:	1
ACCOUNT MAINTENANCE		
ACCOUNT MAINTENANCE		1
	GROUP TOTAL:	1
STATEMENT PREPARATION		
STATEMENTS RENDERED		12
DELIVERY FOREIGN		1,017
	GROUP TOTAL:	1,029
MONEY TRANSFER - INCOMING		
INCOMING VIA ATS		26
FOREIGN LETTER OF ADVICE OR CHIPS		16
	GROUP TOTAL:	42
MONEY TRANSFER - OUTGOING		
DOMESTIC PAYMENT OR TRANSFER		0
FOREIGN PAYMENT OR TRANSFER		174
	GROUP TOTAL:	174

P. Ex. #37-11
1.7.80
JM

(80)

		ACTIVITY
DOMESTIC COLLECTION		
DOMESTIC CLEAN CHECK COLLECTION		97
DOMESTIC DOCUMENTARY COLLECTION		1
	GROUP TOTAL:	98
CREDIT INQUIRIES AND INVESTIGATIONS		
DOMESTIC CREDIT INVESTIGATION		27
FOREIGN CREDIT INVESTIGATION		8
SPECIAL HANDLING		8
VERBAL INQUIRY		1
WRITTEN INQUIRY		1
	GROUP TOTAL:	45
CLEARANCE-IN		
NON MONEY MARKET RECEIVE CLEARANCE		1
	GROUP TOTAL:	1

OPERATIONAL SERVICES RENDERED	ACTIVITY
LETTER OF CREDIT-ISSUANCE	
LETTER OF CREDIT ISSUANCE	37
PRE-ADVICE	26
AMENDMENTS	113
GROUP TOTAL:	176
LETTER OF CREDIT-PAYMENT	
SIGHT PAYMENTS	172
TIME PAYMENTS	2
L/C CLEAN REIMBURSEMENT-PAYMENTS	55
GROUP TOTAL:	229
L/C FORWARDING & CONDITIONAL DISB	
FORWARDING LETTER OF CREDIT	27
GROUP TOTAL:	27
LOAN PROCESSING-FOREIGN	
INTEREST ON FOREIGN OVERDRAFTS	0
GROUP TOTAL:	0

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

1973	O. O. Vincent	Deputy Governor
	F. A. Ijewere	Chief of Banking Operations
	S. A. Okponobi	Deputy Chief of Banking Operations
	Jacob Amao	Assistant Chief Accountant
	A. Bello	Manager of Accounts Office
	T. Ntekop	Banking Manager
	O. Olashore	Chief Bank Examiner
	R. A. Lawal	Chief Accountant
	Usman Nagogo	Chief Personnel Officer
	S. B. Falegan	Deputy Director of Research

1. [redacted] has officially been retired.

[redacted] I suspect that the cement problems caused him some difficulty as well because it was the Central Bank which permitted the Ministry of Defense to issue letters of credit which were well in excess of Defense's budg However, as Ministry of Defense was really controlled by Gowon, it would have been hard for [redacted] to refuse the Ministry's request.

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CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

4. Wagner and I talked at length to Ijewere and Okponobi about potential problems which might arise because of the CBN's attempt to change wording in their lett of credit. I also talked to Deputy Governor Vincent about this problem. We went over the demurrage language in their existing credits and attempted to sh them why the new clause must be considered an amendment. We pointed out that, if they did not treat the new wording as an amendment, they could do serious damage to their future international credit standing. They were not at all impressed by this argument. Their position is that the Government has told them to stop all payments for cement until they can determine which payments are legitimate. Furthermore, they will not allow the cement situation to ruin their economy. Ijewere did like Rod's suggestion that one way to get around the demurrage problem was to pass a local ordinance which would prohibit shipping agents from verifying the number of days a ship was in the harbor if they did not have the approval of the Harbor Master.

The Nigerian Government has decided to take a hard line on the cement problem the hope of scaring away future cement shipments. They are willing to do this regardless of any effect on their reputation. Their position is that no respo sible person would ship cement to Nigeria in view of the port congestion; and, therefore, NGT should not pay any cement credit, whether confirmed or unconfir We told them that, if documents were presented in order under confirmed credit we had to pay Vincent responded that the Government was willing to go to co if we did pay. In a subsequent discussion, Louis Michel of UBA said the BNP told the same thing by the Central Bank, but BNP is convinced that the Central Bank will not refuse to reimburse them for payments they have to make under letters of credit.

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CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

(3)

4. Settlement with 44 contracts has been reached. $73MM has been paid. Bello says all dollar settlements have gone through us, regardless of where the credit was opened. Apparently some of the other banks are encountering difficulty in making these payments. Only one or two Greek shippers are still causing problems. In general, the settlements call for a series of demurrage and cargo payments with the letters of credit to be tendered after 14 days. Only one credit relinquished thus far. At Brown's suggestion, I pointed out that payments have been made in certain cases through our Money Transfer Department, which have not reduced or cancelled the underlying credits. Most of the payments thus far are for demurrage and are outside of the credit. Nigerian settlements call for good faith money 14 days in advance of the hand over of the credit, but it is not clear whether this is 14 days from first or last payment. Nevertheless, Otiti and Ojemoran were very appreciative of the caution, will look into the matter further and asked that we continue to advise them of any problems we saw.

5. Kukoyi is now one of the Deputy Chiefs of Banking Operations. Sanusi is the other. As [illegible] pointed out, they should start a club of MGT/CBN personnel as they all tend to get promoted after our training: Nagoso - Deputy to Chief Personnel Officer; Kukoyi - now Deputy Chief of Banking Operations; Bello - now Assistant Chief Accountant; Akanlokhor - Governor, Kaduna; Ntei Assistant Chief Personnel.

Lagos, Nigeria

CONFIDENTIAL

Ralph J. Bunche, Jr., A.V.P. and Arthur J. Brown, A.T.

CONFIDENTIAL

Between 6 December and 17 December, Arthur Brown and the undersigned made numerous calls on the above. In addition, the nine Heads of Department arranged a luncheon on our behalf, and the junior staff entertained us on various occasions. As usual, Sule Okponobi coordinated all appointments.

(4)

Structure of Organization

McKinsey & Co. has finished its report. The report has been passed by the CBN's Board of Directors and has been submitted to government for approval. One of the main chang recommended by McKinsey is that the two Governors become less involved in daily operat and more involved with policy matters and liason with government. Up until very recently, the views of the Central Bank have been represented to Government by the Ministry of Finance. Apparently, this is one of the reasons that Government did not fully comprehend the letter of credit problems which arose because of the cement crisi McKinsey has recommended that three Executive Director positions be set up to handle the daily bank operations. Each Executive Director would be in charge of 3 Department thus freeing the Governors for policy matters.

R.A. Lawal is definitely leaving in March to become Managing Director of CTB Stockbrokers, one of the 3 local stockbrokers. CTB's major foreign shareholder is the British insurance broker C.T. Bowring. Apparently, CTB intends to widen its scope of business into merchant banking. J. Amao who attended the 1976 Central Bank Semina should take over although no appointment has yet been made.

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

7. Training is still very important. The five who visit us April 2 will be at the Fed from March 29 through April 2, and visit Midland after us. The CBN is trying to set up a training school for junior and senior staff and wishes to have a look at what we do and the materials we use, both for executive and clerical training. Nagogo is also interested in motivational courses. We should introduce them to the company which runs our outside seminar. They will send someone to the SMFB and Central Bank Seminar. Usman showed me the Volker letter in which the Fed offers a central banking course patterned after ours, which also deals with central banking policy and theory. Like our course it is three weeks long, basic expenses for account of participant. It will be offered this year in October and be limited to 20-25 candidates. Central Banks must submit applicants' qualifications, and the Fed will pick those it wants for this year's course.

CONFIDENTIAL

Letters of Credit

The CBR has now taken a firm position on confirmation of letters of credit. It has instructed all the Ministries not to include confirmed letters of credit in any contract regardless of whether or not the beneficiary is willing to bear the charges. In addition, the CBR has asked all its correspondents to tell their clients that the CBR 1) will not request confirmation; 2) is good for its obligations. Apparently, the CBR realized that when it was requesting confirmation with the charges for account of beneficiaries, these charges were being built back into the original contract price.

Accounts

The CBR still holds to its stated policy of one commercial account per country. Their network of commercial bank accounts is NCT, Midland, Deutsche Bank, BNP (only small amount of business due to problems caused by cement crisis - we now receive most of the CBR French business), Bank of Tokyo, Royal Bank of Canada, Credito Italiano, Swiss Bank Corporation, Algemene Bank, Societe Generale de Banque.

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Asst. Vice President

1970

Mallam Adamu Ciroma	Governor
O. O. Vincent	Deputy Governor
A. O. G. Otiti	Chief of Banking Operations
R. A. Lawal	Chief Accountant
J. Amao	Deputy Chief Accountant
Sule A. Okponobi	Deputy Chief Exchange Controller
T. I. Bello	Assistant Exchange Controller
O. Olashore	Chief Banking Examiner
Mr. Ojemoran	Manager, Bills Office
T. Ntekop	Assistant Personnel Manager
Usman Nagogo	Chief Personnel Officer
S. B. Falegan	Chief of Research

As usual, this was a three-day cal'.

1. With a great deal of hard work, Okponobi was able to secure an appointment with Governor Ciroma.

The basic thrust of our conversation was an explanation of NGT and a review of the cement difficulty and our efforts. He seemed well informed and thanked us for our efforts and patience.

2. Otiti has replaced Ijewere. In 1967-1969, he was Deputy Chief of Banking: thus, most of his responsibilities are familiar.

He received us very warmly and also thanked us for our efforts on the cement problem.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

OFFICE MEMORANDUM

To: Messrs. Lewis T. Preston - Executive Vice President
William E. Pike - Chairman, Credit Policy Com. Date October 27, 1975
Carl S. Samuelson, Jr. - Vice President

From: Paul W. Fitzpatrick, Ralph J. Bunche, Jr. & Arthur J. Brown

Subject: CENTRAL BANK OF NIGERIA

At the present time, we have five confirmed letters of credit outstanding for the Central Bank of Nigeria totaling $70,761,907.95. Of these credits, three totaling $67,240,000 cover shipments of cement. (See attached list.) In addition, we have advised (without responsibility on our part) letters of credit totaling $199,994,015.9 of which $164,266,405.26 cover cement.

Over the last several weeks, we have received the following instructions from the Central Bank: (These apply only to cement credits.)

1. All invoices must be certified by supplier.
2. No demurrage charges are to be paid without shippers having certification from the Nigerian Ports Authority.
3. No ships carrying cement are to leave for Nigeria without prior approval of the Central Bank.

All of the above seem to us to be amendments to existing letters of credit, and therefore require the consent of the various beneficiaries. Most beneficiaries are obviously reluctant to accept the proposed amendments without suitable compensation.

With regard to the advised credits, our role is to comply with the instructions from the Central Bank without responsibility on our part. Consequently, if documents are presented, we will only pay if the three above amendments are complied with.

As to the confirmed credits, if beneficiaries submit documents which comply with the original credit and refuse to accept the amendments, we are obliged to pay and then seek to reimburse ourselves from the Central Bank of Nigeria's account at the Federal Reserve Bank of New York. (This is our usual procedure.) It is possible that the Central Bank will refuse to allow us to reimburse ourselves because document do not comply with the above amendments. The three confirmed cement credits which ar presently outstanding were originally opened in May 1974. Since that time, none of these credits have been utilized. All three of the beneficiaries are unsubstantial businesses; and we think it very unlikely that they will be able to find shippers willing to ship to Nigeria under the present circumstances, particularly since none of these credits cover demurrage payments.

We think it is increasingly likely that one or more of the beneficiaries of an advised credit may institute legal action against the Central Bank, and may try to attach assets of the Central Bank which we hold. At the present time, we have a $9,849,021 current account and a custody account with securities totaling $243MM.

OFFICE MEMORANDUM

To: Messrs. Lewis T. Preston - Executive Vice President
William E. Pike - Chairman, Credit Policy Com.
Carl S. Samuelson, Jr. - Vice President

Date October 27, 1975

From: Paul W. Fitzpatrick, Ralph J. Bunche, Jr. & Arthur J. Brown

Subject: CENTRAL BANK OF NIGERIA

We have telexed the Central Bank and advised them that there seems to be an increasing possibility of legal action being instituted in New York against them, and suggested that they engage first rate legal counsel.

P.W.F. R.J.B. A.J.B.

CONFIRMED LETTERS OF CREDIT

Beneficiary	Commodity	Expiry	Balance Outstanding
Nix International	Cement	Dec. 31, 1975	$26,250,000
Chikafis International	Cement	July 31, 1976	14,490,000
Tri Ex Enterprises	Cement	Oct. 31, 1976	26,500,000
TOTAL CEMENT CONFIRMED CREDITS			$67,240,000
GTE International	Telephone Equipment	Dec. 31, 1976	689,814
Harris Corp.	Satellite Tracking Station	Dec. 31, 1976	2,832,093
TOTAL NON-CEMENT CONFIRMED CREDITS			$3,521,907
TOTAL CONFIRMED CREDITS			$70,761,907

ADVISED LETTERS OF CREDIT

TOTAL $199,994,015.90
OF WHICH $164,26[illegible],405 COVER CEMENT

Memorandum for Credit Department Files

(Give full details)

Regarding CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

From Mr. Arthur J. Brown, A.T., 3/15

10/11/78

Mr. A. Ogedegbe
Director of Foreign Operations

M G 120

The above was the guest of Paul Fitzpatrick and the writer for lunch today. This was our first meeting with Ogedegbe and he is clearly an impressive individual and is the one to talk to about investments, and letters of credit and in fact most of the business we can expect to do with Central Bank of Nigeria in the future.

Although the Central Bank feels that it should not be performing many commercial banking functions, they will nevertheless continue with this sort of business first because of commercial banks limited capacity and second because of their traditional function as banker for the Nigerian Government. The Central Bank of Nigeria's ability to get L/C's opened without confirmation is very importa to the government's effort to combat inflation.

We should be hearing more from Ogedegbe's office in about two months with regard to installation of the direct telex in our Cable Department.

We discussed the courier service (International Air Courier) in detail explaining the type of material to be handled and Ogedegbe said we would hear fro him shortly on this matter.

We had the opportunity to mention that should Central Bank of Nigeria have the need to liquidate any of their government investments in the future, the could come to us for our suggestions with regard to any repurchase type of agreem which would be available to them. Ogedegbe seemed very interested in this, he made some notes and said that he would contact us should the need arise.

Ogedegbe asked if we were having any difficulties. I mentioned the fac that they had not been receiving some of the registered mail which we had sent to them. He promised to investigate in Lagos and to telex any suggestions they n have. Ogedegbe mentioned the long letter which was sent to us by his reconcilia manager. I told him we had replied already on several points and were in the pro of compiling several corrected statements which would be sent out this week.

Ogedegbe said that he could not foresee any quick settlements to the remaining cement cases still pending in New York. It seems to him that there is stalemate between National American Corporation and the Government of Nigeria. said Nigeria is willing to wait it out since they are not too upset as the attac funds are earning interest for them and they look upon these attached funds as p of the reserves they would be holding in dollars anyway.

Ogedegbe said that Adegbayemu, their Principal Legal Officer, has take retirement in order to go into politics. He also said that Usman Nagogo was no longer Director of Personnel but is now in Administration.

I talked about our willingness to continue to provide training and I m mentioned the discussions we had with Vincent and Otiti regarding our having

Mer randum 181a for Credit Dep tment Files

(Give full details)

Regarding .....

.....

From M

someone (Sellge) give a lecture or two when their training school conducts an international banking program.

The main purpose of this visit seems to have been merely a courtesy call on us and the Federal Reserve Bank of New York. As an aside, Ogedegbe presented our Custody Department with $10,000,000 in Japanese Development Bank 8 1/2% bonds due 3/15/80 which Central Bank of Nigeria had sold to Yamichi International (Europe) Limited, London and which Yamichi wanted deposited in their account with us.

A.J.B.

cc: R.B. Wagner, S.V.P.
J.J. Sperling, Economists

MG 121

CONFIDENTIAL

CENTRAL BANK OF NIGERIA

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Assistant Treasurer

1 1975

C. Isong	Governor
O. O. Vincent	Deputy Governor
S. A. Okponobi	Deputy Chief Banking Operations
R. A. Lawal	Chief Accountant
Dr. J. O. Adekunle	Director of Research
T. I. Bello	Manager, Accounts Office
O. Olashore	Chief Bank Examiner
Usman Nagogo	Chief Personnel Officer
T. Ntekop	Banking Manager
Mr. Ojemoran	Manager, Bills Office
J. Ogedegbe	Chief of Administration
S. I. Abe	Deputy Chief Bank Examiner
F. K. Banjo	Assistant Chief Internal Auditor (now with ICON)
O. Adesina	Assistant Chief Bank Examiner

	1975 to Date	1974
Deposits:		
Facilities:	Sight Credits - $69.5MM	
	Line for Foreign Exchange Contracts -	

CENTRAL BANK OF NIGERIA

CONFIDENTIAL

LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Assistant Treasurer

Because of the huge amounts involved in recent letters of credit, either the Governor or the Deputy Governor supervises all letter of credit transactions. Isong says the Bank has been very cautious and conservative thus far, particularly because of the many "bucket shops" the ministries have had a tendency to deal with. The Central Bank has become adamant that letters of credit not be confirmed by their correspondents. Apparently, this dogmatic policy has caused severe difficulties only in Germany. I advised the various parties concerned with letters of credit that in certain instances where the commodity is vital to development they might have to be somewhat flexible on the confirmation question. However, it appears that they will consistently refuse to have credits confirmed.

A Bills Department has now been established and is run by a Mr. Ojemoran. The Department was created because of the increasing volume of letter of credit work the Bank has been asked to undertake. As Nigeria's imports continue to grow this year, the volume of Central Bank letters of credit should also increase. The Bank now has a new letter of credit form which incorporates all the changes which our Letter of Credit Department suggested (form attached). As one can see, the form specifically requests that we not add our confirmatio

CENTR[illegible] BANK OF NIGERIA

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LAGOS, NIGERIA

Ralph J. Bunche, Jr. - Assistant Treasurer

(2)

T. Ntekop, who attended last year's seminar, is now the Bank Manager.

They seemed to be pleased with our new payment system worked out by Fitzpatric[illegible] and Brown. Bello did question the amount of "idle" funds which was accumulati[illegible] He referred to a letter he had sent to Brown concerning the build up of these funds. I told him I would check with Brown and revert upon my return.

Lawal, who is Bello's boss, is concerned that overdrafts be avoided at all cos[illegible] and thus is recommending that our drawing rights at the Federal Reserve be increased from the present $1,000,000 maximum per day.

CONFIDENTIAL

R.J.B.

Distribution:

Messrs. Rodney B. Wagner, S.V.P., 2/23
Rolf G. Sellge, V.P., 10/15
Paul W. Fitzpatrick, V.P., 3/15

CONFIDENTIAL

Miscellaneous

The CBN has already paid over 170MM Naira in demurrage claims resulting from the cemen crisis.

A cement shortage is again building. The government has recently increased the number of liscensed importers of cement from 11 to 47.

EXHIBIT P TO PLAINTIFF'S LETTER - OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY IN MIRABELLA V. BANCO INDUSTRIAL DE LA REPUBLIC OF ARGENTINA, AS REPORTED IN NEW YORK LAW JOURNAL, APRIL 13, 1979

NEW YORK LAW JOURNAL—Friday, April 13, 1979

TRIAL TERM, PART 22

Justice Greenfield

MIRABELLA v. BANCO INDUSTRIAL DE LA REPUBLICA ARGENTINA.—The instant action, which was commenced in 1962, has its genesis in events which occurred over thirty years ago in connection with the proposed establishment of an aluminum industry in Argentina. The plaintiff in this action, Anthony Mirabella, is the assingee of Franco Gronda, an Italian entrepreneur, who was the sole proprietor of a business operated under the name of SILPA. Gronda was to relocate to Argentina two industrial plants and build a hydroelectric plant to generate the necessary power. In addition, Gronda was to be permitted to import aluminum for resale or fabrication. Gronda obtained financing for the importation of two industrial plants and aluminum ingots and plates from defendant, Banco Industrial de la Republica Argentina, which had been established pursuant to a Presidential decree to promote industrial development in Argentina. Defendant bank was capitalized with government funds and had the power, inter alia, to grant loans to industrial enterprises through long term and short credits.

In March and April of 1948, defendant issued six letters of credit in favor of SILPA to finance the importation of the two plants and aluminum ingots and plates. The letters of credit were payable at three banks in Italy and Switzerland. On Aug. 18, 1948, allegedly acting on instructions of the Central Bank of the Republic and at the direction of Juan Peron, the President of the Republic, defendant sent cables to the three banks directing them to suspend further payments. The suspension was never lifted and the credits expired.

In this action, plaintiff seeks to recover $85,000,000 based on the cancellation of the letters of credit, which totalled $26,000,000. Defendant contends that the cancellation of the letters of credit was an "act of state", and has asserted act of state as an affirmative defense. The act of state doctrine precludes the courts of this country:

"from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory." (Banco Nacional de Cerbavi Sabbatino, 376 U.S. 398.)

The essence of the principle is that the courts of this country will not question the acts of recognized foreign nations committed within their own territories. J. Zeevi & Sons v. Grindlays Bank (Uganda), 37 NY 2d 120, cert denied, 423 [illegible]

The doctrine of acts of state, which is manifestation of judicial abstention, is distinct from that of sovereign immunity. In this action, defendant had asserted both sovereign immunity and act of state as affirmative defenses; however, the defense of sovereign immunity was dismissed over fifteen years ago. The defense of act of state was not asserted until 1969, leave to amend having been granted by the court.

Before the court is a motion by plaintiff for summary judgment dismissing the act of state defense and a cross-motion by defendant for summary judgment on that defense.

It is defendant's position that the suspension of payment under the letters of credit constitutes an act of state because it was done at the direction of the Central Bank of the Republic and President Peron. However, assuming arguendo that the suspension was ordered or directed by the Central Bank and/or President Peron, the court is not necessarily precluded from inquiring into the validity of the suspension. In the first place, no statute, decree, order or resolution of the Argentine government cancelling the credits was issued. Secondly, notwithstanding defendant's arguments to the contrary, the issuance of the credits was a "commercial transaction," and

"Repudiation of a commercial debt cannot, consistent with th[e] restriction approach to sovereign immunity, be treated as an act of state; for if it were, foreign governments, by merely repudiating the debt before or after its adjudication, would enjoy an immunity which our government would not extend them under prevailing sovereign immunity principles in this country. This would undermine the policy supporting the restrictive view of immunity [The restrictive view eliminates the defense on claims arising from commercial acts (jure gestionis) as opposed to governmental acts (jure imperii) of a sovereign.], which is to assure those engaging in commercial transactions with foregin sovereignties that their rights will be determined in the courts whenever possible." (Alfred Dunhill of London, Ic. v. Republic of Cuba, 425 U.S. 682 at 698-699).

Although a specific exception to the doctrine for commercial activities was recognized by only four Justices in Dunhill, the decision has been construed by the Second Circuit as reaffirming the doctrine of act of state in traditional terms by refusing to apply it to actions where a sovereign issued for commercial activities. Hunt v. Mobil Oil Corp., 550 F. 2d 68, cert. denied, 434 U.S. 984. In the case at bar, the asserted basis for directing suspension of payments was fraud on the part of Gronda. The repudiation of obligations for commercial reasons is not the type of public act to which foregin courts should defer. As noted by a plurality of the court in Dunhill, those engaging in commercial transactions with foregin sovereignties should have their rights determined in the courts whenever possible.

Moreover, although there is no hard and inflexible rule, the doctrine of act of state has generally been limited to acts of a foreign government within its own territory in the exercise of public or governmental functions. (See e.g. Banco Nacional de Cuba v. Sabbatino, supra).

To the extent that defendant relies on the Court of Appeals decision in French v. Banco Nacional de Cuba, 23 NY 2d 46 (1968), its reliance is misplaced. That action stemmed from an exchange control regulation of the Cuban government which, in effect, prevented American and other foreign investors from receiving currency, other than Cuban pesos, on their Cuban investments. Plaintiff, who had invested moneys in a Cuban farm, had received certificates of tax exemption permitting him to receive from the National Bank against delivery of the Certificate and pesos, a check for the equivalent in U.S. Dollars, exempt from Cuba's tax on the exportation of money. Based on a finding that the regulation was issued by an official instrumentality of the Cuban government and that based thereon the National Bank refused to and continues to refuse to exchange pesos for dollars, the court held that the breach of contract, of which plaintiff complained, resulted from and constituted an act of state.

In French, the Court of Appeals was dealing with a measure adopted to control currency and foreign exchange, which the court noted was similar to regulations enacted by many other countries including our own and that such regulations, at least when presented in a context such as the present case, are not appropriate subjects for evaluation by state courts applying local conceptions of public policy.

In the case at bar, we are not dealing with a general regulation or decree, i.e. a public act, but rather with the suspension of payments on letters of credit issued in connection with a specific commercial transaction. The case at bar is analagous to that presented in Dunhill (supra), in which the court refused to apply the act of state doctrine to the Cuban intervenors refusal to repay certain moneys paid to them by mistake. A majority of the Supreme Court held that the refusal to pay did not constitute an act of act of state, inasmuch as the refusal to pay, in and of itself, did not necessarily assert anything more than the claim that there was no obligation to return payments made on these accounts. As in the case at bar, there was no demonstration that the Cuban intervenors had authority to repudiate all or any part of the debts incurred by their business. To the contrary,

"No statute, decree order or resolution of the Cuban government itself was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due three foreign importers" (425 U. S. at 695).

Similarly, in the case at bar there is no statute, order or resolution of the Argentine government directing the suspension. Were this court to accept defendant's contention that the direction by President Peron and/or the order of the Central Bank, in the structure of the Argentine government, rises to the level of a statute, decree, order or resolution, the court is still not precluded from inquiry into the validity of suspension of payment.

As noted by Mr. Justice White, in the portion of the opinion concurred in by a plurality of the court recognizing a commercial exception to the act of state doctrine:

". . . subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on 'national nerves' ". (Id. at 703-704).

In the case at bar, we are dealing with letters of credit which were cancelled for purely commercial reasons, i.e. alleged fraud. Whether defendant, as it contends, acted at the direction of the Central Bank or pursuant to President Peron's alleged direction that measures be taken to avoid further damage to the country, that the credits be annulled and an investigation commenced, the court is not barred from entertaining the action. This is not a case [redacted] become embroiled in evaluating regulations or decrees of foreign governments. To the contrary, the underlying issue here is whether there was, in fact, fraud. Moreover, disposition of this suit does not require this court to sit in judgment on acts of the government of another done within its own territory, which is the underlying rationale of the act of state doctrine (Underhill v. Hernandez, 168 U.S. 250). In the case at bar, we are dealing with extra-territorial directives. Swiss and Italian banks were ordered by defendant to suspend payment. Thus, this is not a case involving acts of a foreign country committed within its own territory and accordingly the act of state doctrine is inapplicable; all that defendant is entitled to is consideration of whether it had grounds to suspend payment. (See Republic of Iraq v. First National City Bank, 352 F. 2d 47, cert denied 382 U.S. 1027 (1966)).

Defendant's attempts to show that it could have enforced the directive to suspend payment within Argentina, are not persuasive. In the first place, this was not done. Secondly, whatever bookkeeping adjustments could have been made at the Central Bank after the fact, the only way to stop the Italian and Swiss Banks from paying on the letters of credit was to direct them to suspend payment.

Our conclusion that the act of state defense is without merit finds additional support in J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda, Ltd.), supra, the Court of Appeals, applying Dunhill and Republic of Iraq, refused to apply the act of state doctrine to prevent judicial scrutiny of the repudiation by the government of Uganda of letters of credit issued in Uganda and payable in New York.

Based on the foregoing, plaintiff's motion for summary judgment dismissing the act of state defense is granted and the cross-motion is denied. Settle order.

KISSAM, HALPIN & GENOVESE
120 BROADWAY
NEW YORK, N.Y. 10005

212-962-2000
CABLE "LEKISSAN"
TELEX 424939 LEK UI

DEFENDANTS' LETTER TO JUDGE HAIGHT DATED JULY 25, 1980

BY HAND

July 25, 1980

Hon. Charles S. Haight, Jr.
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Reale International Inc. v.
Federal Republic of Nigeria
and Central Bank of Nigeria,
Index No. 78 Civ. 0023 (CSH)

Dear Judge Haight:

Defendants Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank) respectfully submit this letter to supplement their application for an order dismissing the above-captioned action for lack of subject matter jurisdiction pursuant to the Foreign Sovereign Immunities Act (Immunities Act). Defendants' application was made by letter to your Honor dated June 24, 1980 (Defendants' letter). By letter dated July 15, 1980, plaintiff Reale International Inc. (Reale), by its attorney B. H. Hoeniger, Esq., opposed the application (Mr. Hoeniger's letter). Nigeria and Central Bank also reply to the points contained in Mr. Hoeniger's letter.

Before addressing these points specifically, Nigeria and Central Bank respectfully note a development which occurred after the above noted submissions were made on this application. By Memorandum and Order dated July 16, 1980, U.S. District Judge J. M. Cannella of this Court dismissed the complaint in Texas Trading & Milling Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria, 78 Civ. 2395 (JMC), for lack of subject matter and personal jurisdiction of Nigeria and Central Bank pursuant to the Immunities Act. A copy of Judge Cannella's Memorandum and Order is Exhibit 1 hereto.

The claim alleged by plaintiff in Texas was substantially identical to that alleged by Reale herein: Texas claimed an anticipatory breach of its cement contract with Nigeria and of its documentary letter of credit established by Central Bank. Texas had invoked the same provisions of the Immunities Act as has Reale herein as a basis for subject matter jurisdiction. The only significant difference in the facts between the Reale and Texas transactions is that Texas had requested that payments under its letter of credit be transmitted to its bank in New York - Fidelity International Bank. Nigeria and Central Bank have noted in Defendants' letter, and Reale does not dispute the fact, that the Reale cement contract and letter of credit provided for payments to be transmitted to Reale's account at a bank in Oviedo, Spain, pursuant to Reale's request.

Despite the seemingly stronger nexus with the United States of the transaction in the Texas action, by comparison to the Reale transaction, Judge Cannella found that due process requirements of the Immunities Act were not satisfied, and that none of the exceptions to immunity defined by the Immunities Act and invoked by Texas existed.

At present Nigeria and Central Bank are not aware whether Texas will appeal Judge Cannella's determination. However, in Verlinden B.V. v. Central Bank of Nigeria, 79 Civ. 1150 (EW), opinion by U.S. District Judge E. Weinfeld dated April 21, 1980, discussed in detail in Defendants' letter, plaintiff Verlinden has filed a notice of appeal to the U.S. Court of Appeals, Second Circuit, of the jurisdictional dismissal by Judge Weinfeld.

The same provisions of the Immunities Act which are at issue herein, and which were invoked in Texas, will be reviewed on the appeal of Verlinden. Nigeria and Central Bank respectfully request that should your Honor deny the current application to dismiss, your Honor also certify the jurisdictional issue for appeal to the U.S. Court of Appeals, Second Circuit, pursuant to 28 U.S.C. Section 1292(b), and stay all further proceedings herein should the Court of Appeals permit the appeal to be taken.

Nigeria and Central Bank, at pages 6-13 of Defendants' letter, discussed each of the provisions of the Immunities Act at issue herein; and respectfully submit that

the relevant facts before Judge Weinfeld in Verlinden are substantially identical to those herein, and that the basis for the jurisdictional dismissal in Verlinden compels the same result herein. Nigeria and Central Bank respectfully submit that Judge Cannella's opinion in Texas provides even stronger support for the jurisdictional dismissal. Even if Reale had designated New York, instead of Spain, as the place of payment under its letter of credit, the due process requirements of the Immunities Act would not have been satisfied to confirm subject matter jurisdiction of Reale's claim.

Plaintiff's Point I

Nigeria and Central Bank have made this application to dismiss pursuant to F.R.Civ.P. Rule 12(h)(3) and by virtue of the recent interpretations of the relevant provisions of the Immunities Act in Harris v. VAO Intourist, Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979), in Verlinden and most recently in Texas. None of these rulings had been made at the time the parties herein entered into their stipulation of May 1978 to be bound by Judge Pierce's ruling on the motion to dismiss in the three consolidated cement actions, or at the time in January 1979, when your Honor struck certain of the affirmative defenses alleged by Nigeria and Central Bank in their answer relating to the jurisdictional issues.

Reale tacitly admits, at page 2 of Mr. Hoeniger's letter, that Rule 12(h)(3) requires the Court to dismiss an action whenever it appears by suggestion of the parties or otherwise that the Court lacks subject matter jurisdiction. The language of this rule is clear and unambiguous. Indeed, the Court on its own initiative, and at any level of the proceeding, may invoke its authority. See, Moore's Federal Practice, Second Edition, Volume 2A, paragraph 12.23, pages 2456-2460, and the citations contained in footnotes 16-18 therein.

Reale attempts to circumvent the clear language of Rule 12(h)(3) by raising two points, neither of which is relevant:

(a) At page 1 of Mr. Hoeniger's letter, Reale argues that your Honor's order of January 19, 1979, which struck defendants' affirmative defenses relating to the jurisdic-

tional issues, represents the "law of the case" and that the jurisdictional issues may not be reviewed again at the district court level. None of the four cases which Reale cites relates to a review of subject matter jurisdiction pursuant to Rule 12(h)(3). In addition, the most recent decision cited by Reale - Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500 (E.D.N.Y. 1975) has nothing at all to do with the "law of the case" rule; the decision discusses only class action certification pursuant to Rule 23. None of the three other cases cited holds that a court is precluded from re-examining the issue of subject matter jurisdiction pursuant to Rule 12(h)(3). In fact, in Riss & Co., Inc. v. Association of Western Railways, 162 F.Supp. 69 (D.C. 1958), the Court, at page 71, in holding that it would be unwise to reopen each and every motion "merely to have the court consider for the first time information which could easily have been furnished at the hearing" implied that if there were relevant developments after the initial hearing, the renewed motion would be appropriate. The opinion, then, is authority for re-examining the jurisdictional issues herein in light of the recent decisions in Harris, Verlinden and Texas.

(b) Reale alleges that Judge Weinfeld's jurisdictional dismissal in Verlinden related solely to personal jurisdiction of Central Bank and not subject matter jurisdiction of the claim pursuant to the Immunities Act; it argues further that Rule 12(h)(3) relates solely to subject matter jurisdiction and that all questions relating to personal jurisdiction have been settled herein pursuant to the "law of the case" rule, so that Nigeria and Central Bank may not now invoke the authority of Verlinden in their Rule 12(h)(3) application.

Nigeria and Central Bank respectfully submit that mere reference to the clear language of 28 U.S.C. Section 1330(a) and (b) settles the issue of whether Judge Weinfeld's analysis in Verlinden of the exceptions to immunity defined in 28 U.S.C. Section 1605(a)(1) and (2), is relevant to the consideration of subject matter jurisdiction herein. Section 1330(a) defines the subject matter jurisdiction of the state and federal courts with respect to actions against foreign states; the section provides that there is no subject matter jurisdiction unless one of the exceptions to immunity defined in 28 U.S.C. Sections 1605-1607 exists or an international agreement applies. The only exceptions to immunity

invoked by Reale as a basis for subject matter jurisdiction herein are those defined in Section 1605(a)(1) and (2), dealing with implied waiver and commercial activity of the foreign state. These are the very same provisions discussed by Judge Weinfeld in Verlinden.

Pursuant to Section 1330(b) there is personal jurisdiction over a foreign state only where the courts have subject matter jurisdiction under 1330(a), i.e., only if an exception to immunity exists, and the foreign state has been served properly pursuant to Section 1608. Only where there has been improper service pursuant to Section 1608, can there be lack of personal jurisdiction of the foreign state in the presence of subject matter jurisdiction of the claim. If the finding of lack of personal jurisdiction is for the reason that none of the exceptions to immunity defined in Sections 1605-1607 is present, then such holding of necessity is also a finding of lack of subject matter jurisdiction. Nowhere in Verlinden does Judge Weinfeld discuss a defect of service as the basis for the finding of lack of personal jurisdiction; his Honor's holding is that none of the exceptions to immunity exists.

Further, Judge Cannella in Texas, after discussing only the exceptions to immunity invoked by plaintiff therein (the same exceptions at issue herein and discussed in Verlinden), dismissed the claim for lack of subject matter and personal jurisdiction.

Nigeria and Central Bank, at pages 7-8 of Defendants' letter, discuss the constitutional issue decided in Verlinden in Point I of Judge Weinfeld's opinion, an issue not present herein, nor in Texas nor any of the other related cement disputes against Nigeria and Central Bank pending in this Court. Nigeria and Central Bank respectfully submit that it was the presence of this constitutional issue which presumably dictated Judge Weinfeld's choice of language in Verlinden as to "subject matter" and "personal" jurisdiction. His Honor's opinion, however, is clear and compelling precedent on the issue of subject matter jurisdiction herein.

Plaintiff's Point II

Reale, at page 4 of Mr. Hoeniger's letter, implies that subject matter jurisdiction of Reale's claim pursuant

to the Immunities Act should be sustained for the reason that prior to the enactment of the Immunities Act, Reale purportedly could have obtained quasi-in-rem jurisdiction of Nigeria and Central Bank by an attachment of funds in New York, which attachment Reale contends could meet the due process standards defined by the U.S. Supreme Court in Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977).

Nigeria and Central Bank respectfully note that the Immunities Act abolished jurisdictional attachments and quasi-in-rem jurisdiction with respect to actions against foreign states and agencies thereof; see, 28 U.S.C. Section 1609. Even if the prior law were still applicable, Nigeria and Central Bank respectfully submit that an attachment by Reale of property of Nigeria and Central Bank in New York (including funds on deposit in Central Bank's account at Morgan Guaranty Trust Company of New York) would not comply with the standards of Shaffer v. Heitner with respect to the claims alleged by Reale herein. In Defendants' letter, Nigeria and Central Bank have demonstrated how completely Reale's cement transaction was to be performed outside the United States; and submit that the due process standards of Shaffer v. Heitner, which permit the exercise of long-arm jurisdiction to an extent far greater than does the Immunities Act, could not be satisfied.

More importantly, Reale fails to explain how reference to a standard for obtaining quasi-in-rem jurisdiction has relevance to the application of the specific provisions of the Immunities Act, which provide only for in personam jurisdiction and specifically prohibit jurisdictional attachments. Reale is simply trying to compare apples and oranges.

At page 5 of Mr. Hoeniger's letter, Reale quotes at length from Judge Weinfeld's opinion in Verlinden in an attempt presumably to distinguish the holding on the grounds that Verlinden was a Dutch corporation while Reale is a Connecticut corporation. At that page, Mr. Hoeniger has underscored Judge Weinfeld's discussion of the dictum by Judge Goettel in National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. 622 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979). Judge Weinfeld's own comments are dicta as well, since his Honor's conclusion as to possible "direct effect" in New York is based upon the assumption that certain

factors existed, none of which his Honor holds were present in Verlinden. The factors mentioned included not only the status of plaintiff as a New York or domestic corporation but also the provision for payments in New York under the letter of credit.

It is surprising that Reale would cite this dictum in Verlinden, when its own credit specifically and at its request, was made payable in Spain. In Verlinden the fact that payment was to be made outside the United States, i.e., in Amsterdam, was the keystone to Judge Weinfeld's analysis and conclusion that the "direct effect" provisions of Section 1605(a)(2) of the Immunities Act were not satisfied. See, also, Judge Cannella's statement with respect to Verlinden at page 15 of the Texas opinion.

At pages 6-8 of Mr. Hoeniger's letter, Reale argues that there is both subject matter and personal jurisdiction as to the claim alleged against Nigeria (but not as to Central Bank) by virtue of the provision in the Reale cement contract that all disputes shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France (ICC). Reale argues that the agreement to arbitrate before the ICC constituted an implied waiver by Nigeria of its immunity pursuant to 28 U.S.C. Section 1605(a)(1). In support of its position, Reale contends that: (1) The rules of the ICC permit the arbitration to be conducted at any place fixed by the ICC Court of Arbitration, including the United States; (2) Judge Weinfeld in his Honor's discussion of the same arbitration provision, at pages 40-43 of the Verlinden opinion, incorrectly presumed that the arbitration would be conducted in France; and (3) two opinions by the District Court for the District of Columbia support Reale's position on implied waiver - Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F.Supp. 824 (D.C. 1978); and Libyan American Oil Company v. Socialist People's Libyan Arab Jamahirya, 482 F.Supp. 1175 (D.C. 1980).

Each of these three points is incorrect:

(1) Reale has appended as Exhibit C and D to Mr. Hoeniger's letter extracts from the ICC Rules for Arbitration. Nigeria and Central Bank attach hereto as Exhibit 2 additional excerpts from the same publication which clarify that ICC arbitration proceedings must be initiated at and are supervised by the ICC Court of Arbitration which sits only in Paris. The arbitration clause in the Reale cement

contract cannot be invoked nor any proceeding thereunder be initiated except in Paris at the ICC Court of Arbitration.

(2) Nigeria and Central Bank respectfully submit that Judge Weinfeld's analysis in Verlinden of the provisions of implied waiver in Section 1605(a)(1) is correct. His Honor refused to construe the agreement to arbitrate at the ICC in Paris as consent by the foreign state to submit to the jurisdiction of American courts.

(3) Both the Ipitrade and the Libyan American decisions were rendered prior to the decision in Verlinden. Nigeria and Central Bank respectfully submit that Judge Weinfeld's analysis of implied waiver pursuant to Section 1605(a)(1) effectively overrules the two District of Columbia cases. In Verlinden at page 39, footnote 84, Judge Weinfeld correctly notes that jurisdiction in Ipitrade should have been confirmed by virtue of the treaty on the enforcement of arbitration awards to which all relevant parties were signators. Subject matter jurisdiction of claims against foreign states which are covered by treaty or international agreement is specifically defined in 28 U.S.C. Section 1330(a). The decision in Libyan American does not indicate that the arbitration clause in the contract at issue provided for arbitration at the ICC in Paris. To the contrary, it appears that the parties therein negotiated and then amended the clause so that it specifically provided for arbitration anywhere. Despite the liberal language of the Libyan American arbitration clause, Nigeria and Central Bank respectfully submit that Judge Weinfeld's conclusion in Verlinden on implied waiver under the Immunities Act would compel a different result from that reached by the District of Columbia Court.

Plaintiff's Point III

Reale argues, at pages 9-10 of Mr. Hoeniger's letter, that the analysis by Judge Weinstein in Harris of the same provisions of the Immunities Act as are at issue herein is solely dictum and irrelevant because Judge Weinstein failed to consider the only provision of the Immunities Act which, in Mr. Hoeniger's opinion, was relevant, i.e., Section 1605(a)(5) relating to tortious activity "occurring in the United States."

Nigeria and Central Bank respectfully submit that Judge Weinstein's very learned opinion requires no justification;

that the inapplicability of Section 1605(a)(5) to the claim alleged in Harris is evident from a plain reading of that section; and that Reale's complete failure to distinguish Judge Weinstein's analysis of the provisions of the Immunities Act which Reale has invoked is a tacit omission by it that the analysis in Harris is sound and controlling.

Plaintiff's Point IV

At pages 10-16 of Mr. Hoeniger letter, Reale sets forth what it purports are the relevant jurisdictional facts herein. There are 13 separately numbered paragraphs in this discussion. No where, however, does Reale seek to explain how these purported jurisdictional facts support subject matter jurisdiction pursuant to any of the bases defined by Section 1605(a)(1) or (2) of the Immunities Act which it has invoked.

The apparent thrust of Reale's discussion is to demonstrate that Central Bank, by virtue of its correspondent banking relationship with Morgan Guaranty, was "doing business" in New York; see Mr. Hoeniger's letter at pages 11-12, paragraphs 4-6; and page 14, paragraph 11.

The opinions in Harris and Verlinden explain clearly that there is no "doing business" standard defined in the Immunities Act as a basis for long-arm jurisdiction over a foreign state or agency thereof. Each of the three situations defined in Section 1605(a)(2) as exceptions to immunity relating to commercial activity of the foreign state are analyzed in detail in both Harris and Verlinden, and referred to in Defendants' letter at pages 9-14.

Reale argues again, in Mr. Hoeniger's letter at page 12, paragraph 6, that the facts support a basis for confirming a jurisdictional attachment pursuant to the standards defined in Shaffer v. Heitner, supra, and also pursuant to your Honor's opinion in Feder v. Turkish Airlines, 441 F.Supp. 1273 (S.D.N.Y. 1977). Nigeria and Central Bank have explained above that the Immunities Act specifically prohibits jurisdictional attachments and quasi-in-rem jurisdiction with respect to actions against foreign states or agencies thereof; and respectfully submit that the authority of Shaffer and Feder is irrelevant to the jurisdictional issue herein. Neither case discusses the statutory provisions of

the Immunities Act. Both Harris and Verlinden, after careful analysis of the Immunities Act and its Legislative History, conclude correctly that the long-arm provisions of the Immunities Act do not extend to the limits permitted by International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and following decisions, including Shaffer.

The most significant admission by Reale with respect to the relevant jurisdictional facts herein appears in Mr. Hoeniger's letter at pages 13-14, paragraphs 9 and 10. In these paragraphs, Reale concedes that the Reale cement contract and letter of credit specifically provided for payment to Reale at its bank in Oviedo, Spain; and that all of Reale's activities with respect to obtaining and shipping cement to Nigeria were concentrated in Spain. Reale does not dispute that its arrangements with respect to assignments of proceeds to its Spanish cement supplier and Spanish shipper were made by it through the Spanish bank; and that neither Morgan Guaranty, Central Bank nor Nigeria were involved in these arrangements. Further, neither Central Bank, Nigeria nor Morgan Guaranty were ever advised by Reale of these arrangements through the Spanish Bank.

Reale, in Mr. Hoeniger's letter at page 14, paragraph 10, states that the proceeds to which Reale was entitled out of the payments made pursuant to Central Bank's letter of credit were "ultimately remitted to Reale in the United States." If indeed, this were the case - and Reale cites no evidence in the record or developed on discovery herein to support the allegation - this was part of Reale's private arrangement with its Spanish bank; it did not involve Nigeria, Central Bank or Morgan Guaranty. Nothing in the contracts at issue even suggests an obligation by Nigeria or Central Bank to remit payment to Reale in the United States. Reale's own choice of language, i.e., that payments were "ultimately" to be remitted to the United States, is at the very least ambiguous, and suggests other conditions or arrangements made privately by Reale through its Spanish bank.

In Mr. Hoeniger's letter at pages 15-16, paragraph 13, Reale appears to argue that the New York Court of Appeals decision in J. Zeevi & Sons v. Grindlays Bank (Uganda) Ltd., 37 N.Y.2d 220, 371 N.Y.S.2d 892, cert. den., 423 U.S. 866 (1975), has some relevance to Reale's position that jurisdiction exists pursuant to Section 1605(a)(1) or (2) of the Immunities Act, but Reale does not explain how this is so.

Reale correctly notes that Judge Weinfeld in Verlinden, at pages 32-36, discussed Zeevi and questioned whether the principal holding of Zeevi was still the law of New York.

Reale disagrees with Judge Weinfeld and to support its contention that Zeevi is still the law of New York, notes that in two decisions, one by the New York Court of Appeals, and one by the Supreme Court of the State of New York, New York County, Zeevi was cited. Reale neglects to note, however, that the Court in neither of these decisions cites Zeevi for the principal holding therein: in Ehrlich-Bober & Co. v. University of Houston, _____ N.Y.2d _____ (April 3, 1980), New York Law Journal, April 23, 1980, the New York Court of Appeals cites Zeevi for the collateral point that New York will not apply the governing law of a foreign jurisdiction if that foreign law conflicts with the public policy of the State of New York; in Mirabella v. Banco Industrial de la Republica Argentina, New York Law Journal, April 13, 1979, (Sup.Ct., N.Y. Co.; not officially reported), the Court cited Zeevi for its discussion of the act of state doctrine.

In conclusion, Nigeria and Central Bank respectfully submit that Reale has failed to demonstrate how any of the jurisdictional facts it describes satisfies the requirements of the relevant provisions of the Immunities Act.

Plaintiff's Point V

At page 16 of Mr. Hoeniger's letter, Reale argues that Nigeria and Central Bank may not properly raise the act of state doctrine in its discussion of subject matter jurisdiction herein. Reale quite obviously has misunderstood the significance of the discussion at pages 11-12 of Defendants' letter of the requirement in the third situation defined by Section 1605(a)(2) that the acts performed abroad which give rise to plaintiff's claim must be commercial acts of the foreign state, not governmental acts.

If the acts by Nigeria and Central Bank, which Reale alleges as the acts of breach herein, were an integral part of the governmental activity of imposing and implementing the ports embargo in 1975, as defendants contend, they do not confer subject matter jurisdiction pursuant to Section 1605 (a)(2).

The quotation from Verlinden, which appears at page 16 of Mr. Hoeniger's letter, does not support a conclusion that the acts by Central Bank were commercial rather than governmental.

Judge Cannella, in his opinion in Texas at page 9, noted that Nigeria and Central Bank had argued the governmental nature of the acts in question on their motion to dismiss. Judge Cannella held it was not necessary to reach that issue, since even if the alleged acts of breach (the same as those alleged by Reale herein) were commercial in nature, no exception to immunity defined by the Immunities Act was present.

Plaintiff's Point VI

At pages 16-17 of Mr. Hoeniger's letter, Reale describes judicial proceedings against Nigeria and Central Bank conducted in other countries with respect to similar cement contracts and letters of credit, which resulted in determinations that sovereign immunity was not available as a defense.

Nigeria and Central Bank respectfully submit that none of these determinations is precedent for a finding of subject matter jurisdiction herein pursuant to the Immunities Act. Reale fails to demonstrate that the laws applicable in these foreign proceedings were in any way similar to the detailed statutory scheme defined in the Immunities Act.

This Court in both Verlinden and Texas had before it relevant facts which were identical to those herein on the jurisdictional issues, and in each case the Court dismissed the action for lack of subject matter jurisdiction and personal jurisdiction pursuant to the Immunities Act. In both instances the Court acknowledged and cited the detailed analysis of the relevant provisions of the Immunities Act made by Judge Weinstein in Harris. Nigeria and Central Bank respectfully submit that these three decisions compel a dismissal herein for lack of subject matter jurisdiction.

Respectfully submitted,

KISSAM, HALPIN & GENOVESE

By James G. Simms
James G. Simms

JGS/sl

cc: B. H. Hoeniger, Esq.
Attorney for Plaintiff

EXHIBIT 2 TO DEFENDANTS' LETTER - EXTRACT FROM INTERNATIONAL CHAMBER OF COMMERCE PAMPHLET ENTITLED ICC ARBITRATION - THE INTERNATIONAL SOLUTION TO INTERNATIONAL BUSINESS DISPUTES

(FOLLOWING PAGE)

ne ICC Court of Arbitration

a:'itration is insti'.tional. This means that n the parties make reference to the Rules of ICC C.u.t of Arbitrat'n in their contract, they implicitly agreeing to follow an established set roceedings*. The conduct of these proceedings nsured by permanent bodies, namely:

the ICC Court of Arbitration
the Secretariat of the Court

ucture of the Court

he Court comprises:
Five Vice-Chairmen
A Secretary General
Technical advisers chosen by the ICC Council
Members appointed by ICC National Committees and Councils. Each Committee and Council is entitled to name one permanent member of the Court. In certain circumstances they may also nominate an alternate member, who may take the permanent member's place during the latter's absence. Members are not remunerated.

e role of the Court

Court does not settle disputes itself. It ervises the application of the Rules by the trator(s) named in each individual case. It norizes the opening of the proceedings, itors their conduct through a series of inistrative measures, and makes its assistance lable to the arbitrator(s).

Court's functions also include the following:

taking all measures that may be required with regard to appointing, replacing, or challenging the arbitrators;
determining the place of arbitration when the parties have not made any provision to that effect;
in the event of a challenge, deciding whether an arbitration clause binding the parties exists in the first place;
ensuring that the arbitrator's terms of reference are drafted without delay;
- in the event of refusal by one of the parties to sign the terms of reference, setting a time limit at the expiry of which the arbitration shall proceed;
- deciding on any extension of the time limit for making the award;
- scrutinizing the draft award to check if any modifications in the form of the award are required, and/or to draw the arbitrator's attention to points concerning the merits of the case, without in any way affecting his liberty of decision;
- fixing the amount of the deposit to be made at the beginning of the proceedings and, when scrutinizing the draft award, determining the costs of the arbitration in accordance with the Schedule annexed to the Rules.

Functioning

Working languages. The Court holds its meetings in English and French, the two official languages of the ICC. When a document, statement of terms of reference, or draft award is written in another language, it is automatically submitted to the members of the Court with a translation into one of the two official languages.

Internal regulations. The Rules of Arbitration provide that the Court can draw up its own internal regulations, under which it may delegate to one or more groups of its members the power to take certain decisions provided that any such decision shall be reported to the Court at its next session.

The Court normally meets once a month.

Decisions. The Chairman has the power to take urgent decisions on behalf of the Court, should this be required in the period between two sessions. Any such decisions must be reported to the Court at its next session.

The Court may take decisions when at least six members are present.

All the documents of the Court of Arbitration are confidential, except the list of its members. Extracts from the minutes can be made available to courts of law as proof of the decisions taken, should such proof be necessary in enforcement proceedings.

1 Request for arbitration

The request for arbitration

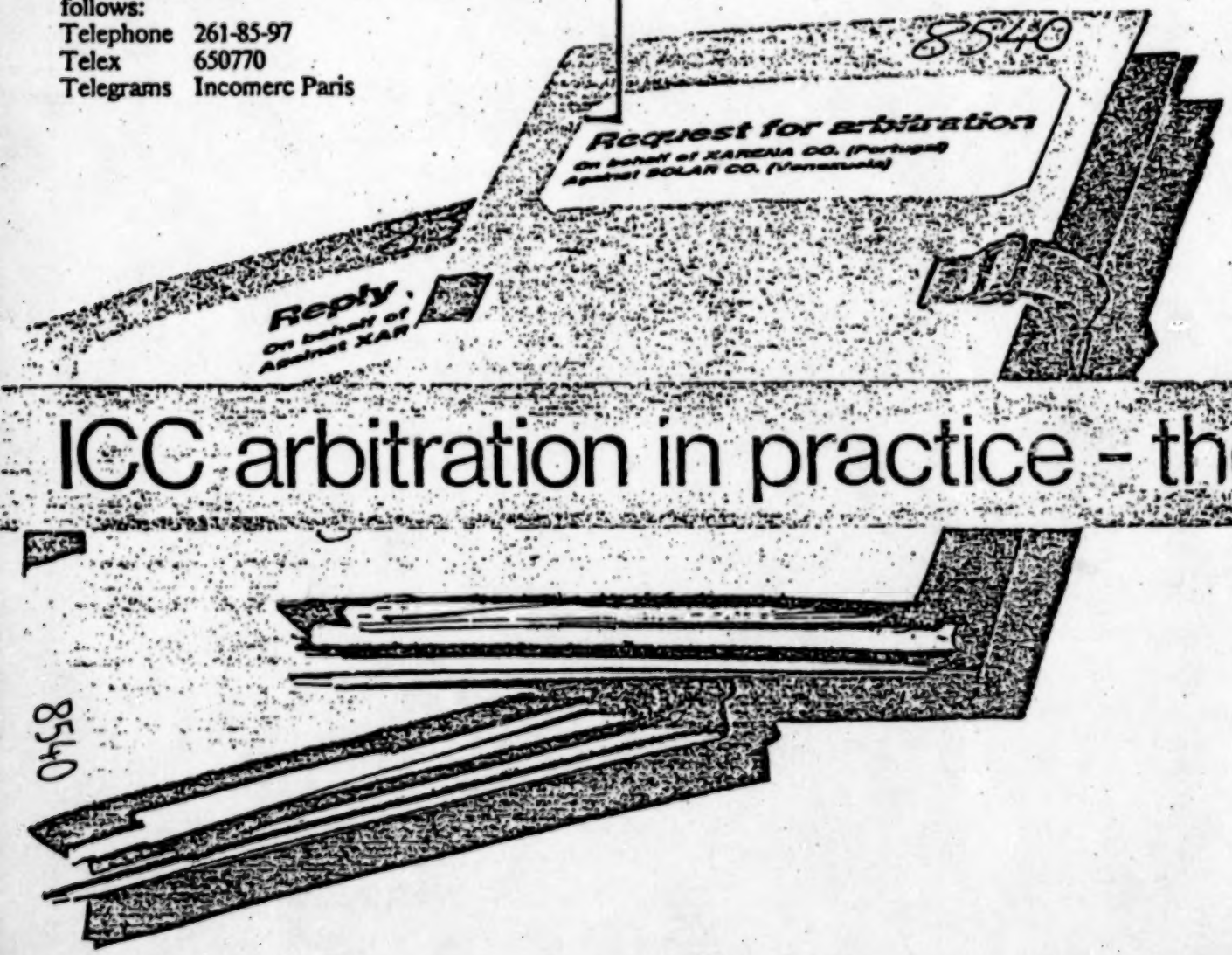
The party or parties wishing to initiate proceedings must address a request in writing to:
The Secretariat
ICC Court of Arbitration
38, Cours Albert 1er
75008 Paris
either directly or through an ICC National Committee or Council.

For reference the telephone and telex numbers and telegraphic address of the Court's Secretariat are as follows:

Telephone	261-85-97
Telex	650770
Telegrams	Incomerc Paris

The date of reception of the request by the Court's Secretariat is regarded as the formal date of commencement of the proceedings.

The request should include a file which provides all the documents needed for an initial analysis of the problem.



ICC arbitration in practice - the

The request must include the following information:

- the full names and addresses of the parties, with brief descriptions of their activities.
- the circumstances of the case, in the form of a concise statement*
- an outline of the legal grounds (cancellation of contract, disagreement over payment of invoice or royalties etc.)
- the number of arbitrators requested, and any stipulations concerning the manner in which they should be chosen.

* The statement should mention the amount in dispute if this has already been assessed. If not, the party or parties may reserve the right to fix the amount later or may leave assessment to the arbitrators.

The request should be accompanied by copies of relevant documents, notably any agreements signed by the parties that prove the existence of the arbitration agreement.

No particular stipulations are made concerning the presentation and layout of the request. Three copies should however be supplied if the dispute is to be submitted to a sole arbitrator, or five copies if three arbitrators are envisaged.

procedure

The Secretariat of the Court notifies the defendant of the request for arbitration by forwarding it one copy of the request together with a complete set of the appended documents.

The defendant must reply within thirty days. The period of thirty days laid down by the Rules does not imply that the defendant is unable to reply subsequently, and to have such a reply taken into consideration. It does however mean that the Court and the arbitrators are entitled to go ahead with the proceedings as soon as the period has expired, even if no reply has been received from the defendant.

Reply to the request

The defendant's reply to the request should contain similar particulars to those required in the claimant's request for arbitration, and should be sent to the secretariat in three or five copies. The secretariat sends one copy to the claimant.

Counter-claim

The defendant's reply may be accompanied by a counter-claim submitted under the same conditions as an original claim. In such cases the claimant, as defendant to the counter-claim, is free to submit another statement in the form of a reply to the counter-claim (Article 5).

The arbitrators may subsequently call for further documents in order to draw up their terms of reference. The parties should however not provide any further documents until the arbitrators have officially received the file from the Secretariat.

Registration fee

No request for the Court's services can be accepted unless it is accompanied by the payment, by each of the parties, of the $ 50 registration fee.

This registration fee is payable for all requests for conciliation or arbitration.

Submission of the case to the arbitrator

The file is sent to the arbitrator(s) as soon as they have been nominated and at least half the deposit has been paid. From this point onwards the parties communicate directly with the arbitrator(s), sending copies for information to the other party and the Secretariat.

5

Rights of the parties failing settlement.

Should a settlement not result, the parties shall be at liberty to refer their dispute to arbitration or to bring an action at law should they so desire, unless they are bound by an arbitration clause.

Nothing that has transpired in connection with the proceedings before the Conciliation Commission shall in any way affect the legal rights of any of the parties to the dispute whether in an arbitration or in a Court of law.

No person having sat on a Conciliation Committée for the settlement of a dispute may be appointed arbitrator for the same dispute.

rbitration

rticle 1

Court of Arbitration.

The Court of Arbitration of the International Chamber of Commerce is the international arbitration body attached to the International Chamber of Commerce. Members of the Court are appointed by the Council of the International Chamber of Commerce. The function of the Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with these Rules.

In principle, the Court meets once a month. It draws up its own internal regulations.

The Chairman of the Court of Arbitration or his deputy shall have power to take urgent decisions on behalf of the Court, provided that any such decision shall be reported to the Court at its next session.

The Court may, in the manner provided for in its internal regulations, delegate to one or more groups of its members the power to take certain decisions provided that any such decision shall be reported to the Court at its next session.

5 The Secretariat of the Court of Arbitration shall be at the Headquarters of the International Chamber of Commerce.

Article 2

Choice of arbitrators.

1 The Court of Arbitration does not itself settle disputes. Insofar as the parties shall not have provided otherwise, it appoints, or confirms the appointments of, arbitrators in accordance with the provisions of this Article. In making or confirming such appointment, the Court shall have regard to the proposed arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals.

2 The disputes may be settled by a sole arbitrator or by three arbitrators. In the following Articles the word "arbitrator" denotes a single arbitrator or three arbitrators as the case may be.

3 Where the parties have agreed that the disputes shall be settled by a sole arbitrator, they may, by agreement, nominate him for confirmation by the Court. If the parties fail so to nominate a sole arbitrator within 30 days from the date when the Claimant's Request for Arbitration has been communicated to the other party, the sole arbitrator shall be appointed by the Court.

4 Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request for Arbitration and the Answer thereto respectively one arbitrator for confirmation by the Court. Such person shall be independent of the party nominating him. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

The third arbitrator, who will act as chairman of the arbitral tribunal, shall be appointed by the Court, unless the parties have provided that the arbitrators nominated by them shall agree on the third arbitrator within a fixed time limit. In such a case the Court shall confirm the appointment of such third arbitrator. Should the two arbitrators fail, within the time limit fixed by the parties or the Court, to reach agreement on the third arbitrator, he shall be appointed by the Court.

5 Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such a case the parties shall each have a period of 15 days within which to nominate an arbitrator.

6 Where the Court is to appoint a sole arbitrator or the chairman of an arbitral tribunal, it shall choose a National Committee of the International Chamber of Commerce from which it shall request a proposal. The sole arbitrator or the chairman of the arbitral tribunal shall be chosen from a country other than those of which the parties are nationals. However, in suitable circumstances and provided that neither of the parties objects, the sole arbitrator or the chairman of the arbitral tribunal may be chosen from a country of which any one of the parties is a national.

Where the Court appoints an arbitrator on behalf of a party which has failed so to do, it shall request a proposal from the National Committee of the country of which that party is a national. If the country of which such party is a national has no National Committee, the Court is at liberty to choose any person whom it regards as suitable.

7 Should an arbitrator be challenged by one of the parties, the Court, as sole judge of the grounds of challenge, shall make a decision which shall be final.

8 If an arbitrator dies or is prevented from carrying out his functions or has to resign consequent upon a challenge or for any other reason, or if the Court, after having considered the arbitrator's observations, decides that the arbitrator is not fulfilling his functions in accordance with the Rules or within the prescribed time limits, he shall be replaced. In all such cases the procedure indicated in the preceding paragraphs 3, 4 and 6 shall be followed.

Article 3

Request for arbitration.

1 A party wishing to have recourse to arbitration by the International Chamber of Commerce shall submit its Request for arbitration to the Secretariat of the Court, through its National Committee or directly. In this latter case the Secretariat shall bring the Request to the notice of the National Committee concerned.

The date when the Request is received by the Secretariat of the Court shall, for all purposes, be deemed to be the date of commencement of the arbitral proceedings.

2 The Request for arbitration shall inter alia contain the following information:
a) names in full, description, and addresses of the parties,
b) a statement of the Claimant's case,
c) the relevant agreements, and in particular the agreement to arbitrate, and such documentation or information as will serve clearly to establish the circumstances of the case,
d) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Article 2 above.

3 The Secretariat shall send a copy of the Request and the documents annexed thereto to the Defendant for his Answer.

Article 4

Answer to the request.

1 The Defendant shall within 30 days from the receipt of the documents referred to in paragraph 3 of Article 3 comment on the proposals made concerning the number of arbitrators and their choice and, where appropriate, nominate an arbitrator. He shall at the same time set out his defence and supply relevant documents. In exceptional circumstances the Defendant may apply to the Secretariat for an extension of time for the filing of his defence and his documents. The application must, however, include the Defendant's comments on the proposals made with regard to the number of arbitrators and their choice and also, where appropriate, the nomination of an arbitrator. If the Defendant fails so to do, the Secretariat shall report to the Court, which shall proceed with the arbitration in accordance with these Rules.

2 A copy of the Answer and of the documents annexed thereto, if any, shall be communicated to the Claimant for his information.

Article 5

Counter-claim.

1 If the Defendant wishes to make a counter-claim, he shall file the same with the Secretariat, at the same time as his Answer as provided for in Article 4.

2 It shall be open to the Claimant to file a Reply with the Secretariat within 30 days from the date when the Counter-claim was communicated to him.

Article 6

Pleadings and written statements, notifications or communications.

All pleadings and written statements submitted by the parties, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat.

All notifications or communications from the Secretariat and the arbitrator shall be validly made if they are delivered against receipt or forwarded by registered post to the address or last known addresses the party for whom the same are intended as notified by the party in question or by the other party as appropriate.

notification or communication shall be deemed to [illegible] ected on the day when it was received, or should, if made in accordance with the preceding paragraph, have been received by the party itself or by its representative.

Article 7

Absence of agreement to arbitrate.

Where there is no prima facie agreement between the parties to arbitrate or where there is an agreement but it does not specify the International Chamber of Commerce, and if the Defendant does not file an Answer within the period of 30 days provided by paragraph 1 of Article 4 or refuses arbitration by the International Chamber of Commerce, the Claimant shall be informed that the arbitration cannot proceed.

Article 8

Effect of the agreement to arbitrate.

1 Where the parties have agreed to submit to arbitration by the International Chamber of Commerce, they shall be deemed thereby to have submitted ipso facto to the present Rules.

2 If one of the parties refuses or fails to take part in the arbitration, the arbitration shall proceed notwithstanding such refusal or failure.

3 Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the Court be satisfied of the prima facie existence of such an agreement, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself.

4 Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas.

5 Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat of the Court of Arbitration. The Secretariat shall inform the arbitrator thereof.

Article 9

Deposit to cover costs of arbitration.

1 The Court shall fix the amount of the deposit in a sum likely to cover the costs of arbitration of the claims which have been referred to it.

Where, apart from the principal claim, one or more counter-claims are submitted, the Court may fix separate deposits for the principal claim and the counter-claim or counterclaims.

2 As a general rule, the deposits shall be paid in equal shares by the Claimant or Claimants and the Defendant or Defendants. However, any one party shall be free to pay the whole deposit in respect of the claim or the counter-claim should the other party fail to pay a share.

3 The Secretariat may make the transmission of the file to the arbitrator conditional upon the payment by the parties or one of them of the whole or part of the deposit to the International Chamber of Commerce.

4 When the Terms of Reference are communicated to the Court in accordance with the provisions of Article 13, the Court shall verify whether the requests for deposit have been complied with.

The Terms of Reference shall only become operative and the arbitrator shall only proceed in respect of those claims for which the deposit has been duly paid to the International Chamber of Commerce.

Article 10

Transmission of the file to the arbitrator.

Subject to the provisions of Article 9, the Secretariat shall transmit the file to the arbitrator as soon as it has received the Defendant's Answer to the Request for Arbitration, at the latest upon the expiry of the time limits fixed in Articles 4 and 5 above for the filing of these documents.

Article 11

Rules governing the proceedings.

The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, whether or not reference is thereby made to a municipal procedural law to be applied to arbitration.

Article 12

Place of arbitration.

The place of arbitration shall be fixed by the Court, unless agreed upon by the parties.

Article 13

Terms of reference.

1 Before proceeding with the preparation of the case, the arbitrator shall draw up, on the basis of the documents or in the presence of the parties and in the light of their most recent submissions, a document defining his Terms of Reference. This document shall include the following particulars:

a) the full names and description of the parties,
b) the addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made,
c) a summary of the parties' respective claims,
d) definition of the issues to be determined,
e) the arbitrator's full name, description and address,
f) the place of arbitration,
g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitrator to act as amiable compositeur,
h) such other particulars as may be required to make the arbitral award enforceable in law, or may be regarded as helpful by the Court of Arbitration or the arbitrator.

2 The document mentioned in paragraph 1 of this Article shall be signed by the parties and the arbitrator. Within two months of the date when the file has been transmitted to him, the arbitrator shall transmit to the Court the said document signed by himself and by the parties. Upon the arbitrator's request, the Court may, in exceptional circumstances, extend this time limit.

Should one of the parties refuse to take part in the drawing up of the said document or to sign the same, the Court, if it is satisfied that the case is one of those mentioned in paragraphs 2 and 3 of Article 8, shall take such action as is necessary for its approval. Thereafter the Court shall set a time limit for the signature of the statement by the defaulting party and on expiry of that time limit the arbitration shall proceed and the award shall be made.

3 The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.

4 The arbitrator shall assume the powers of an amiable compositeur if the parties are agreed to give him such powers.

5 In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages.

Article 14

The arbitral proceedings.

1 The arbitrator shall proceed within as short a time as possible to establish the facts of the case by all appropriate means. After study of the written submissions of the parties and of all documents relied upon, the arbitrator shall hear the parties together in person if one of them so requests; and failing such a request he may of his own motion decide to hear them.

In addition, the arbitrator may decide to hear any other person in the presence of the parties or in their absence provided they have been duly summoned.

2 The arbitrator may appoint one or more experts, define their terms of reference, receive their reports and/or hear them in person.

3 The arbitrator may decide the case on the relevant documents alone if the parties so request or agree.

Article 15

1 At the request of one of the parties or if necessary on his own initiative, the arbitrator, giving reasonable notice, shall summon the parties to appear before him on the day and at the place appointed by him and shall so inform the Secretariat of the Court.

2 If one of the parties, although duly summoned, fails to appear, the arbitrator, if he is satisfied that the summons was duly received and the party is absent without valid excuse, shall have power to proceed with the arbitration, and such proceedings shall be deemed to have been conducted in the presence of all parties.

3 The arbitrator shall determine the language or languages of the arbitration, due regard being paid to all the relevant circumstances and in particular to the language of the contract.

4 The arbitrator shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitrator and of the parties, persons not involved in the proceedings shall not be admitted.

5 The parties may appear in person or through duly accredited agents. In addition, they may be assisted by advisers.

Article 16

The parties may make new claims or counter-claims before the arbitrator on condition that these remain within the limits fixed by the Terms of Reference provided for in Article 13 or that they are specified in a rider to that document, signed by the parties and communicated to the Court.

ticle 17

Award by consent.

If the parties reach a settlement after the file has been transmitted to the arbitrator in accordance with Article 10, the same shall be recorded in the form of an arbitral award made by consent of the parties.

ticle 18

Time-limit for awards.

The arbitrator shall make his award within six months of the date of signing the document mentioned in Article 13.

The Court may, in exceptional circumstances and pursuant to a reasoned request from the arbitrator, or if need be on its own initiative extend this time limit if it decides that it is necessary so to do.

Where no such extension is granted and, if appropriate, after application of the provisions of Article 2 (8), the Court shall determine the manner in which the dispute is to be resolved.

ticle 19

Awards by three arbitrators.

When three arbitrators have been appointed, the award is given by a majority decision. If there be no majority, the award shall be made by the Chairman of the arbitral tribunal alone.

ticle 20

Decision as to costs of arbitration.

The arbitrator's award shall, in addition to dealing with the merits of the case, fix the costs of the arbitration and decide which of the parties shall bear the costs or in what proportions the costs shall be borne by the parties.

The costs of the arbitration shall include the arbitrator's fees and the administrative costs fixed by the Court in accordance with the scale annexed to the present Rules, the expenses, if any, of the arbitrator, the fees and expenses of any experts, and the normal legal costs incurred by the parties.

The Court may fix the arbitrator's fees at a figure higher or lower than that which would result from the application of the annexed scale if in the exceptional circumstances of the case this appears to be necessary.

rticle 21

Scrutiny of award by the Court.

Before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance. No award shall be signed until it has been approved by the Court as to its form.

Article 22

Making of award.

The arbitral award shall be deemed to be made at the place of the arbitration proceedings and on the date when it is signed by the arbitrator.

Article 23

Notification of award to parties.

1 Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitrator: provided always that the costs of the arbitration have been fully paid to the International Chamber of Commerce by the parties or by one of them.

2 Additional copies certified true by the Secretary-General of the Court shall be made available, on request and at any time, to the parties but to no one else.

3 By virtue of the notification made in accordance with paragraph 1 of this article, the parties waive any other form of notification or deposit on the part of the arbitrator.

Article 24

Finality and enforceability of award.

1 The arbitral award shall be final.

2 By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.

Article 25

Deposit of award.

An original of each award made in accordance with the present Rules shall be deposited with the Secretariat of the Court.

The arbitrator and the Secretariat of the Court shall assist the parties in complying with whatever further formalities may be necessary.

Article 26

General rule.

In all matters not expressly provided for in these Rules, the Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law.

Statutes of the Court

Article 1

Appointment of members.

The members of the Court of Arbitration of the International Chamber of Commerce are appointed for a term of two years by the Council of that Chamber pursuant to Article III, 3/ of the Constitution, on the proposal of each National Committee.

Article 2

Composition.

The Court of Arbitration shall be composed of a Chairman, of five Vice-Chairman, of a Secretary General and of one or several Technical Advisers chosen by the Council of the International Chamber of Commerce either from among the members of the Court or apart from them, and of one member for, and appointed by, each National Committee.

The chairmanship may be exercised by two Co-Chairmen; in this case, they shall have equal rights, and the expression "the Chairman", used in the Rules of Conciliation and Arbitration, shall apply to either of them equally.

When a member of the Court does not reside in the city where International Headquarters of the International Chamber of Commerce is situated, the Council may appoint an alternate member.

If the Chairman is unable to attend a session of the Court, he shall be replaced by one of the Vice-Chairmen.

Article 3

Function and powers.

The function of the Court of Arbitration is to ensure the application of the Rules of Conciliation and Arbitration of the International Chamber of Commerce and the Court has all the necessary powers for that purpose. It is further entrusted, if need be, with laying before the Commission on International Commercial Arbitration any proposals for modifying the Rules of Conciliation and Arbitration of the International Chamber of Commerce which it considers necessary.

Article 4

Deliberations and Quorum.

The decisions of the Court shall be taken by a majority vote, the Chairman having a casting vote in the event of a tie.

The deliberations of the Court shall be valid when at least six members are present.

The Secretary General of the International Chamber of Commerce, the Secretary General of the Court and the Technical Adviser or Advisers shall attend in an advisory capacity only.

PLAINTIFF'S LETTER TO JUDGE HAIGHT DATED AUGUST 4, 1980

FFICE COPY

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Disposition

BY MESSENGER

August 4, 1980

Hon. Charles S. Haight, Jr., U.S.D.J.
United States Courthouse
Foley Square
New York, New York 10007

E-mailed by mail 8-5-80
SERVED
FILED
DOCKET 8-28-80
DIARY

Re: Reale International, Inc. v.
Federal Republic of Nigeria
and Central Bank of Nigeria
78 Civ. 0023 (CSH)

Dear Judge Haight:

Pursuant to the schedule communicated to both sides by Your Honor's law secretary, Mr. Klein, this letter constitutes plaintiff's response to defendants' letter-reply dated July 25, 1980 (but served on me on July 28 at 6:40 P.M.), and the last of the permitted submissions by either side. We turn first to two preliminary matters under sections A and B.

A.

It seems clear that however Your Honor resolves the issue of subject matter jurisdiction, that decision, earlier or later, will be appealed by the losing side. Under these circumstances, it is crucial that all facts relevant to this issue be adduced now, so that Your Honor will be able to make detailed and specific findings of jurisdictional fact as a basis for the conclusions of law with respect to both §1605(a)(1) (implicit waiver of sovereign immunity by Nigeria and Central Bank) and §1605(a)(2) (commercial activity). Many of these jurisdictional facts are hotly disputed. Plaintiff does not believe that these disputed issues of fact can properly be resolved on papers, however long.

Hence, plaintiff hereby requests an evidentiary hearing on the issue -- and solely the issue -- of subject matter jurisdiction which defendants have now raised anew under F.R.Civ.P. 12(h)(3). Bernstein v. Universal Pictures, 517 F.2d 976, 979-80 (2d Cir. 1975). Plaintiff recognizes that this request marks a change of position from its July 15, 1980 letter to Your Honor, last paragraph. That change is caused by defendants' reply, which shows that many key jurisdictional facts, which plaintiff believed to be indisputable, are disputed by defendants.

In the East Europe/Nikkei/Chenax actions, a three-week trial before Judge Pierce last September was preceded by long and intense trial preparation, and succeeded by several hundred pages of proposed findings, conclusions, post-trial and supplemental memoranda and addenda. Nonetheless, the defendants have now made the same "suggestion" of lack of subject matter jurisdiction to Judge Pierce as they make to Your Honor herein. Such pattern makes a mockery of any considerations of speed, economy, efficiency and finality in the judicial process. It is a pattern which ought not to be allowed to recur in this action.

Plaintiff believes that that pattern is best avoided by (a) the requested evidentiary hearing, (b) §1292(b) certification if Your Honor's conclusion is that there is no sovereign immunity and hence that there is subject matter jurisdiction, and (c) a suspension of further proceedings on the merits until the jurisdictional issue has been finally resolved. (Such suspension should not extend to defendants' appeal from Magistrate Gershon's order to produce two documents, since these documents may have jurisdictional significance.) The substance of the suggestions set forth in (b) and (c) is also advanced by defendants in their July 25, 1980 letter, page 2, last full paragraph, and thus represents the consensus of both sides.

B.

Defendants regrettably persist in attempting to lead this Court into a basic factual error, viz. the belief that Central Bank's letter of credit in favor of Reale was payable in Spain. True, that is what Reale had requested, and what the cement contract called for. But it is not what the defendants did. Rather, unilaterally, for their own purposes and convenience, they elected to cause the letter

of credit to be (a) advised by, and (b) payable at, and only at, Morgan Guaranty, in New York, (c) out of defendants enormous funds in New York. See complaint, ¶9; and Exhibits H and K to plaintiff's letter of July 15, 1980. Exhibit K, Morgan's advice of this letter of credit to plaintiff, states:

> "Your drafts [under this letter of credit] must ... be presented to our Commercial Credits Department, 15 Broad Street, New York, N.Y. 10015 ....".

Whatever may have been the facts in Texas Trading, as found by Judge Cannella without trial or evidentiary hearing, this was not an accommodation to Reale. Rather, it was a unilateral decision by defendants purposefully to invoke the protection and benefits of U.S. and New York law, and a deliberate choice to use their enormous funds in this country -- of the magnitude of $1 billion -- for payments under this letter of credit.

Morgan's advice (Exhibit K) was sent directly to plaintiff in East Hartford, Connecticut, as well as to Banco de Bilbao in Spain. See complaint, ¶10. All subsequent advices by Morgan were similarly sent in duplicate to both. In either case, Morgan was communicating to and with plaintiff, both directly and "thru" Banco de Bilbao. See Morgan's own heading of Exhibit K ("This refers to ... our Telex of today thru Banco de Bilbao ...".)

We further submit herewith as Exhibit T Morgan's pretrial deposition testimony in Verlinden (three volumes). We are submitting the Verlinden depositions because they are directed at least in part to jurisdictional facts, whereas plaintiff's deposition of Morgan in this action is directed solely to the merits, since plaintiff believed that the jurisdictional issue had been resolved by the stipulation and order herein to adopt Judge Pierce's jurisdictional determination as controlling. We respectfully call particular attention to the following testimony:

1. p. 94, l. 15 - p. 105, l. 12 (this is an explanation of the 3-page summary of services performed by Morgan for Central Bank in 1975, Exhibit N to plaintiff's July 15, 1980 letter, second document).

2. p. 21, l. 20 - p. 22, l. 7; p. 32, l. 19 - p. 36, l. 10; p. 46, l. 17 - p. 47, l. 6; p. 59, l. 8-24; p. 61, l. 12 - p. 62, l. 18; p. 69, l. 20 - p. 75, l. 14; p. 76, l. 20 - p. 77, l. 3; p. 84, l. 4 - 19; p. 85, l. 18 - p. 86, l. 6.

3. p. 107, l. 19 - p. 111, l. 3; p. 111, l. 6 - p. 113, l. 6; p. 113, l. 17 - p. 116, l. 5; p. 118, l. 7 - p. 119, l. 12.

4. p. 158, l. 3 - 15; p. 164, l. 19 - p. 165, l. 5 and 167, l. 14 - p. 168, l. 15; p. 198, l. 5 - 18.

Should the Court desire the exhibits marked for identification on the Morgan deposition, plaintiff will be happy to supply a set thereof.

Surely, what is jurisdictionally significant is what actually happened here, rather than what plaintiff requested but defendants did not do. It is precisely those facts which defendants -- understandably -- seek to obscure.

I.

Defendants point out that under 28 U.S.C. §1330(a), there is subject matter jurisdiction only if one of the exceptions to sovereign immunity specified in §§1605 - 1607 applies. We agree.

Defendants point out that under §1330(b), personal jurisdiction is present or absent depending wholly on whether or not there is subject matter jurisdiction under §1330(a), so that subject matter and personal jurisdiction go hand in hand, and that personal jurisdiction under the Immunities Act cannot be lacking if subject matter jurisdiction exists and process was duly served in accordance with the Act. Again, we agree that this is indeed the clear scheme of the Act.

Finally, defendants argue that since Judge Weinfeld in Verlinden held that there was no personal jurisdiction, that holding, and his discussion of §1605(a)(1) and (2), must mean that Judge Weinfeld held that there was also no subject matter jurisdiction. We disagree. Judge Weinfeld very clearly held that there was subject matter, but that there was not personal, jurisdiction. See plaintiff's letter of July 15, 1980 to Your Honor, pp. 2-3. The Clerk of this Court, on April 30, 1980, entered a judgment on Judge Weinfeld's decision -- prepared by the Clerk -- dismissing the Verlinden

complaint "for lack of personal jurisdiction." However contradictory or even violative of the Act's design Judge Weinfeld's two holdings may appear, they are what they are. They lend no support to defendants' "suggestion" of lack of subject matter jurisdiction herein.

The jurisdictional facts recited by Judge Cannella in Texas Trading and the facts proven or to be proven herein are crucially different.

Texas Trading	Reale
1. The cement contract provided that all disputes arising under it would be submitted to arbitration before the ICC, Paris, France. (Op., p.3.)	1. The cement contract provides that all disputes arising under it shall be submitted to arbitration of the ICC, headquartered in Paris, France, pursuant to the ICC Arbitration Rules. Those Rules provide, in this case, that the arbitration shall take place where the arbitrator(s) determine. See section II, below, and Exhibits V and W submitted herewith.
2. Nigeria's Ministry of Defense appears not to have anticipated that the huge quantities of cement ordered exceeded the unloading capacity of Nigeria's deep water ports. (Op., p.4.)	2. Defendants knew that the 16 million tons ordered for delivery over an 18-months period could not be unloaded in less than three-and-a-half years at best. The huge contracts were entered into in the undisclosed contemplation that 20% or less thereof would be performed. (Exh. U submitted herewith, p. 79 thereof.)
3. "A letter of credit payable in New York is an accommodation to plaintiff." (Op., p.13.)	3. Defendants, contrary to plaintiff's wishes and the underlying contract, unilaterally, for their own purposes and convenience, caused the letter of credit to be advised and to be made payable in New York, out of their huge funds in New York.

4. "[T]here is no indication in the present case that the defendants purposefully availed themselves of the privilege of conducting business in the United States ...". (Op., p.16.)

4. Defendants purposefully availed themselves of the privilege of conducting business in the United States by, inter alia (a) causing the Reale, Chenax, Verlinden and other L/C's to be made payable here when in each case the beneficiary had requested a foreign bank, (b) keeping $1 billion or more of their funds here and directing Morgan to pay drafts under these L/C's out of those funds, (c) selling more of their crude oil to the United States than to any other country, (d) purchasing more of their requirements here than from any other country, (e) regularly and systematically sending Central Bank officials to Morgan in New York for training, (f) sending thousands of Nigerian students to United States colleges and universities and having all or some of their expenses paid by Morgan, (g) causing Morgan to perform a variety of services which go beyond a mere correspondent banking relationship, and (h) engaging in a variety of other purposeful activities in the United States for commercial purposes.

5. "Since the allegations of plaintiff's complaint do not fulfill the 'minimum contacts' requirements of International Shoe and its progeny, they cannot reach the level of 'direct effect' described in section 1605(a)(2)." (Op., p.16; emphasis added.)

5. Reale has submitted copious documentary evidence, depositions, etc., and requested an evidentiary hearing. Jurisdiction when it turns upon the quantum of contacts or other issues of fact, involves factual inquiry and factual determination, and is in no way finally controlled by the allegations of the complaint. 28 U.S.C. §1653; Cox v. Livingston, 407 F.2d 392 (2d Cir. 1969).

Indeed, in Texas Trading, plaintiff submitted no evidence whatever on the issue of jurisdiction; the two affidavits which it submitted to Judge Cannella, aggregating seven pages, are solely in opposition to defendants' alternative motion for summary judgment on other, non-jurisdictional grounds.

BERTHOLD H. HOENIGER

Clearly, the key facts (and/or allegations of the Texas Trading complaint) which formed the stated basis of Judge Cannella's decision are sharply, if not diametrically, different from the record facts, and the facts which plaintiff will prove at an evidentiary hearing, in this action.

II.

We suggested, at p. 4 of plaintiff's letter of July 15, 1980 to Your Honor, (a) that Judge Weinfeld's decision in Verlinden denies personal jurisdiction under a fact pattern which clearly would have supported jurisdictional attachment and quasi-in-rem jurisdiction before the Immunities Act took effect, (b) that the Immunities Act barred jurisdictional attachments and quasi-in-rem jurisdiction and substituted therefor an expansive, liberal scheme of personal jurisdiction, and (c) that the Verlinden decision fails to recognize both this "quid pro quo" and the Congressional intent to reduce, not to expand, sovereign immunity to judicial jurisdiction. See, in addition to National American and Libyan American Oil, Geveke & Co. Intern. v. Kompania Di Awa, 482 F.Supp. 660, 663 (S.D.N.Y. 1979, also, surprisingly, by Judge Weinfeld). We suggested that Judge Weinfeld's Verlinden decision, in holding that there is no personal jurisdiction in a situation where there would have been clear quasi-in-rem jurisdiction prior to the Immunities Act, does not effectuate, but rather frustrates, this Congressional intent of codifying a restrictive approach to sovereign immunity.

We believe that our point was clear, despite the efforts of defendants in their last letter to becloud the same.

In section II of plaintiff's prior letter to Your Honor, we demonstrated that Judge Weinfeld's reading of the arbitration clause in the mimeographed form contracts of adhesion as calling for arbitration in Paris, France and under French law was erroneous. Defendants, in their July 25, 1980 letter, pp. 7-8, dispute this conclusion.

We respectfully submit herewith, as Exhibit V, copy of letter dated July 25, 1980, from plaintiff's counsel to M. Yves Derains, Secretary General of the ICC Court of Arbitration. The facts stated

BERTHOLD H. HOENIGER

therein apply equally to this action, to Verlinden, to Texas Trading, and to East Europe, Nikkei, and Chenax. We similarly submit, as Exhibit W, the cable reply to this letter from M. Derains. That reply shows conclusively that, under the ICC Rules and jurisprudence, the clause does not call for arbitration in or "at" Paris, but rather leaves the place of arbitration to be designated by the ICC arbitrator(s), and that the words "Paris, France" are simply the address of the ICC's headquarters and secretariat. Thus, the clause is square on all fours with that in Libyan American Oil. Further comment is superfluous.

Defendants appear now to concede this point. They still argue, however, that the ICC arbitration must be initiated in Paris, and, wherever it takes place, will be supervised by the ICC Court of Arbitration in Paris. The contention is false. We submit herewith as Exhibit X the brochure, "ICC arbitration," portions of which were annexed to our July 15 letter to Your Honor as Exhibit D. We call particular attention to the material on page 6 under the heading "It is neutral;" and the material on page 7 under the heading "It offers international solutions," reading as follows:

> "Judges in national courts, for example, are bound by rigid rules when deciding which country's laws is applicable. An arbitrator is not so bound unless the parties to the dispute stipulated an applicable law in their contract.
>
> He can therefore normally determine the most appropriate substantive rule as soon as he has made a detailed study of the various factors in the dispute.
>
> The arbitrator's thorough knowledge of international trade practices moreover enables these practices to be taken into full consideration. This is highly desirable since these practices now constitute a set of standards of direct application to various aspects of international economic activity, independent of State legal systems."

ARTHOLD H. HOENIGER

Finally of crucial importance in refuting defendants' contention is the text of page 22 under the heading "Place of arbitration":

"A distinctive feature of the ICC system is complete liberty given to the parties as regards choice of the place of arbitration (with most national arbitration centres, the place of arbitration is normally the place where the centre is located).

In practice the place of arbitration is only stipulated in the contract or the arbitration agreement in about a third of the cases that come before the Court. The contracting parties generally prefer to leave the Court to settle this point in the event of a dispute arising, particularly since they sometimes have difficulty in agreeing on a place at the time the contract is concluded.

The place where the proceedings take place before the arbitrators can be fixed by the parties or the Court anywhere in the world.

It is entirely independent of the place where the Court meets and where its Secretariat is located.

Agreement on a place

If the parties fix the place of arbitration, they should bear in mind the difficulties which may be involved by choosing certain countries due to the mandatory provisions of those countries' procedural laws.

Such provisions must be observed if the award is to be valid in the place where it is made. Parties in doubt about this point are advised to check with the Secretariat of the Court.

Where the parties have made no stipulation the Court of Arbitration generally chooses as the place of arbitration the country of the sole

ARTHOLD H. HOENIGER

arbitrator or of the Chairman of the arbitral tribunal. This is not however an invariable principle, and the Court is able to choose any country in view of the circumstances of the case."

(Emphasis in original)

There is also ample authority for holding that not only Nigeria but also Central Bank is covered by this arbitration clause. Here, "the letters of credit were established solely as the means for payment by Nigeria of obligations imposed by the cement contracts, so that the plaintiffs' claims for damages are identical and merged whether they arise under the cement contract or the letter of credit." (Defendants' Post Trial Memorandum of Law in East Europe et al., dated October 29, 1979, p. 9.) "The letters of credit were ... the means for payment for cement ... and for any demurrage ...". (Defendants' Proposed Findings of Fact in East Europe et al., Finding 4.)

Since Central Bank acted solely as Nigeria's instrumentality or marionette in issuing and in repudiating these letters of credit (Exh. U submitted herewith, p. 79, last ¶, 4th sentence), it is bound by its sovereign's and master's arbitration clause. It, like its master, has thereby implicitly waived its immunity to suit here. Farkar Co. v. R. A. Hanson DISC, Ltd., 583 F.2d 68 (2d Cir. 1978) (parent's agreement to arbitrate binds its subsidiary which carried out the contract and acted as parent's instrumentality); Fisser v. International Bank, 282 F.2d 231, 234 (2d Cir. 1960) ("We hold now that if the parent is bound to the contract then like its marionette it is bound to submit to arbitration."); Chilean Nitrate Sales Corp. v. The Nortuna, 128 F.Supp. 938 (S.D.N.Y. 1955); Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., 334 F.Supp. 1013 (S.D. N.Y. 1971); Wells Fargo Bank Int'l Corp. v. London Steamship Owners' A s'n, 408 F.Supp. 626 (S.D.N.Y. 1976); Sumaza v. Cooperative Ass'n, 297 F.Supp. 345 (P.R. 1969); Crawford v. Merrill Lynch, 35 N.Y. 2d 291 (1974); Matter of Willard Alexander, Inc., 31 N.Y. 2d 270 (1972).

Thus, both defendants' implicit waiver of immunity under §1605(a)(1) constitutes a second, independent ground of subject matter and personal jurisdiction, which further emphasizes the correctness of Magistrate Schreiber's conclusion in East Europe et al., Judge Pierce's adoption thereof, and Your Honor's and Judge Pierce's striking of these defenses when repleaded in defendants' answers herein and in East Europe et al.

III.

We pointed out, at pp. 9-10 of plaintiff's July 15, 1980, letter to Your Honor, that Harris involved a non-commercial tort -- personal injury and death in a Moscow hotel fire. We further pointed out that Congress specifically decreed an exception to sovereign immunity in §1605(a)(5) for such non-commercial torts occurring in the United States. We submitted that the principle inclusio unius est exclusio alterius clearly applies, and that §1605(a)(5), although not discussed by Judge Weinstein, compels the result reached in Harris.

We respectfully adhere to that view. We continue to be unable to perceive how §1605(a)(2) -- specifically and expressly limited to claims arising out of commercial activity -- applies to an action for the wrongful death of an American tourist in Moscow due to alleged negligence there.

IV.

We have previously dealt in section B hereof with the persistent misstatement by defendants of the terms -- especially the place of payment -- of the letter of credit.

ERTHOLD H. HOENIGER

Defendants state, at p. 10 of their July 25, 1980 letter, that both Harris and Verlinden conclude that the long-arm provisions of the Immunities Act do not extend to the Constitutionally permitted limits, as elucidated in International Shoe and its progeny. We concur that this is indeed the conclusion of both those opinions. We submit, however, with deference, that that conclusion is clearly erroneous.

In National American Judge Goettel held that quasi-in-rem jurisdiction there was Constitutionally proper under Shaffer v. Heitner standards, in full recognition of the fact that Shaffer had extended the Constitutional due process limitations which had theretofore been thought to govern only in personam jurisdiction also to quasi-in-rem jurisdiction. 448 F.Supp. at 632-35. Judge Goettel then went on to discuss in personam jurisdiction, both under pre-Act law and under the Act, at 635-39. The Second Circuit, in affirming, simply noted the defendants' argument that National American's "original claims arise out of governmental and sovereign acts of Nigeria which are acts of state, thereby rendering the claims non-justiciable." 597 F.2d at 316. The Second Circuit did not deem these contentions of sovereign immunity andact of state worthy of discussion in its opinion. There is no question that the careful opinion of Judge Goettel which the Second Circuit affirmed is instinct with the premise that Congress, in abolishing quasi-in-rem jurisdiction under the Act, intended and did, as the quid pro quo therefor, extend personal jurisdiction to the Constitutionally permissible limits.

In Carey v. National Oil Corporation, 592 F.2d 673, 676 (2d Cir. 1979), the Second Circuit addressed this issue directly and said:

> "We assume that Congress chose the language in the act purposefully. Section 1605(a)(2) speaks of acts which have a 'direct' effect in the United States. The legislative history of this section makes clear that it embodies the standard set out in International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), that in order to satisfy due process requirements, a defendant over

> whom jurisdiction is to be exercised must have 'certain minimum contacts with [the forum state] such that the maintenace of the suit does not offend "'traditional notions of fair play and substantive justice.'"
>
> (Footnotes omitted; emphasis added.)

International Shoe is, of course, the leading case on the outer Constitutional limits of in personam jurisdiction.

The legislative history (Exhibit F) states at p. 6612:

> "(b) Personal Jurisdiction. -- *** The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction."
>
> (Footnotes omitted; emphasis added.)

Your Honor will find further relevant history throughout the House Report, including the discussion of waiver of immunity under §1605 (a)(1) at p. 6617, and the discussion of the commercial activity group of exceptions of §1605(a)(2). With respect to sub-section (a)(2) -- commercial activity -- it is also interesting to note that Congress intended the Act to apply "when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price" (p. 6605). Finally, it is highly signifi-

BERTHOLD H. HOENIGER

to note what the House Report says at pp. 6614-15 with respect to the concept of "commercial activity" defined in §1603:

> "(d) Commercial activity. -- Paragraph (c) of section 1603 defines the term 'commercial activity' as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A 'regular course of commercial conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a 'particular transaction or act.'"
>
> (Emphasis added.)

In short, we submit that the holdings of Judges Weinfeld and Weinstein that Congress did not intend personal jurisdiction to extend to the Constitutionally permitted limits fly in the face of both the legislative history and of the Second Circuit's unequivocal statement in Carey.

V. and VI.

The claim that the defendants' breach and repudiation of their commercial obligations without compensation to the supplier-beneficiaries constitute an act of state and is thus a nonjusticiable controversy, can be dealt with in one sentence. No tribunal, U.S. or foreign, has accepted this argument. It merits no further discussion.

BERTHOLD H. HOENIGER

Hon. Charles S. Haight, Jr.,
U.S.D.J. -15- August 4, 1980

Conclusion

Although plaintiff recognizes that a large body of evidentiary material has now been placed before Your Honor, plaintiff nonetheless renews its request for an evidentiary hearing solely on the issue of subject matter jurisdiction. Plaintiff believes that this is the only way to lay that issue to rest, and to avoid a repetition of the East Europe et al. pattern where Judge Pierce, after months of patient and intense labor including a three week trial, now finds himself faced with a new Rule 12(h)(3) "suggestion" of lack of subject matter jurisdiction by the defendants, and is deluged with hundreds of pages of material in support of and opposition to that suggestion.

Respectfully yours,

Berthold H. Hoeniger
Attorney for Plaintiff

BHH:rho
Encls.

CC: James G. Simms, Esq.
Mitchell M. Bailey, Esq.

appears to be copy of telex or cable from Central Bank of Nigeria to Morgan with the stamp August 20, 1975, one page.

(Xerox copy of telex from CBN to Morgan bearing stamped date August 20, 1975, referred to above, marked Plaintiff's Exhibit 11 for identification, of this date.)

Q Mr. Koebel, can you tell us what Plaintiff's Exhibit 11 for identification is?

A It's a telex amendment from the Central Bank of Nigeria to this letter of credit.

MR. HOENIGER: Will you next mark what appears to be copy of telex or cable from Central Bank to Morgan dated in Lagos, Nigeria, 8/22/75, received stamp August 23, 1975, one page.

(Xerox copy of telex from CBN to Morgan dated August 22, 1975, referred to above, marked Plaintiff's Exhibit 12 for identification, of this date.)

Q And Mr. Koebel, can you tell us what Plaintiff's Exhibit 12 for identification is?

A It's a telex from the Central Bank of Nigeria authorizing us to add our confirmation to the credit if our charges were paid by the beneficiary.

Q Now assuming that your charges were paid by the beneficiary, would you have confirmed, would Morgan have

confirmed without Central Bank's authorization or consent?

MR. HOFFMAN: Do you mean, had the beneficiary requested but Central Bank not consented?

MR. HOENIGER: Correct.

MR. HOFFMAN: In other words, he wants to know whether, if the beneficiary had requested you to confirm the credit --

MR. HOENIGER: And paid your charges.

MR. HOFFMAN: -- and paid your charges, you would have done so if Central Bank of Nigeria had not consented to the confirmation.

A No, we'd have not.

Q And what I also want to know, was Central Bank's consent to confirmation one of the preconditions for confirmation.

A Yes.

Q Okay. Was that Morgan's general practice --

MR. HOFFMAN: Can you read back the last question and answer, please, before you go on.

MR. HOENIGER: Surely.

(Pending record read.)

Q -- in 1975 with respect to letters of credit which it advised?

A Yes? I am sorry.

Q Okay. It's all right. Was it Morgan's general practice with regard to all letters of credit it advised, whether on behalf of Central Bank of Nigeria or on behalf of other customers?

A To require the opener's permission?

Q Yes, sir.

A Yes.

MR. HOENIGER: Thank you.

MR. SIMMS: Well, by your asking that was it a general requirement, you mean no matter who the opening bank was?

THE WITNESS: That's correct.

MR. HOFFMAN: Right.

MR. HOENIGER: Will you mark as Plaintiff's Exhibit 13 what appears to be copy of telex from Morgan to Slavenburg's, September 2, 1975.

(Xerox copy of telex from Morgan to Slavenburg's Bank dated September 2, 1975, referred to above, marked Plaintiff's Exhibit 13 for identification, of this date.)

Q Mr. Koebel, can you tell us what Plaintiff's Exhibit 13 for identification is?

A It's a telex that we sent to Slavenburg's Bank informing them of the conditions under which we would add

our confirmation to the credit.

Q And the condition reflected I think is, primarily, payment of $28,800 by Verlinden?

MR. HOFFMAN: I object to the extent that the document speaks for itself. If you want to ask him if he has any recollection outside of the document, then that would be fair.

MR. HOENIGER: Okay.

MR. HOFFMAN: I just want to avoid a situation where Mr. Koebel sees a document that is put before his face and, in an attempt to be helpful, tries to give it some color and add something to the document that's not there, that's not part of his recollection.

Q Mr. Koebel, as far as you know, or as far as your file reflects if you have no independent recollection, was this Verlinden letter of credit ever confirmed by Morgan?

A It was not.

Q Mr. Koebel, the Verlinden letter of credit was one of fourteen essentially similar letters of credit which Morgan advised on behalf of Central Bank in or about 1975; is that correct?

MR. HOFFMAN: Please read that question back.

(Pending question read.)

A That's correct.

Q Okay. And all fourteen of those letters of credit related, as shown by the documents called for in order to obtain payment, to sales of cement to Nigeria; is that correct?

A That's correct.

Q Okay. Were any of the other fourteen letters of credit ever confirmed by Morgan?

MR. HOFFMAN: I object. I think that the question is misleading. He has testified this was one of fourteen, and you said, were the other fourteen.

MR. HOENIGER: Any of the other fourteen.

MR. HOFFMAN: There were thirteen others. It was one of fourteen.

MR. HOENIGER: Thank you.

Q Were any of the other thirteen l/c's -- Verlinden being the fourteenth, in that context -- ever confirmed by Morgan?

MR. HOFFMAN: I object on one additional ground: I don't think this is an intention on your part, Mr. Hoeniger, but you were aware from previous testimony and from documents produced to you among the previous testimony of Mr. Koebel that in addition to the fourteen advised credits there were three

confirmed cement credits.

MR.HOENIGER: Absolutely I am aware of that.

MR. HOFFMAN: So what you are referring is not to the three that you know were confirmed, but to the thirteen other advised credits.

MR. HOENIGER: Absolutely.

MR. HOFFMAN: You want to know whether any of them was ever confirmed.

MR. HOENIGER: I am referring to the body of fourteen credits that started out as advised credits.

We have just been marking documents showing that Verlinden was asking about confirmation; Central Bank said yes, you can confirm if Verlinden pays the charges; Morgan informs Verlinden's bank the charges are $28,800, and Mr. Koebel has told us that the letter of credit to Verlinden was never confirmed.

Q What I am asking is, with respect to the thirteen other advised ones, were any of those ever confirmed by Morgan?

A No.

Q With respect to those thirteen others, or any of them, did Central Bank ever give Morgan authorization or permission to confirm if the beneficiary paid the charges? This is other than Verlinden.

MR. HOFFMAN: If you can remember.

A I would have to consult the file.

MR. HOENIGER: May we leave a blank for your answer, Mr. Koebel, and you can fill it in when you receive the transcript.

MR. SIMMS: No, I object to doing that. We are under no time pressure.

MR. HOENIGER: You would prefer for us to meet again with Mr. Koebel?

MR. SIMMS: Yes. I just generally object to leaving spaces in the deposition where an answer might give rise to requirement for additional cross examination or what have you.

If necessary, we can continue with Mr. Koebel later or through another Morgan witness -- I don't know whether it is your intention to depose Morgan Guaranty through additional witnesses other than Mr. Koebel -- but I just see no reason to leave a blank space in the transcript.

MR. HOENIGER: Fine. Mr. Koebel, I will ask you please to ascertain that information, and when we meet again, I shall ask you to supply the answer.

MR. HOFFMAN: We will take that question under advisement.

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MR.HOENIGER: Off the record for a minute.

(Discussion off the record.)

THE WITNESS: Would you repeat your question?

(Discussion off the record.)

MR. HOENIGER: On the record.

Q Mr. Koebel, when you received amendments to or instructions to amend the Verlinden credit from CBN, you advised Verlinden and Slavenburg's; is that correct?

A We advised Verlinden through Slavenburg's.

MR. HOENIGER: Thank you. Will you next mark what purports to be copy of cable or telex from CBN to Morgan dated in Lagos 9/15/75.

(Xerox copy of telex from CBN to Morgan dated September 15, 1975, referred to above, marked Plaintiff's Exhibit 14 for identification, of this date.)

Q I show you Plaintiff's Exhibit 14 for identification and ask you what that is.

A It's a telex from the Central Bank of Nigeria --

MR. HOFFMAN: Go ahead. I don't want to stop you in the middle of an answer.

A -- indicating documentary requirements for the cement credits.

(Mr. Hoffman and witness confer.)

MR.HOENIGER: Could I hear that answer?

I think the question implicitly calls for a legal conclusion. We have been using the words "amendment" and "requirement," but by virtue of the fact that the credit is to be governed by the Uniform Customs and Practice, by its terms, I think that it is improper to have Mr. Koebel characterize these communications as amendments or requirements in terms of what the Uniform Customs provide with respect to credits of this type.

Q Can you answer the question, Mr. Koebel?

MR. HOFFMAN: I will remove my objection if you rephrase the question just to ask him whether this telex imposes any precondition to payment under the credit that was not in the original documentary credit.

MR. HOENIGER: Fine.

MR. HOFFMAN: I think that is the only thing in issue anyway.

MR. SIMMS: I object to that question on the same ground: It implicitly calls for a legal conclusion.

MR. HOENIGER: All right.

Q Was it your understanding that the cable you have in front of you -- Plaintiff's Exhibit 19 for identification-- imposed any additional condition or reaffirmed any additional condition for payment under the credit which was not in the

original credit?

A Yes.

Q Okay. And what was that condition?

MR. SIMMS: I object again to this whole line of questioning.

Q Go ahead, Mr. Koebel.

A The requirement, it added the requirement for the two months' registration of vessels.

MR. SIMMS: I object to Mr. Koebel's answer if he is just answering by reading the telex or communication.

MR. HOENIGER: Mr. Simms, you have an objection to the whole question and obviously, therefore, also to the answer. I would appreciate it if you didn't interrupt Mr. Koebel. You can state your objection when he is finished.

MR. SIMMS: Well, I should like the court reporter to at least record the fact that Mr. Koebel is reading from the document you have had before him; he is not testifying from recollection, except --

MR. HOENIGER: It is obvious that that is so.

MR. SIMMS: -- it's not on the record.

MR. HOENIGER: Okay.

MR. SIMMS: It is now: that he is reading from the document.

Q Have you finished your answer, Mr. Koebel?

A No.

Q Will you finish it, please.

A They required two months' registration, and then, reading from the telex, shipment of cement should therefore not be -- of cement, payment should therefore not be paid fo cement ships; and the fact that demurrage should only be paid after we received specific instructions from the Central Bank of Nigeria.

Q Okay. Now to your knowledge did Verlinden ever assent to either of the two requirements which you identified in your last answer?

MR. SIMMS: I object to the question, too. I don't know whether Mr. Koebel is capable of answering what Verlinden did or did not do.

MR. HOENIGER: I said, to your knowledge.

MR. SIMMS: But I think the question is still improper unless you establish first whether Mr. Koebel has any knowledge --

(Mr. Hoffman and witness confer.)

MR. SIMMS: -- with respect to action taken by Verlinden except what is reflected in the documents that have been produced from the letter of credit file of Morgan.

(Mr. Hoffman confers with witness)

MR. HOENIGER: Are you finished conferring? Okay.

Q Go ahead, Mr. Koebel. The question is, to your knowledge did Verlinden assent to either of those two requirements.

A No. And I would like to clarify something here:

I said the requirements were two months' registration. I was incorrect in saying that. I should have said, registration and two months' clearance of ships.

MR. HOENIGER: Thank you.

MR.HOFFMAN: In any case,you were reading from the document, were you not?

THE WITNESS: Yes.

MR. HOENIGER: Will you mark as Plaintiff's Exhibit Twenty what appears to be two-page telex or cable from Central Bank to Morgan dated in Lagos 10/24/75, received stamp October 24.

(Two-page Xerox copy of telex from CBN to Morgan dated October 24, 1975, referred to above, marked Plaintiff's Exhibit 20 for identification, of this date.)

Q Mr. Koebel, I show you Plaintiff's Exhibit 20 for identification and tell us what that is, please.

A It's a telex from the Central Bank of Nigeria to Morgan.

Q I note, Mr. Koebel,that 20, Plaintiff's Exhibit 20,

purports to be copy of letter from Morgan to Verlinden dated September 30, 1975.

(Xerox copy of letter from Morgan to Verlinden dated September 30, 1975, referred to above, marked Plaintiff's Exhibit 26 for identification, of this date.)

Q I show you Plaintiff's Exhibit 26 for identification and ask you to tell us what that is.

A It's a copy of our advice of amendment to Central Bank's credit.

MR. HOENIGER: Okay. Next please mark two-page letter from Morgan to Verlinden dated September 30, 1975.

(Two-page Xerox copy of letter from Morgan to Verlinden, referred to above, marked Plaintiff's Exhibit 27 for identification, of this date.)

Q What is Plaintiff's Exhibit 27 for identification, Mr. Koebel?

A A letter from Morgan Guaranty to Verlinden.

Q By referring to your file can you tell whether that was a form letter in which only certain information, such as the addressee's name and address and the number of the particular credit, was filled in?

A I can determine that from this (indicating).

Q Oh. Then what is your answer, sir?

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A My answer is yes.

Q Fine. Did this identical letter -- Plaintiff's Exhibit 27 for identification -- go tothe beneficiaries of all fourteen of the advised cement letters of credit?

A Yes.

MR. HOENIGER: Will you next mark what purports to be cable from Central Bank to Morgan dated in Lagos 8/25/75, received stamp August 26, one page.

(Xerox copy of cable from CBN to Morgan dated August 25, 1975, referred to above, marked Plaintiff's Exhibit 28 for identification, of this date.)

Q Can you tell us what Plaintiff's Exhibit 28 for identification is, Mr. Koebel?

A It's a telex from the Central Bank to Morgan.

MR. HOENIGER: Next please mark copy of letter from Morgan to Verlinden, October 8, 1975.

(Xerox copy of letter from Morgan to Verlinden dated October 8, 1975, referred to above, marked Plaintiff's Exhibit 29 for identification, of this date.)

Q Can you tell us what Plaintiff's Exhibit 29 for identification is?

A It's our advice of amendment to Central Bank's credit.

MR. HOENIGER: Next mark copy of letter from Morgan to Verlinden, October 22, 1975.

credit business, scant as it is, suggests that in no case would a payment be made --

MR. HORNIGER: Excuse me. I stop the objection, which I think now telegraphs answers to the witness.

I will withdraw the question.

Q Mr. Koebel, under the letter of credit -- Plaintiff's Exhibit 4 for identification -- prior to any amendments, if Verlinden or Verlinden's banker presented demurrage claims at the rate of $3,500 per day per vessel, accompanied by time sheets and accompanied by the ship's agent's statement, ship's agent in Lagos' statement, duly certified, would Morgan have paid those claims as made if the documents were in order?

A Yes, yes.

Q Okay. And if the claim was at the rate of $3,500 per day per vessel, Morgan would have paid that $3,500 per day per vessel if the documents set out in the appendix had been duly presented; right?

A Yes.

Q And would Morgan have made any inquiry prior to paying that claim as to how much cement the vessel carried? This is under the original l/c which you have in front of you, specifically Paragraph 4 of the appendix.

A We would have looked to have seen if we had paid for

the cement first.

Q Because that would serve as verification that the --

A That's right.

Q -- vessel --

A Yes.

Q -- had in fact arrived in Nigeria, right?

But other than that, Mr. Koebel, would you have made any inquiry as to how much cement the particular vessel carried, in connection with the demurrage?

A No.

Q That was irrelevant to the demurrage; right?

A Yes.

Q Would you have made any inquiry as to what rate of demurrage, if any, Verlinden had agreed to pay to the owner of the vessel?

A No.

Q That was irrelevant under the Paragraph 4 to the appendix of the l/c, right?

MR. SIMMS: I object to the question. You are putting words, leading Mr. Koebel, as to reasons why Morgan may have taken whatever action they would have taken had demurrage claims been presented.

I object to that, this question and the previous question, as leading, and it also calls for a

somewhat legal conclusion in terms of what is relevant or irrelevant.

MR. HOENIGER: Off the record.

(Discussion off the record.)

MR.HOENIGER: Would you answer that.

A Yes.

Q Mr. Koebel, in my Reale deposition of Morgan through you, at Page 39, Lines 3 through 8, the following occurred, quote:

"Mr. Hoeniger: Mr. Koebel has testified that the restrictive measures adopted by CBN, which prohibit Morgan from making further payments, related both to the Reale credit and to the thirteen other credits.

"Question: Is that correct, Mr. Koebel?

"Answer: That's correct."

Q Now my question to you today is, Mr. Koebel, whether, when these restrictive measures were adopted and communicated to Morgan in September and October 1975, was it your understanding that the intended effect thereof was to prohibit or prevent further payments under those fourteen letters of credit?

MR. SIMMS: Objection to the question.

MR. HOFFMAN: I object to that question as well.

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I think you can ask him whether anybody told him that.

MR. HOENIGER: I think I am entitled to his understanding, and then I shall go into discussions.

MR. SIMMS: No. I object to the question further. You are trying to incorporate something that was cumulative in the Reale deposition into this deposition, and I object to that.

MR. HOFFMAN: I have a problem about it.

MR. HOENIGER: Are you instructing him not to answer?

MR. HOFFMAN: I should like to make a statement first.

MR. HOENIGER: No. Excuse me, but I should like to have your --

MR. HOFFMAN: Mr. Hoeniger, I am entitled to make any statement for the record I like.

MR. HOENIGER: All right. But, please --

MR. HOFFMAN: My objection is that you have laid no foundation to indicate, nor do I know for myself, whether Mr. Koebel has ever met anybody from the Central Bank of Nigeria, much less that he is able to know what their intention was.

MR. HOENIGER: I am trying to.

MR. HOFFMAN: I think it is an improper question

unless you ask him if they communicated to him that their intention was to prevent him to make further -- to make payments under the letters of credit.

MR. HOENIGER: I will withdraw the question.

(Mr. Hoffman and witness confer.)

MR. HOENIGER: Note the conference.

MR. HOFFMAN: I was just trying to find out whether Mr. Koebel met anybody from the Central Bank.

And you said, yes, but not in connection with this?

THE WITNESS: That's correct.

Q Mr. Koebel, an article in Business Week, November 3 1975, Page 40, entitled, quote, "NIGERIA SETTING ITS OWN RULES FOR BANKING AND TRADE," unquote, carries the following sentence, quote:

"The order stopping payment on the letters of credit is virtually unprecedented in international trade."

Based on your more than thirty years of experience with letters of credit for Morgan, would you say that the quoted statement is a fair characterization of the actions taken by Central Bank in September and October 1975?

MR. SIMMS: I object to the question. The statement you have read does not show that it relates to any activity conducted by Morgan with respect to any letters

of credit, and I object to that. I think you are relating a statement out of context, a hearsay statement to begin with, too, and have not shown its relevance to any issue in this lawsuit.

MR. HOENIGER: Would you answer the question.

MR. HOFFMAN: Would you read the question so I can remember now what it was.

(Pending question read.)

MR. HOFFMAN: With regard to these cement credits, Mr. Koeniger.

THE WITNESS: Yes.

MR. SIMMS: What orders stopping payment on letters of credit are being referred to? I don't understand the connection.

MR. HOENIGER: Fine. Mr. Koebel, would you answer my question, please.

A Yes.

MR. HOENIGER: I have no further questions at this point. As you stated at the beginning, Mr. Hoffman, when Mr. Brown has completed his review of other documents, and also when Mr. Koebel has ascertained the answer to the one question which he did not know but said he could ascertain, for which Mr. Simms did not want a blank left, we will arrange to meet again

Q Do you understand the question?

MR. HOENIGER: (to reporter) Did you get that, "I agree"?

A I say that the Central Bank of Nigeria did not make a request for an amendment. They amended it and requested us to advise the beneficiary.

Q But with respect to each of the amendments that had been instructed to be made, you have already testified that you have no knowledge of whether or not Verlinden objected or consented to these amendments?

A That's correct.

Q Or indeed whether some of them were requested by Verlinden?

A Yes.

MR. SIMMS: I am asking the questions. If you want to reserve any of your questions --

MR. HOENIGER:No. I am simply correcting incomplete statements of the record made by you.

Q Mr. Koebel, what I should like to do is ask you the basis of your response to Mr. Hoeniger's previous question when he referred to a quotation from the article in Business Week that the order stopping payment on the letters of credit was virtually unprecedented in international trade, to which you agreed.

What is the basis of your agreeing with that statement?

A I have never seen an action on this scale taken before.

Q What do you mean, "on this scale"?

A Blanket changes of similar letters of credit.

Q Have you ever dealt with a large number of similar letters of credit before?

A Never in credits of -- well, I can say we have dealt with large numbers of credits for Chevrolets, I can say that, but we've never -- well, I would have to get back: I'd never seen any action on this scale before.

Q What I am trying to find out, Mr. Koebel, is what you mean by, "on this scale."

A Blanket amendments.

Q Well, what do you mean by "blanket amendments"?

A We had fourteen letters of credit here.

Q Yes?

A Similar letters of credit; and I have never --

Q You have never seen fourteen similar letters of credit established by an issuing bank at one time for such large amounts, is that what you mean?

Q When you add, "for such large amounts," I say, yes.

Q What do you mean by "blanket amendments"?

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A By the restrictions that we were -- that the Central Bank established.

Q What do you mean by restrictions?

A The fact that the documents had to be certified in Nigeria.

Q But you are aware, with regard to other letters of credit, that issuing banks have ordered amendments to be made in the terms of irrevocable letters of credit?

A Oh yes.

Q In your experience how often do such instructions for amendments occur with respect to irrevocable letters of credit?

A I am certain that in more than fifty per cent of them.

Q I see. So that you consider these cement letters of credit unique in the sense only that there were fourteen of them, similar, and that they were for large amounts?

A That's right.

Q Has Morgan Guaranty ever advised letters of credit in amounts similar to those established for these cement contracts?

A Yes.

Q Have they advised letters of credit in amounts exceeding those that were established with the cement contracts?

A Yes.

Q So the size of the individual letter of credit of Verlinden of $14,400,000 for cement was not extraordinary in and of itself?

A At that time they were.

Q If you look at the Verlinden letter of credit as a letter of credit alone and not as a group of letters; right?

A If we looked at it alone, we would say that was a very large letter of credit and that's that, yes.

Q But you have dealt with larger letters of credit?

A We have.

Q And you say that in about fifty per cent of all letters of credit advised through Morgan Guaranty which are irrevocable, there are instructions from the issuing banks to make amendments to the terms?

A Yes.

Q So that the fact of a request for such amendment isn't extraordinary?

MR. HOENIGER: Objection to the word "request."

MR. SIMMS: Answer the question.

MR. HOENIGER: Objection to form.

MR. HOFFMAN: Answer the question.

MR. SIMMS: Will you answer.

Q (cont'g) The instruction from Central Bank to mak an amendment to the terms of an irrevocable letter of credi was not extraordinary, then?

A It was not extraordinary to have a -- to ask that; to amend a letter of credit.

Q Is it the practice of Morgan Guaranty to inquire of the beneficiary whether he consents or objects to the instruction for the amendment?

A Not on an advised credit.

Q I see. But on receipt of an instruction to amend the letter of credit, irrevocable letter of credit, from the issuing bank on which Morgan Guaranty is only the advising bank, Morgan Guaranty adopts the amendment, is that correct? In the sense that the amendment then is incorporated into the terms of the original credit and presentments would then have to conform to the amendment?

A Yes.

Q And this is done, as you say, in approximately fifty per cent of the cases of irrevocable letters of credits that are advised by Morgan Guaranty?

MR. HOENIGER: Excuse me. Before you answer, Mr. Koebel, I should like to hear the prior question and the answer read.

(Record read as requested.)

A Yes.

Q Did you have an opportunity at any time, Mr. Koebel, to read the article in Business Week of November 3, 1975, from which Mr. Hoeniger quoted?

A I don't remember reading it.

Q Apart from the quotation that Mr. Hoeniger read to you, were you aware of what the content of that article is?

A No.

Q Do you know now what is referred to in the article by, "The order stopping payment on letters of credit," refers to, it refers to --

A I assume that it refers --

Q I see. It was an assumption on your part?

A Yes.

MR. SIMMS: Thank you.

MR. HOENIGER: I should like to have Mr. Koebel's answer completed: "I assume that -- "

MR. SIMMS: I am sorry.

MR. HOENIGER: " -- it -- "

THE WITNESS: I assume that it referred to the cement credits.

Q Which cement credit?

A Opened by the Central Bank of Nigeria.

Q Are you aware of other cement credits opened by

the Central Bank of Nigeria apart from those advised through Morgan Guaranty?

A No.

Q And am I correct that your agreement to the statement -- if your assumption is correct -- was based primarily on the fact that you were dealing with fourteen similar and very large letters of credit which, in your experience, was rather unique at Morgan Guaranty?

A Yes.

Q Was in fact unprecedented, in your experience, to see fourteen similar letters of credit of this size established?

A That's correct.

Q You have stated on direct examination, Mr. Koebel, that no presentment had been made by the beneficiary of this letter of credit for payment of any kind; is that correct?

A That's correct.

Q Was Morgan Guaranty ever requested to make any payments at all to Verlinden by Central Bank of Nigeria absent a presentment?

MR. HOFFMAN: Are you talking about now through a letter of credit?

MR. SIMMS: With respect to this letter of credit.

A R T H U R B R O W N , the witness herein, residing at 329 Jackson Avenue, West Hempstead, Long Island, New York 11512, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY

MR. HOENIGER:

Q Mr. Brown, in the course of the National American trial, Mr. Paul Winston Fitzpatrick testified, in substance, that during a year -- and I have forgotten if it was 1975 or 1976 -- Central Bank of Nigeria's business had a profitability of approximately $600,000 for Morgan during that year.

Since that time, be it 1975 or 1976, has the level of profitability of CBN's business to Morgan been approximately of the same magnitude?

A Approximately, yes.

Q And if there has been a difference, so far as you know, has it been greater or less than that roughly six hundred thousand dollar magnitude?

A Less.

MR. HOFFMAN: May I interject for one moment? I should have said this earlier, but the document that was produced is marked "Confidential."

As I am sure you can appreciate, Mr. Hoeniger,

and this is not the first time that this matter has been discussed, I am sure, statistics about the operation of a customer's account are confidential in two respects:

One, as it relates to competitors of the Morgan Guaranty Trust Company, and, second, as it relates to disclosure of the client's business to the public. I think that it is the second concern which is especially strong here, because the client is the Central Bank of a sovereign nation, and, accordingly, I think the precedent has been well laid for you to be able to get this information in previous cases; but I do request that we agree, as attorneys, that you will confine the use of the material that you learn during the course of this deposition as to the business of the Morgan Guaranty Trust Company to use in this case.

Of course, I will be happy to make a stipulation with you that you can use it in any other case involving similar subject matter.

My concern is essentially to the disclosure to the public.

MR. HOENIGER: So agreed.

MR. HOFFMAN: Okay.

MR. HOENIGER: Off the record.

(Discussion off the record.)

BY MR. HOENIGER:

Q Mr. Brown, let's turn now to Plaintiff's Exhibit 37 for identification, and under the column "Operational Services Rendered," the first item is, "Checks paid individual foreign," and you have a total of 19 there; is that correct?

A That is correct.

Q Could you explain what the designation means?

A These would be checks which are paid against the account which Central Bank has drawn.

Q I see. And can you give me a dollar amount, an aggregate dollar magnitude for those 19 checks, Mr. Brown?

A Not without an extensive investigation of all of the activity for the account. We do not maintain records of the amounts of the checks paid, in the normal course of business, in aggregate.

Q How about individually? Were they primarily large checks?

A It's impossible to tell what the amounts of the checks were.

Q Does Morgan maintain an account statement for Central Bank of Nigeria showing credits and debts?

A Yes.

MR. HOFFMAN: Off the record.

(Discussion off the record.)

Q In an off-the-record comment Mr. Hoffman stated some of the problems that would be involved in deriving the total of the nineteen checks, mechanical problems.

I don't wish to further explore it, Mr. Brown, unless you want to elaborate, but I think you indicated your agreement with what Mr. Hoffman said; is that correct?

A Yes.

Q Let's go down to the item on Page 1 now, "Statement Preparation."

Now, I take it, "Statements Rendered" is a sub item under one; is that correct?

A That's correct.

Q And that indicates what? Does it indicate twelve statements, each one a monthly one?

A That's correct.

Q And then there is another sub item under "Statement Preparation", "Delivery Foreign"?

A Yes.

Q And that indicates 1,017 items of activity, if I read it rightly; is that correct?

A That's correct.

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Q What does "Delivery Foreign" mean in this context?

A That each one of those items of activity was delivered to the foreign customer.

In other words, for each activity, for each item of activity, a statement was mailed to Central Bank of Nigeria for that piece of activity.

Q I see. For example, a payment under a letter of credit established by Central Bank by Morgan?

A That's correct.

Q Central Bank would be advised?

A Yes, that's correct.

Q Or a money transfer made on Central Bank's instructions?

A That's correct.

Q May we infer from that then, Mr. Brown, from the "Statement Preparation" group, that Morgan engaged in slightly over one thousand transactions on behalf of CBN in 1975?

A Yes.

Q Going now to the next item, which is headed "Money Transfer-Income." I see we have under that two sub items, the first being "Incoming via A.T.S."

What does A.T.S. stand for?

A I don't know exactly what the letters stand for, but

that's an indication of transfers coming in from the Federal Reserve System.

Q And Morgan had authority to draw on Central Bank of Nigeria's fund at Federal Reserve, whenever they felt it appropriate to do so; is that correct?

A That is correct.

Q And still has that authority?

A Yes it does.

Q And it is unlimited in amount?

A Yes it is.

Q Now, the second sub item under the "Money Transfer-Incoming" is "Foreign Letter of Advice," or "CHIPS"?

A Yes.

Q Could you explain what that means.

A The word "CHIPS"?

Q Yes.

A "CHIPS" is the designation for Clearing House Interbank Payment System, and it is on this system that we would receive credits for the Central Bank's accounts from other members of the clearing bank system for New York.

Q I see, but that would not include monies from the Federal Reserve?

A That's correct, it would not.

Q It would not?

A No.

Q At the bottom of Page 1, I see an item, "Foreign Payment or Transfer," with 174 activity items.

Can you describe generally what is embraced in "Foreign Payment or Transfer"?

A These are payments that the Central Bank would ask us to make in favor of beneficiaries outside of the United States.

Q Turning now to Page 2, I see a total of forty-five credit inquiries and investigations during that year.

A Yes.

Q Do you know whether any credit inquiry was made by Central Bank of Nigeria with respect to Verlinden B.V.?

A No, I do not know that there was an investigation on that name.

Q Have you checked your file to ascertain whether there was or was not?

A No, I have not.

Q Would you do so, please, Mr. Brown.

A Certainly.

MR. HOENIGER: And if you have no objection, Mr. Hoffman, may we leave a blank space in the transcript for that information to be supplied?

MR. HOFFMAN: You just don't want a yes-or-no

answer?

MR. HOENIGER: I would like to know whether or not there was an inquiry, and if there was, I would ask for the production of the inquiry and the response thereto.

I represent to you, Mr. Hoffman, that in the case of East Europe Import Export there was an inquiry and a response.

MR. HOFFMAN: We will certainly take your request under advisement.

Q Now, the last item on Page 2 is headed, "Clearance-In," and under that, "Non-money Market Receive Clearance."

Could you explain that?

A No, I prefer to investigate this and then let you know at a later time.

I can't explain what "Clearance-In" is.

Q You did not prepare Exhibit 37, Mr. Brown?

A We prepared it from other information but we didn't --

Q No, excuse me, when I said "you," I meant you, Arthur Brown.

A No, I did not.

Q Who prepared it?

A The group in the bank that's charged with the responsibility of accumulating information for management.

Q What group is that?

A It's called the MAIPA department.

Q The what?

A The MAIPA department.

Q Does MAIPA stand for something?

A Yes, it does.

Q Management Assistance --

A Management Analysis Information, or something in that order.

MR. HOFFMAN: Let the record show that perhaps Mr. Brown was confused as to one thing.

We did prepare the exhibit in the sense that the information was taken off a form that is prepared by that department, and we did do the physical typing so that it was in a form you could use, but at the same time did not disclose information which is of a highly confidential nature, but the information thereon is not kept regularly by Mr. Brown as part of his duties.

I think, essentially, that is what he is saying; is that correct?

THE WITNESS: That's correct.

Q All right, Mr. Brown, in terms of an approximation, what is the total amount of money disbursed by Morgan, or

paid out by Morgan, for CBN funds, or for the account of CBN during 1975, whatever the heading is? I am aggregating all categories.

A The debits to the account?

Q If you wish.

A For the year 1975?

Q Yes.

A That was approximately $288,000,000 for 1975.

Q And what were the credits to the account for the year?

A I would only say that the credits would have to be about the same amount.

Q About $288,000,000?

A If we're talking in approximations, yes.

Q About $288,000,000, give or take some?

A That's right, yes, sure.

Q On Page 3 of Exhibit 37 we have noted the issuance of thirty-seven letters of credit.

A Yes, sir.

Q And that includes both advised and confirmed L/C's, does it?

A Yes.

Q And it would include, I believe, the fourteen advised cement credits which CBN issued in 1975 through

Morgan; is that correct?

A Yes.

MR. HOFFMAN: I object to the question.

MR. HOENIGER: It's been answered.

MR. HOFFMAN: Yes, but the question that was answered was -- I'm not sure that all of the fourteen were issued in 1975, and your question was, it would include the fourteen that were issued in 1975.

Q Well, it would include most, if not all; is that correct?

A It would include those that were issued in 1975.

Q Correct. We understand that one or two might have been issued in 1974.

MR. HOFFMAN: My objection is that the record says what it says.

You have all of them, Mr. Hoeniger, and certainly your records would show which ones were issued in 1975.

Q Right, and do you happen to know whether those 1975 letters of credit issued included any of the L/C's issued for cement in 1974/1975?

MR. HOFFMAN: Objection. You have all those.

MR. HOENIGER: No, I don't.

MR. HOFFMAN: Yes, you do, and I believe I am in a position to show you right now that you do have them

all.

I have a folder here that I believe contains the documents which we have already produced to you.

MR. HOENIGER: Fine, if you would pull them out, I would appreciate it.

MR. HOFFMAN: Under cover of my letter dated May 16, 1978, and although I am not in a position to give you these because they are part of my file, I have here a copy of a letter of credit issued in favor of Chifakis International on June 11, 1974.

MR. HOENIGER: Right.

MR. HOFFMAN: Which is one of them. I also have a copy of a letter of credit issued in favor of Tri-Ex Enterprises, Inc. on May 30, 1974.

And I think I have here the cover page -- no, this is the second page. Well, I have at least a cover page, and if I look through this file I think I probably will find the second page as well, of a letter of credit issued in favor of Nix International on June 14, 1974.

MR. HOENIGER: So that would seem to establish that those three were all issued prior to the year 1975.

MR. HOFFMAN: If you would like, Mr. Hoeniger, I can make additional copies of those for you.

MR. HOENIGER: I would appreciate it.

MR. HOFFMAN: I am sure you do have them, though.

MR. HOENIGER: Okay, I would appreciate it.

Mr. Hoffman, I call now for the production of the twelve monthly accounts statements for the CBN account with Morgan for the year 1975, and, of course, I am prepared to stipulate confidentiality in the same terms as previously stated on the record.

MR. HOFFMAN: I will take your request under advisement, Mr. Hoeniger.

MR. HOENIGER: Well, I would like very quick advice because this deposition, as you know, is being taken promptly to develop facts in opposition to CBN's motion to dismiss and for summary judgment, which is scheduled for hearing January 22.

MR. HOFFMAN: I will respond promptly.

MR. HOENIGER: Thank you.

Q Mr. Brown, approximately since what time has Morgan had a customer relationship with either Nigeria or CBN, a bank-customer relationship?

A Since the early part of 1974.

Q And was an account established with Morgan at that time, one or more accounts?

A Yes.

Q In what name or names?

A The account was established in the name of Central Bank of Nigeria.

Q Has the account always remained in that name?

A Yes, it has.

Q During the period that CBN has had an account at Morgan, to your knowledge, has CBN or the Federal Republic of Nigeria had an account with the Federal Reserve Bank of New York.

MR. HOFFMAN: Please repeat the question.

(The pending question was read by the reporter.)

A Yes, sir.

Q To your knowledge, did there come a time in or about February of 1976 when the account at Federal Reserve was switched from the Central Bank of Nigeria to the Federal Republic of Nigeria?

A I was told that that occurred.

Q Do you know whether Central Bank, CBN, still maintains, at the present time, any account in its name in the Federal Reserve of New York?

A I don't know whether they do or not.

Q When Morgan draws Nigerian funds at Federal Reserve do you know which account, or what account at Federal Reserve is debited?

A I don't know for certain which account is debited, no.

I suspect that the account which is debited is the account in the name of the Government of Nigeria. That may be the only account. I'm not certain.

Q That, in substance, if it is any comfort to you, was the testimony of Mr. Ryan of Federal Reserve at the National American trial.

A He must have been more certain than I then.

Q Mr. Brown, when Morgan makes such a drawing on Nigerian funds at Federal Reserve, in what form are the funds received by Morgan?

A They're received in the form of a wire transfer, whereby the Federal Reserve credits Morgan on its books.

Q So, essentially, it is a debit and credit transaction by Federal Reserve?

A That's correct.

Q They debit the Nigerian account and credit Morgan's account?

A That's correct, yes.

Q And I assume that Morgan receives some kind of confirmation?

A Yes, we do.

Q That is, confirmation of the credit?

A Yes, we do.

Q And does that confirmation show which account, or the name of the account that was debited?

A I don't think that it does. It may, but that is not a necessity for our being advised of the credit to our account.

Q No, I understand that.

Is one of these confirmations readily available, Mr. Brown, that you could look at, to refresh your recollection?

A I'm sure there is.

MR. HOFFMAN: What is the purpose of this, Mr. Hoeniger? You have testimony from an officer of the Federal Reserve Bank, which, although it may not be in a form where it is admissible at trial, it is still in a form that you can use on a motion.

I would just like to know what is your purpose in finding out whether Morgan's records confirm or not, or have information, or do not have information that indicates the name of the account, when you already have testimony from the Federal Reserve Bank itself, from an officer of that bank, as to what happens.

Q Mr. Brown, after the transfer on the Federal Reserve account from Central Bank's name to that of Nigeria in early 1976, which you say you heard about, have you heard about any other transfers in the name or designation

of that account at Federal Reserve?

A No, I have not.

MR. HOENIGER: Off the record.

(Discussion off the record.)

Q Mr. Brown, move now please to Item 5 of my letter of November 16 of 1979 to Mr. Hoffman, attached to the supplemental subpoena.

Can you tell me, with some fair degree of accuracy, the total number of CBN personnel who received training or instruction at Morgan, and by that I include visiting and observing, during the year 1975.

A Yes, our records show that there were three people from Central Bank.

Q Three people from Central Bank during the year 1975?

A Yes.

Q Can you tell me the approximate number of man days involved?

A Well, one man was here for five weeks, and the other two were here for four weeks each.

Q Okay, in the following year, 1976, do you know whether the number of CBN people who received instruction at Morgan increased?

A I can say that there was at least one more.

Q So there were at least four?

A There were at least four, and there may have been one or two more during the following year, nineteen --

Q 1977?

A No, 1976.

Q There may have been one or two more in 1976?

A Yes. I can say for certain there were at least four.

Q And possibly five or six?

A And possibly five or six, right.

Q How about 1977?

A My answer would be the same as for 1976.

Q 1978?

A There may have been three in 1978, three or four.

Q And 1979, the year we have just completed?

A About the same, three or four.

Q And would the time of the instruction period be in approximately the same range, three to five weeks, generally?

A Yes.

Q Per man?

A Yes.

Q Can you give me some idea, during this period from 1975 through 1979, of the level of the CBN people who came here for such instruction at Morgan or for such training?

A I would say that they were at the middle management level.

Q Would they be equivalent to an assistant treasurer, or an assistant vice president in a New York bank?

A Yes.

Q About your level, Mr. Brown, or lower or higher?

A About my level.

Q And I think when you and Mr. Sandler and Mr. Simms and I met in connection with the East Europe, Nikkei and Chenax cases for deposition, the records thus produced indicated that Morgan normally made hotel arrangements, and other such arrangements for the CBN personnel who were coming here.

MR. HOFFMAN: Objection. What do you mean by "other such arrangements"?

MR. HOENIGER: Strike "other such arrangements."

Q Hotel arrangements?

A Yes.

MR. HOENIGER: Would you mark as Plaintiff's Exhibit 38 for identification a one-page document which purports to be a Morgan inter-office memorandum dated April 12, 1976.

(One-page inter-office memorandum dated April 12, 1976, was marked for identification Plaintiff's Exhibit 38, of this date.)

Q Mr. Brown, I show you what has been marked for identification as Plaintiff's Exhibit 38. I represent to

you that it is a document produced to me by Mr. Hoffman, pursuant to subpoena, and I ask you if you can identify that document.

A Yes, this is a memorandum written by Walter Anderson, who is in charge of the Letter of Credit Department, to the Premises and Staff Services Department.

Q Did you receive a copy of that memorandum, do you know.

A I did not, to my knowledge, receive a copy.

Q Have you seen it previously?

A I don't recall having seen it.

Q Is there any doubt in your mind that it comes from the files of Morgan?

A No, there's no doubt.

Q Okay, may I see it for a minute, Exhibit 38?

A Yes.

(Handing.)

Q Exhibit 38 for identification shows that as of that date Morgan had outstanding -- that there was outstanding approximately $493,000,000 in letters of credit advised by Morgan, on behalf of CBN, but not confirmed by Morgan, and approximately $112,000,000 in CBN L/C's, which Morgan had confirmed; is that correct?

MR. HOFFMAN: I'm sorry, I don't understand the

question. Are you saying whether he knows, or are you asking him whether his recollection accords with the memorandum?

MR. HOENIGER: Yes.

MR. HOFFMAN: If you knew.

Q Well, you have no question that this is --

A I have no reason to doubt these figures.

Q Right. In 1975, when Morgan advised an L/C on behalf of CBN, was it Morgan's practice to establish some kind of reserve or hold of CBN's funds against that L/C?

A No, it was not.

Q What about L/C's issued by CBN which Morgan confirmed?

A The answer is the same.

Q And was the reason for not establishing any kind of cash reserve of CBN funds the fact that Morgan felt secure that it would be possible to recoup the payments made under such L/C's by drawings from the Federal Reserve, or was that at least one of the reasons?

A That's the reason in the case of the confirmed letters of credit, but in the case of the advised letters of credit, we do not have any liability for advised letters of credit. And, therefore, we are never looking to back that up with any sort of collateral, in any case.

Q It is only on confirmed letters of credit that Morgan sometimes looks for credit or backup; is that correct?

A Yes, but not in the case of the Central Bank.

Q Yes, I understand. Thank you.

A That's true.

Q With regard to the approximately $112,000,000 in confirmed letters of credit reflected in Plaintiff's Exhibit 38, did Morgan have at least an approximate idea in 1976 of the magnitude of the funds standing to Nigeria's credit in the Federal Reserve?

A We did not.

Q Morgan was satisfied that they would cover the $112,000,000 or so?

A Yes.

MR. HOENIGER: Off the record.

(Discussion off the record.)

Q Mr. Brown, let's take the years 1975 and 1976 for starters.

How many other Central Banks, if any, were there, for which Morgan performed the same range, or a greater range of services, as for CBN?

MR. HOFFMAN: Just for clarification, now, as I understand what you are talking about when you say "range of services," you are talking about services

in the broad sense, like issuing a money transfer, or advising a letter of credit, and not trying to get down to as to whether there were any particular differences in the accounts, as, of course, there are.

MR. HOENIGER: Yes, of course, your interpretation is correct. I was talking about the range of services as reflected in Plaintiff's Exhibit 37 for identification.

MR. HOFFMAN: In other words, if I understand the question, you want to know whether there were others, and, if so, approximately how many other Central Banks Morgan did the same kind of things as Exhibit 37 reflects was done for the Central Bank of Nigeria; is that correct?

MR. HOENIGER: Correct, covering about as wide a range of activity as Exhibit 37 reflects, or a wider one.

A I can only make a guess at the number of Central Banks.

Q Give me your best estimate.

A I would say seventy.

Q 70?

A 70.

Q Now, in terms of the volume of activities, including dollar volume of debits and credits to the account, how many

Central Banks were there for which, or with which Morgan did an equal or greater volume of business in 1975 or 1976?

A My experience is only with Africa, and for me to answer that question it would be a pure guess without doing any research.

Q Well, let's confine it to Africa.

How many African Central Banks are there for whom the volume was as great as for CBN in those two years, either as great or greater?

A One or two may have been as great or greater, in terms of volume during those years.

Q And moving closer to the present, would that also be true for 1977, that one or two may have been as great or greater as CBN, in terms of volume.

A Yes, I would say so.

Q 1978?

A Yes.

Q And 1979?

A Yes.

Q And you are not sure whether, with respect to those one or two, the volume was greater, less, or approximately equal, but you are speaking in terms of a roughly comparable magnitude; is that a fair statement?

A I would say so, yes.

Q So that we can place this in some context, Mr. Brown, how many African Central Banks are we talking about? How many comprise this universe that you are familiar with? Ten? Fifteen? Twenty?

A About ten or twelve.

Q Anyhow, it is fair to say that during the period we are discussing, 1975 through 1979, of the African Central Banks for which Morgan served as a, or the U.S. correspondent, Central Bank was one of the top three, in terms of volume; is that correct?

A That's correct.

Q Mr. Brown, Verlinden B.V. is not a customer of Morgan, is it, so far as you know?

A That's right, it is not.

Q And has not at any time been, as far as you know?

A That's right.

Q In this lawsuit in which Verlinden is the plaintiff and your customer, Central Bank of Nigeria the defendant, do you have any feeling as to whom you would rather see win?

A Who I would rather see win?

Q Yes.

A I would rather see the Central Bank win.

Q And that is because it is a good and valued customer; is that right?

A Because I understand their position.

Q And because they are a good and valued customer?

A Yes.

Q Mr. Brown, do you recall that you testified at the East Europe, Nikkei and Chenax trial last September?

A Yes.

Q Do you recall that you and I discussed, while you were on the stand, the East Europe letter of credit?

A Yes.

Q And do you recall that we determined that that letter of credit had originally come through from Central Bank without an appendix?

A Yes.

Q Do you recall that we determined, because the appendix was missing, there was, for example, no demurrage clause at all in that letter of credit until it was supplied later by amendment; is that correct?

A Yes.

Q You also recall, do you not, that that letter of credit was for, or called for the presentment of documents showing on board bills of lading, freight prepaid, of cement to Lagos, Nigeria?

A At the time we discussed this, I believe we had the letter of credit there.

Mr. Koebel.

- - -

A L F R E D K O E B E L , the witness herein, having been previously duly sworn, resumed the stand and testified further as follows:

THE WITNESS: We said -- I said in the affidavit that there had been no requests for an extension of the commencement of shipment date, and in the telex that was received from Verlinden, the telex included the remarks, "Please note that shipments can only commence within forty-five days after receiving the changes of the L/C."

Now, it is conceivable that that could be interpreted as a request to extend the shipping date.

I look at it as a statement of fact, but Mr. Hoffman and I agreed that it could perhaps be interpreted as a request for an extension of that date.

MR. HOFFMAN: If I might just conduct a brief examination, just to have the full thing out.

Did you find any evidence in the file, Mr. Koebel, of what Morgan Guaranty did in response to that telex from Verlinden?

THE WITNESS: We quoted the telex to the Central

Bank of Nigeria.

MR. HOFNIGER: Off the record.

(Discussion off the record.)

MR. HOFFMAN: Read back Mr. Koebel's last answe

(Answer read.)

MR. HOFFMAN: I show you Plaintiff's Exhibit 8 a ask you if that is the telex that you were referrin

THE WITNESS: Yes.

MR. HOENIGER: May I see it?

MR. HOFFMAN: Yes (handing).

Did you review the file to determine whether th Central Bank of Nigeria amended the letter of credit to extend the shipping date for shipments?

THE WITNESS: The credit was not amended to exte that date.

MR. HOFFMAN: Okay. Off the record.

(Discussion off the record.)

MR. HOFFMAN: I am going to discontinue my examination of Mr. Koebel in favor of Mr. Hoeniger's because it is his deposition, but in favor of furthe fairness will also show him that there are two other telexes in the file which seem to relate to the same one.

One is a telex by Verlinden to Morgan Guaranty,

asking what happened to this telex, and another one is the telex back from Morgan Guaranty saying that they are in receipt of the contents and await their reply.

EXAMINATION (CONTINUED)

BY MR. HOFNIGER:

Q Mr. Koebel, with respect to the first document that you have just mentioned, which you and Mr. Hoffman discussed last Thursday, I put before you what appears to me to be a Xerox copy of the document that you produced, and I ask you to verify that that is in fact an accurate photocopy, and then I will have the photocopy marked.

MR. HOFFMAN: Off the record again.

(Discussion off the record.)

MR. HOFNIGER: Let's mark the yellow photocopy that you have produced as Plaintiff's Exhibit 39.

(Yellow photocopy of document mentioned above marked Plaintiff's Exhibit 39 for identification, of this date.)

Q You next produced, Mr. Koebel, a one-page document which I will ask the reporter to mark as Plaintiff's Exhibit Forty for identification.

This document appears to be a telex dated July 12, 1975 from Worlinden to Morgan Guaranty.

MR. HOFFMAN: Let the record show that whereas we have pulled these copies of telexes out of the letter of credit file, all of these telexes have been produce previously to Mr. Koeniger as part of the entire lette of credit file.

****

(Telex dated July 18, 1975 referred to above marked Plaintiff's Exhibit 40 for identification, of this date.)

Q Mr. Koebel, have I correctly characterized Plaintiff's Exhibit 40 for identification? This is a telex from Verlinden to Morgan Guaranty, dated July 18, 1975?

A You have.

Q Or possibly a cable?

A You have described it correctly, sir.

MR. HOENIGER: Okay. And, finally, I will have the reporter mark as Plaintiff's Exhibit 41 for identification the debit ticket, Morgan copy of a telex cable from Morgan to Verlinden, dated 7/21/75.

****

(Cable dated 7/21/75 above referred to marked Plaintiff's Exhibit 41 for identification, of this date.)

Q Have I correctly described Exhibit 41, Mr. Koebel

A Yes, you have.

Q It is from Morgan to Verlinden; is that correct?

A Yes, sir.

Q Mr. Keebel, when we met last in this case on August 2nd of last year I asked you -- and that is at Page 23, Line 22 -- whether with respect to the 13 other advised cement letters of credit, Morgan was ever authorized by Central Bank to confirm any of those, or whether Verlinden's was the only one.

Doyou know the answer now?

A I said to you at that time that I would have to review the file.

Q Right.

And that is still true?

A No. I have reviewed the file.

Q And what does that review indicate?

A We found one credit.

Q Where Central Bank had authorized confirmation?

A If in fact the beneficiary paid the confirmation commission.

Q Which credit was that?

A The one in favor of Ying International Group.

Q Was the Ying letter of credit ultimately confirmed?

A No, it was not.

Q Then at Page 45, Line 4, I asked you whether the

amendment reflected in Plaintiff's Exhibit 23 for identification -- I will put that in front of you -- had been requested by Verlinden, and you said you would have to review the file to answer that question.

My question now is whether you have done so and can answer the question.

MR. HOENIGER: Off the record.

(Discussion off the record.)

MR. HOENIGER: I will ask the reporter to leave a blank space in the record and Mr. Koebel can insert the answer.

A _____

MR. HOENIGER: Will you next mark what appears to be a copy of a cable or telex from Slavenburg's Bank to Morgan Guaranty, bearing a receive stamp June 16, 1975.

(Copy of telex dated June 16, 1975, referred to above, marked Plaintiff's Exhibit 42 for identification of this date.)

Q Mr. Koebel, can you identify Plaintiff's Exhibit 4

A It's a telex from Slavenburg's Bank to Morgan.

MR. HOENIGER: Next mark what appears to be a photocopy of something called, "Export Issue Instruction Stub," dated 6/17/75.

(Copy of document entitled "Export Issue

Instructions Stub," dated 6/17/75, referred to above, marked Plaintiff's Exhibit 43 for identification, of this date.)

Q I show you Plaintiff's Exhibit 43 for identification and ask you if you can identify that.

A It's one of the slips that we use in establishing the record at the bank that the letter of credit of the Central Bank of Nigeria has been received.

Q Or at least pre-advice thereof?

A Yes.

MR. HOENIGER: Next mark what appears to be a Morgan Guaranty commercial credits department form, dated 6/17/75.

(Commercial credits department form dated 6/17/75 referred to above, marked Plaintiff's Exhibit 44 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 44 for identification, Mr. Koebel?

A It's part of a fanfold that's prepared upon the receipt of a pre-advice of a letter of credit.

MR. HOENIGER: Will you please mark next what appears to be a copy of a cable or telex from Morgan to Slavenburg's Bank, dated, as best as I can make out, 6/20/75. I am not sure about the 20.

(Copy of telex heretofore described marked Plaintiff's Exhibit 45 for identification, of this date.)

Q Mr. Koebel, can you identify what has been marked as Plaintiff's Exhibit 45 for identification?

A It's a telex from Morgan to Slavenburg's Bank.

Q I notice a name on there, Kipp.

A Yes.

Q Can you identify Kipp?

A At the time that this telex was prepared, Mr. Kipp was one of our correspondents. He handled correspondence for the department.

Q In the technical letter of credit department?

A Yes.

MR. HOENIGER: Thank you. I should next like to have marked for identification another export issue instruction stub, or a copy thereof, dated 7/7/75.

(Copy of export issue instruction stub dated July 7, 1975, referred to above, marked Plaintiff's Exhibit 46 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 46 for identification, Mr. Koebel?

A This would also be one of the forms prepared in establishing Morgan's record that the letter of credit had

been received.

MR. HOENIGER: Would you next mark what appears to be a Morgan form dated 7/7/75. Apparently it is a debit ticket or debit advice.

(Debit advice of Morgan Guaranty Bank dated July 7, 1975, referred to above, marked Plaintiff's Exhibit 47 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 47 for identification, Mr. Koebel?

A Yes. It's a copy of a Morgan debit.

Q To Central Bank?

A To Central Bank of Nigeria.

Q For forwarding the Verlinden letter of credit?

A For forwarding the Verlinden letter of credit.

MR. HOENIGER: Next will you mark what appears to be a cable or telex fromSchade to Morgan, bearing a receive stamp July 7, 1975.

(Copy of telex from Schade to Morgan, dated received 7/7/75, referred to above, marked Plaintiff's Exhibit 48 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 48 for identification, Mr. Koebel?

If it helps you at all, Mr. Koebel, I will represent to you that Schade is Verlinden's accountant.

A I would identify it as a telex from Accountantskantoor Schade to Morgan.

MR. HOENIGER: Next will you mark copy of Morgan letter to Slavenburg's Bank dated July 7, and attached thereto copy of another MOrgan letter, also dated July 7 but to Verlinden, as Plaintiff's Exhibit 49 for identification.

(Copy of letter dated 7/7 from Morgan Guaranty Trust Company to Slavenburg's Bank and attachment, referred to above, marked Plaintiff's Exhibit 49 for identification, of this date.)

Q Canyou identify Plaintiff's Exhibit 49 for identification?

A It's our covering letter to Slavenburg, enclosing a copy of Central Bank's letter of credit.

MR. HOENIGER: Next will you mark what appears to be a telex to Morgan from Slavenburg's, dated July 7, 1975, bearing a receive stamp of the same date.)

(Telex dated 7/7/75 from Slavenburg's Bank to Morgan Guaranty Trust Company, referred to above, marked Plaintiff's Exhibit 50 for Identification, of this date.)

Q Can you identify Plaintiff's Exhibit 50 for

identification?

A It's a telex from Slavenburg's Bank to Morgan.

Q Okay. I am sorry, Mr. Koebel. Doyou want to look at it?

A No, that's all right.

MR. HOENIGER: Will you next mark what appears to be a telex from Slavenburg's to Morgan dated July 8, 1975.

(Telex from Slavenburg's Bank to Morgan Guaranty Trust Company dated July 8, 1975, referred to above, marked Plaintiff's Exhibit 51 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 51 for identification, Mr. Koebel?

A It's a telex from Slavenburg's Bank to Morgan.

MR. HOENIGER: Next will you mark what appears to be a copy of a cable or a telex from Morgan to Slavenburg's, dated July 9, 1975.

(Copy of telex from MOrgan Guaranty Trust Company to Slavenburg's Bank dated July 9, 1975, referred to above, marked Plaintiff's Exhibit 52 for identification, of this date.)

Q Canyou identify Plaintiff's Exhibit 52 for identification, Mr. Koebel?

A It's a telex from Morgan to Slavenburg's Bank.

MR. HOENIGER: Next will you mark what appears to b a telex from Verlinden to Morgan dated July 9, 1975, bearing receive stamp of July 9.

(Telex from Verlinden to Morgan dated July 9, 1975 referred to above, marked Plaintiff's Exhibit 53 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 53 for identification?

A This is a telex from Verlinden to Morgan.

MR. HOENIGER: Will you next mark what appears to be a letter from Morgan to Slavenburg, dated July 9, 1975.

(Letter dated July 9, 1975 from Morgan Guaranty Trust Company to Slavenburg's Bank, referred to above, marked Plaintiff's Exhibit 54 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 54 for identification, Mr. Koebel?

A A letter to Slavenburg from Morgan.

MR. HOENIGER: Could I hear that answer, please?

(Pending answer read.)

MR. HOENIGER: Next will you mark what appears to b cable or telex dated July 11, 1975, from Morgan to

Slavenburg.

(Telex dated July 11, 1975 from Morgan Guaranty Trust Company to Slavenburg's Bank, referred to above, marked Plaintiff's Exhibit 55 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 55 for identification, Mr. Koebel?

A It's a telex from Morgan, signed by myself, as a matter of fact, to Slavenburg's.

Q And in that telex, Mr. Koebel, you in substance told Slavenburg's that a previous advice should be disregarded and the transfers abroad had to be handled through Morgan; is that correct?

A In substance, yes.

MR. HOENIGER: Will you next mark what appears to be telex or cable from Slavenburg's to Morgan, dated July 21, 1975.

(Telex dated July 21, 1975, describe above, marked Plaintiff's Exhibit 56 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 56 for identification?

A It's a telex from Slavenburg's to Morgan.

MR. HOENIGER: Off the record.

(Discussion off the record.)

MR. HOENIGER: Will you next mark what appears to be telex from Verlinden to Morgan dated July 11, 1975.

(Telex dated July 11, 1975, referred to above, marked Plaintiff's Exhibit 57 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 57 for identification, Mr. Koebel?

A This is a telex from Verlinden to Morgan.

MR. HOENIGER: Will you next mark what appears to be a copy of a letter from Morgan to Verlinden dated August 13, 1975.

(Copy of letter dated August 13, 1975, referred to above, marked Plaintiff's Exhibit 58 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 58 for identification?

A This is our advice of an amendment to Central Bank's credit.

MR. HOENIGER: Okay. Will you next mark what appears to be a copy of a letter from Morgan to Slavenburg's dated August 13, 1975.

(Copy of letter dated August 13, 1975, referred to above, marked Plaintiff's Exhibit 59 for identificati

of this date.)

Q Can you identify Plaintiff's Exhibit 59 for identification?

A It's our covering letter to Slavenburg's Bank with which our advice of amendment was sent.

Q In other words, with which Plaintiff's Exhibit 58 for identification was sent?

A Yes, sir.

MR. HOENIGER: Will you next mark what appears to be a copy of a cable or telex from Morgan to Central Bank dated August 14, 1975.

(Copy of telex dated August 14, 1975, referred to above, marked Plaintiff's Exhibit 60 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 60 for identification?

A Thisis a telex from Morgan to Central Bank of Nigeria.

MR. HOFFMAN: Off the record.

(Discussion off the record.)

MR. HOENIGER: Will you next mark what appears to be a copy of a letter from Morgan to Slavenburg's, dated August 21, 1975.

(Copy of letter dated August 21, 1975, referred to above, marked Plaintiff's Exhibit 61 for identification,

of this date.)

Q Can you identify Plaintiff's Exhibit 61 for identification, Mr. Koebel?

A This is another covering letter to Slavenburg's Bank wherein we wouldhave sent an advice regarding the letter of credit through Slavenburg's to Verlinden.

MR. HOENIGER: Can you next mark what appears to be a Morgan debit memorandum or advice to Central Bank dated August 21, 1975.

(Copy of debit advice dated August 21, 1975, referred to ab ove, marked Plaintiff's Exhibit 62 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 62 for identification, Mr. Koebel?

A It's a copy of Morgan's debit to the Central Bank of Nigeria.

Q And it reflects that the debit was --

A For amending the letter of credit.

Q -- in favor of Verlinden?

A Yes.

MR. HOENIGER: Can you next mark a Morgan letter to Slavenburg, dated August 22, 1975.

(Letter dated August 22, 1975, referred to above, marked Plaintiff's Exhibit 63 for identification, of

this date.)

Q Can you identify Plaintiff's Exhibit 63 for identification, Mr. Koebel?

A This is another covering letter sending an amendment to the credit to Verlinden through Slavenburg.

MR. HOENIGER: Can you next mark a Morgan Guaranty commercial credits department form dated August 28, 1975 as Plaintiff's Exhibit 64.

(Morgan form dated August 28, 1975, referred to above, marked Plaintiff's Exhibit 64 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 64 for identification?

A This is a copy of the form that we would have sent to the account officer handling the Central Bank of Nigeria, seeking to get their approval to add our confirmation to the credit.

Q When you say, "would have sent," you mean that you did send; is that correct?

A I believe we did, yes.

MR. HOENIGER: Can you next mark Morgan commercial credits department form dated August 29, 1975, as Plaintiff's Exhibit 65.

(Morgan commercial credits department form dated

August 29, 1975, referred to above, marked Plaintiff's Exhibit 65 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 65 for identification?

A Thisis a Morgan credit authorization relating to the confirmation of the Verlinden letter of credit.

Q What is the date of that, Mr. Koebel?

A August 29th, 1975.

MR. HOENIGER: I am going to show the witness nex what I assume to be a telex message, or copy of a tele sent by Slavenburg's to Verlinden, dated September 3, 1975.

Will you mark that first as Plaintiff's Exhibit 66.

(Copy of telex dated September 3, 1975, referred to above marked Plaintiff's Exhibit 66 for identification, of this date.)

Q Can you identify that, please, Mr. Koebel?

I will put before you, if it helps you, Plaintiff Exhibit 13 for identification, which I believe is quoted in Plaintiff's Exhibit 66, and I represent to you that Plaintiff's Exhibit 66 is one of the documents produced to me by Mr. Hoffman as coming from Morgan's files.

A This would be a copy of Slavenburg's advice to

Verlinden quoting our telex to Slavenburg's.

Q The latter having been marked as Plaintiff's Exhibit 13 for identification; right?

A Yes.

Q Do you know how Plaintiff's Exhibit 66 comes to be in Morgan's files? Was it sent to you by Slavenburg's as a courtesy?

A I can only assume that it would have been sent by Slavenburg's for the completion of our files; yes, sir.

MR. HOENIGER: Will you next mark copy of letter from Slavenburg's to Morgan dated September 5, 1975.

(Copy of letter dated September 5, 1975, referred to above, marked Plaintiff's Exhibit 67 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 67 for identification?

A It's a letter from Slavenburg's to Morgan.

MR. HOENIGER: Okay. Will you next mark a document headed, "AMEND AS FOLLOWS:".

(Document above described marked Plaintiff's Exhibit 68 for identification, of this date.)

Q Can you describe or identify Plaintiff's Exhibit 68 for identification, Mr. Koebel?

A These are instructions to our letter of credit typists

to prepare an amendment to this letter of credit.

Q And identical instructions were also given to amend the thirteen other advice cement credits: right?

A Yes, sir.

MR. HOENIGER: Will you next mark what appears to be a copy of a Morgan letter to Slavenburg's dated September 17, 1975.

(Copy of letter dated September 17, 1975, referred to above, marked Plaintiff's Exhibit 69 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 69 for identification?

A It's a letter from Morgan to Slavenburg.

Q Did you write that letter, Mr. Koebel?

A No, I did not.

Q Can you tell who did?

A I believe it was Mr. Juricek.

Q Is Plaintiff's Exhibit 69 for identification the response to Plaintiff's Exhibit 67?

A Yes.

Q Doyou have an independent recollection that the two amendments referred to in Plaintiff's Exhibits 67 and 6 originally went out to Slavenburg's or Verlinden without Morgan's signature?

A I have no recollection.

Q Do the two exhibits indicate to you that that was apparently the case?

A Yes.

MR. HOENIGER: Will you next mark what appears to be a telex from Slavenburg's to Morgan dated September 29, 1975.

(Telex dated September 29, 1975, referred to above, marked Plaintiff's Exhibit 70 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 70 for identification?

A This is a telex from Slavenburg's to Morgan.

MR. MORGAN: Will you next mark letter from Slavenburg's to Morgan dated September 29, 1975.

(Letter dated September 29, 1975, referred to above, marked Plaintiff's Exhibit 71 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 71 for identification?

A This is a letter from Slavenburg's to Morgan.

Q And, in fact, it is the letter of confirmation of Plaintiff's Exhibit 70, the telex, isn't it?

A Yes,sir.

MR. HOENIGER: Will you next mark a debit memo, or debit advice, from Morgan to Central Bank, dated September 30, 1975.

(Debit advice dated September 30, 1975, referred to above marked Plaintiff's Exhibit 72 for identificati of this date.)

Q Can you identify Plaintiff's Exhibit 72 for identification?

A It's a debit to Central Bank for passing on an amendment.

Q To the Verlinden letter of credit?

A To the Verlinden letter of credit.

MR. HOENIGER: Will you next mark one sheet, with handwriting on it, headed at the top, "Important."

(Sheet with handwriting thereon, referred to above, marked Plaintiff's Exhibit 73 for identificatior of this date.)

Q Can you identify Plaintiff's Exhibit 73 for identification?

A Yes. This was a departmental advice that was inserted in the cement credits.

Q All fourteen?

A Yes, sir.

Q Whose handwriting is that?

A Harry Herder.

Q Mr. Koebel, I can't quite make out the date at the bottom, in the right-hand corner there (indicating). I know it is September. Can you help us out with the particular date, maybe by referring to one of the L/C files?

MR. HOFFMAN: Could we have about a two-minute recess while he is doing that?

MR. HOENIGER: Surely.

(At 2:40 p.m., a recess was taken until 2:45 P.M.)

BY MR. HOENIGER:

Q Anyway, can we agree, Mr. Koebel, that it is a date in September, probably sometire between September 15 and September 30?

A Yes.

MR. HOFFMAN: Now can you please read the question and answer?

(Record read.)

MR. HOENIGER: Will you next mark copy of Morgan cable or telex to Slavenburg's dated October 1, 1975.

(Copy of cable dated October 1, 1975, referred to above, marked Plaintiff's Exhibit 74 for identification, of this date.)

Q Can youidentify Plaintiff's Exhibit 74 for identification?

A It's a telex from Morgan to Slavenburg's Bank.

MR. HOFFMAN: I am sorry. How did you identify it?

THE WITNESS: A telex to Slavenburg's Bank from Morgan. I'm sorry. Thank you.

Q Advising that you were not willing to extend the period during which Morgan was prepared to confirm the Verlinden L/C; is that right?

A That's correct.

MR. HOENIGER: Will you next mark copy of Morgan letter to Slavenburg's dated October 8, 1975.

(Copy of letter dated October 8, 1975, referred to above, marked Plaintiff's Exhibit 75 for identification, of this date.)

Q Can you identify Plaintiff's Exhibit 75 for identification, Mr. Koebel?

A It's a covering letter sending an advice to Slavenburg's Bank with respect to an amendment to the letter of credit.

Q That is October 8?

A Yes, October 8, 1975.

MR. HOENIGER: Thank you. Can you next mark a Morgan debit ticket, or advice, to the account of Central Bank dated October 8, 1975.

(Debit advice dated October 8, 1975, referred to above, marked Plaintiff's Exhibit 76 for identification,

of this date.)

Q Can you identify Plaintiff's Exhibit 76 for identification, Mr. Koebel?

A It's Morgan's debit to the Central Bank for passing on an amendment to the letter of credit.

Q In favor of Verlinden?

A Yes.

Q And that is dated October 8; right?

A Yes, it is; right.

MR. HOENIGER: Finally, would you mark what appears to be a copy of a telex from Committee Secretary to Verlinden, dated, I believe, January 2nd, and my own interpolation is, 1976.

(Copy of telex dated January 2, 1976, referred to above, marked Plaintiff's Exhibit 77 for identification, of this date.)

Q Mr. Koebel, can you identify Plaintiff's Exhibit 77 for identification? I represent to you that it was produced to me by Mr. Hoffman from Morgan's files.

A It's a copy of a telex from the Committee Secretary in Lagos to Verlinden.

MR. HOENIGER: Okay. Thank you.

MR. HOFFMAN: Off the record.

(Discussion off the record.)

MR. HOFFMAN: Now will you state that for the record?

THE WITNESS: I don't recall seeing it.

Q Mr. Koebel, let's put aside Plaintiff's Exhibit 77 for identification, which you don't recall ever seeing before and which does not appear to be in the Verlinden L/C file --

MR. HOFFMAN: Subject to further check, of course.

MR. HOENIGER: Yes. It is really not material now.

Q -- but let's deal with all the other documents, Plaintiff's Exhibits 39 through 76 for identification.

First, were all of these documents either generated from or received by Morgan in the regular course of Morgan's business?

MR. HOFFMAN: I object, because now that I don't see this one, I also wonder about the copy of the telex, the one that was in both languages.

Did we have that in this file?

THE WITNESS: I don't recall that one either.

MR. HOFFMAN: Just hold on for one second. What I suggest you do, Mr. Hoeniger --

MR. HOENIGER: Are you referring to this one (indicating)?

MR. HOFFMAN: Yes.

Q Then, Mr. Koebel, receiving not only Plaintiff's Exhibit 77 for identification, but also Plaintiff's Exhibit 66 for identification, with respect to all of the other documents that we have marked here today, that would be Plaintiff's Exhibits 39 through 76, with the exception of Plaintiff's Exhibit 66 and the exclusion of Plaintiff's Exhibit 77, are all those documents which Morgan either generated or received in the regular course of its business?

MR. HOFFMAN: I object and suggest that in view of the exceptions that you have made here, why don't you just pose a question as to whether the documents you have marked were kept in the regular course of Morgan's business, and hand them to Mr. Koebel, and he will very quickly, in about five minutes, go exhibit by exhibit and say either yes or no.

MR. HOENIGER: All right.

Q Mr. Koebel, what I need to know from you are two things:

(a) Whether the documents which I am handing you were made or received in the regular course of Morgan Guaranty's business, and;

(b) Whether they have been retained by Morgan in the regular course of Morgan's business, and whether it is Morgan's regular course of business to so retain them.

MR. HOFFMAN: Do you have the question in mind?

THE WITNESS: Yes.

Q You can flip through them if you wish, Mr. Koebel.

MR. HOFFMAN: And what I would suggest, Mr. Koebel, is that you first announce the exhibit number and then say either yes or no. How is that, Mr. Hoeniger?

MR. HOENIGER: That is fine.

A No. 76, yes. No.75, yes. No.74, yes. No. 73, yes. No. 72, yes. No.71, yes. No.70, yes. No. 69, yes.

No.68, yes. No.67, yes. No. 65, yes. No. 64, yes. No. 63, yes. No.62, yes. No.61, yes. No. 60, yes. No.59, yes. No. 58, yes. No. 57, yes. No. 56, yes. No. 55, yes. No. 54, yes. No. 53, yes. No. 52, yes. No. 51, yes.

No. 50, yes. No. 49, yes. No. 48, yes. No. 47, yes. No. 46, yes. No. 45, yes. No. 44, yes. No 43, yes. No. 42, yes. No. 41, yes.

No.40, yes. No. 39, yes.

Q Mr. Koebel, would you turn to the copy of the Verlinden letter of credit in your L/C file, or anywhere else? It was marked Plaintiff's Exhibit 4 for identification when we last met in this case.

A Okay.

Q I should like to direct your attention to the top of Page 2, which states, "From any European ports to Lagos/

EXHIBIT U TO PLAINTIFF'S LETTER - EXTRACT FROM SEPTEMBER 1978 CONFIDENTIAL INFORMATION MEMORANDUM ON FEDERAL REPUBLIC OF NIGERIA MULTICURRENCY CREDIT FACILITY

(FOLLOWING PAGE)

306a-/

CONFIDENTIAL INFORMATION MEMORANDUM

THE FEDERAL REPUBLIC OF NIGERIA

US $750,000,000

Multicurrency Credit Facility

DRESDNER BANK AKTIENGESELLSCHAFT
NATIONAL WESTMINSTER BANK GROUP
CHASE MANHATTAN LIMITED
CITICORP INTERNATIONAL GROUP
FIRST CHICAGO LIMITED
MIDLAND BANK LIMITED

as Lead Managers

September, 1978

NOTICE

The banks listed on page 7 of this Memorandum as Lead Managers, Managers and Co-Managers (together, "the Managers", which term, as hereinafter used, shall include the companies affiliated with any of them) have been requested by the Federal Republic of Nigeria (the "Borrower") to arrange the Credit Facility described in this Memorandum, and to distribute this Memorandum to potential participants in the Credit Facility. Unless otherwise indicated, the information contained herein has been provided by the Central Bank of Nigeria, the Federal Ministry of Finance, the Federal Ministry of Economic Development—the Central Planning Office, the Federal Office of Statistics and various other ministries of the Federal Republic of Nigeria. The information has not been independently verified by the Managers and no representation or warranty, express or implied, is made by the Managers or any of their affiliated companies with respect to the completeness or accuracy of any information contained herein, or that any information remains unchanged in any respect as of any date or dates after those stated herein. The Managers have requested projections of Nigeria's Balance of Payments for the calendar year 1978 and projected International Reserves as of December 1978 from the Borrower and have been advised by the Ministry of Finance of the Borrower that such information is not available at this time.

At the request of the Ministry of Finance of the Federal Republic of Nigeria, contained in their letter on page 5 of this Memorandum, the information is being submitted to selected financial institutions in connection with the Credit Facility. Each potential participant in this Credit Facility should make its own independent evaluation of the Federal Republic of Nigeria, and its determination of interest in participating should be based on such investigation as it deems necessary. Officials of the Federal Republic of Nigeria are available to answer any questions concerning the information provided herein. The information in this Memorandum may not be reproduced or used in whole or in part for any other purpose.

Notes:

1. Unless otherwise stated the following IMF yearly exchange rates (₦=US $) have been used throughout this Memorandum.

1972	1973	1974	1975	1976	1977	1978
1.5200	1.5227	1.5904	1.6248	1.5959	1.5352	1.5600

2. The sign ₦ refers to Nigerian Naira.

3. The sign $ refers to United States dollars.

4. The Nigerian financial year commences on April 1st and ends on March 31st of the succeeding calendar year.

5. Standard engineering and technical abbreviations, which the managers believe are self explanatory are used in this Memorandum including:
"bpd" for barrels per day.

TABLE OF CONTENTS

	Page
TERMS & CONDITIONS OF PROPOSED CREDIT FACILITY	6
THE PROJECTS	9
Iron and Steel	11
Telecommunications	16
Power	22
Petroleum	28
Sugar	36
THE FEDERAL REPUBLIC OF NIGERIA	41
Background	43
Geography	43
Population	43
History	43
Political Organisation	44
Judicial System	44
International Relations	45
THE NIGERIAN ECONOMY	46
Introduction and Structure of the Economy	46
Agriculture	50
Mining and Quarrying (excluding Oil)	51
Industry	51
Education	52
Energy	52
Communications	53
Transportation	53
Ports	54
THE NIGERIAN PETROLEUM INDUSTRY	55
Overview	55
Oil Production	55
Exports/Oil Prices	56
Oil and the Nigerian Economy	58
Indigenisation and Industry Structure	59
Revenue System	60
Incentives for Oil Producers	60

	Page
THE PUBLIC SECTOR	61
Budget Process	61
Current Revenues	61
Current and Capital Expenditures	61
Budget Summary	63
Budget Projections	63
Development Planning	65
MONEY AND BANKING	66
Monetary Developments	66
Banking—Central Bank of Nigeria	67
Commercial Banks	69
Merchant Banks	69
Others	69
Development of Financial Markets	69
Reform of the Financial System	70
THE EXTERNAL ECONOMY	71
Foreign Trade	71
Exports	72
Imports	73
Trading Partners	74
Balance of Payments	75
International Reserves	76
Naira Rate	77
External Public Debt	77
Litigation	79

The following letter has been received from the Federal Ministry of Finance, Lagos, Nigeria:

THE FEDERAL MINISTRY OF FINANCE OF THE
FEDERAL REPUBLIC OF NIGERIA

To: The Managers of the Credit Facility mentioned below.

11th September, 1978

Sirs,

We refer to the proposed Credit Facility of US $750,000,000 which you are arranging, at our request, for the Federal Republic of Nigeria and the principal terms of which are reflected in the attached Information Memorandum.

We confirm that the funds disbursed under this Facility will only be applied to projects as specified under the Projects Section of this Memorandum. Furthermore, we confirm that starting from page 9 all the information set forth in the Memorandum has been supplied by us on behalf of the Federal Republic of Nigeria and consequently on behalf of the Republic we approve the same. By this letter we request and authorise you to distribute the Information Memorandum on a strictly confidential basis to prospective participants in the proposed Credit Facility.

In consideration of your arranging the Facility and of distributing the Information Memorandum, we, on behalf of the Federal Republic of Nigeria, agree to indemnify you against all costs, claims, demands and expenses (if any) which you may sustain or incur as a result of or arising from legal actions brought or threatened in connection with the Information Memorandum or its contents or the distribution thereof; and confirm that we accept full responsibility for the Information Memorandum and the accuracy or otherwise for its contents.

Yours faithfully,

S. A. Musa,

for and on behalf of the Federal Ministry of Finance
of the Federal Republic of Nigeria.

The following letter has been received from the Federal Ministry of Finance, Lagos, Nigeria:

THE FEDERAL MINISTRY OF FINANCE OF THE
FEDERAL REPUBLIC OF NIGERIA

To: Banks concerned.

Following the recent invitation to your bank to participate in the US $1 billion financing being managed amongst others by Dresdner Bank, National Westminster Bank Limited, Chase Manhattan Limited, Citicorp International Bank Limited, First Chicago Limited and Midland Bank Limited, the Federal Republic of Nigeria would like to take this opportunity to clarify its external financing programme.

2. In the mandate given to the lead managers of 7th July and in subsequent discussions with members of the management group officials of the Federal Ministry of Finance gave an undertaking that the Federal Republic of Nigeria had no intention of re-entering the Euro-currency floating interest rate market before January 1979. This undertaking is without prejudice to any bilateral i.e. (government to government) or multilateral i.e. (World Bank and other multilateral financial agencies) credits which might be extended to the Federal Government or to any bond issues that it might decide to float in order to fulfil its borrowing programme in the 1978/79 Financial Year.

3. It had been reported to the Ministry of Finance by the management group that a number of banks have not taken any final decision to participate in Nigeria's US $1 billion syndication because some of their customers are competing to secure or have secured government contracts for which the banks might be called upon to provide finance. The projects that are usually associated with these contracts are in the power (including the Shiroro and Jebba Hydroelectric Projects), telecommunications, iron and steel (with the possible exception of Direct Reduction Steel Plant at Warri) and petroleum sectors (including the Kaduna and Warri Refineries) of the Third National Development Plan. To avoid any misunderstanding we feel it necessary to reiterate that the Federal Government attaches the highest priority to the financing of these and other projects through the syndicated loan which it is presently raising. We should like to stress that we attach much value to seeing the $1 billion loan well placed and accepted by the market, in view of the important role such a loan plays in the financing of Nigeria's capital budget and consequently in the financing of your customers' projects. For projects attracting the exporting country's government credit facilities i.e. (Eximbank, Coface, Hermes, E.C.G.D., Eximbank of Japan etc.) shortfalls in funding will be met from internal resources or by additional generally syndicated eurocurrency borrowings, floating rate notes, and fixed rate instruments. We have no intention of financing these projects through any other form of bank borrowing, such as project-related commercial bank loans.

4. It is necessary to re-emphasise that the Federal Ministry of Finance is solely responsible for negotiating and concluding any agreement for external borrowings or guarantees for all public sector borrowings by both Federal and State governments and their agencies. In the case of state governments, it is necessary to point out that their external borrowings are limited only to export credits and project loans procured on their behalf by the Federal Government from the World Bank or regional development banking institutions such as the African Development Bank.

5. Consequent upon the foregoing clarification, the Federal Ministry of Finance hereby calls upon all those banks who have made financial commitments to Ministries or Government agencies with a view to financing any of the projects enumerated above to transfer such amounts to the US $1 billion syndicated loan presently being arranged.

Office of the Permanent Secretary

Federal Ministry of Finance, Lagos

SUMMARY OF TERMS OF PROPOSED CREDIT FACILITY

Borrower:	The Federal Republic of Nigeria.
Purpose:	Proceeds of the Loan will be employed to assist in financing the completion of certain high priority development projects in Nigeria. A list of specific projects to be financed is included in the Information Memorandum.
Amount:	US Dollars 750,000,000 or its equivalent in other currencies freely convertible into US Dollars.
Maturity:	Eight years from the date of signing of the Credit Agreement.
Availability Period:	Twelve months from signing of the Credit Agreement.
Repayment:	In eleven equal semi-annual instalments commencing 36 months from signing of the Credit Agreement.
Prepayment:	Permitted without penalty on interest payment dates provided 15 days notice is given.
Interest Rate:	One per cent per annum for the first four years from date of signing and 1⅛ per cent per annum thereafter over the London Interbank Offered Rate (LIBOR) for 3 or 6 month US Dollar deposits or other currencies in which the facility is denominated.
Participation fees:	As specified in the offering telex.
Minimum Participation:	US Dollars 2,000,000.
Commitment Fee:	One half of one per cent per annum on the undrawn portion of the loan during the drawdown period commencing fifteen days after the date of signing of the Credit Agreement. Commitment fees are payable 6 months from the date of signing and upon the termination of the drawdown period.
Taxes:	All payments due and payable under the Credit Agreement will be made free and clear of any form of taxation in Nigeria or any political subdivision of taxing authority thereof.
Reference Banks:	A representative sample of banks participating in this Credit Facility will be selected as reference banks to establish LIBOR at the start of each interest period.
Governing Law and Jurisdiction:	The Credit Agreement will be governed by the laws of England. The Borrower agrees to non-exclusive jurisdiction in the courts of Nigeria, England and the State or Federal courts of the state of New York.
Documentation:	Completion of this transaction is subject to execution of legal documentation satisfactory to all parties, including, *inter alia*, a Credit Agreement containing clauses customary for Eurodollar loans. Documentation will include provision for cross default, sovereign immunity, increased costs and changes in law, and will be similar to documentation governing the previous $1 billion loan for Nigeria.
Legal Counsel to the Lenders:	Allen and Overy—English C. Ogunbanjo —Nigerian.

Lead Managers:	Dresdner Bank Aktiengesellschaft
	National Westminster Bank Group
	Chase Manhattan Limited
	Citicorp International Group
	First Chicago Limited
	Midland Bank Limited
Managers:	Banque Nationale de Paris
	Société Generale
Co-Managers:	The Bank of Tokyo, Ltd.
	Barclays Bank International Limited
	First Pennsylvania Bank N.A.
	IBJ International Limited
	Morgan Guaranty Trust Company of New York
	Standard Chartered Merchant Bank Limited
Agent:	International Westminster Bank Limited
Financial Advisor to the Borrower:	The First Boston Corporation

Nigeria has 3,670 km. of railways connecting Lagos with Nguru in the North-East and Port Harcourt with Kaura Namoda in the North-West, with extensions from Kafanchan to Maiduguri in the far North-East and from Minna to Baro. An expansion programme is under consideration by the Nigerian Railways Corporation under which the track is expected to be extended by a total of 1,175 km., from the west through Bendel State to the eastern States, as far as the port of Calabar and from Gusau to Sokoto. A third line which will connect Port Harcourt to Ajaokuta near the new Federal Capital of Abuja is also presently under active consideration.

The Nigerian National Shipping Line (NNSL) provides both passengers and cargo services. It is estimated that NNSL ships make about 70 voyages and carry about 750,000 tonnes of cargo per year. The NNSL is expected to improve on this performance through the acquisition of an additional fleet of 19 vessels for which deliveries are due shortly. In addition, the first Nigerian oil tanker with a carrying capacity of 270,000 tonnes was launched in 1976 and more deliveries are expected as part of a major expansion programme presently underway.

There are also plans underway to improve the inland waterways transport of goods along the Niger and part of the Benue rivers. The various dams to be built in connection with the hydroelectric power projects will improve the navigational capabilities of the Niger and the Benue in the future.

Ports

Following the easing of the congestion of Nigerian ports in 1976, the Nigerian Ports Authority, the statutory corporation responsible for administering the Nigerian ports, embarked upon a major expansion programme to meet immediate and future requirements. Lagos Port has been extended and Tin Can Island Port has been completed within schedule bringing into use 10 berths. In addition, the large scale lighterage operation at Lagos Port and the use of midstream buoy berths which were introduced during the decongestion exercise are being continued and the number of ships awaiting berths in Lagos have been reduced to about 75.

The expansion programmes for additional berthing facilities at Warri, Port Harcourt, Calabar and other ports are near completion.

Table 12

Shipping Activity

	1974	1975	1976	1977	% Change 1975	% Change 1976	% Change 1977
Total Shipments (thousand tonnes) ..	7,507	8,522	8,848	12,007	+13.5	+3.8	+35.7
Imports (thousands of tonnes) ...	5,110	6,545	7,954	11,323	+28.1	+21.5	+42.4
Exports (thousands of tonnes) ..	2,397	1,977	894	684	−17.5	−54.8	−23.5

Source: Central Bank of Nigeria.

Table 45

Projected Debt Service

($ million)

	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
Debt Service on Existing Debt ..	85	88	90	102	103	112	111	103	46	46
(Principal)	(44)	(44)	(43)	(54)	(59)	(64)	(65)	(58)	35	34
(Interest)	(41)	(44)	(47)	(48)	(49)	(48)	(46)	(45)	(11)	(12)
Debt Service on First $1 billion Multicurrency Loan[1]	—	63	90	90	299	279	259	239	—	—
(Principal)	(—)	(—)	(—)	(—)	(222)	(222)	(222)	(222)	—	—
(Interest)	(—)	(63)	(90)	(90)	(77)	(57)	(37)	(17)	—	—
Debt Service on Second $1 billion Multicurrency Loan[2]	—	6.0	67	90	179	260	240	223	207	190
(Principal)	—	—	—	—	(90)	(182)	(182)	(182)	(182)	(182)
(Interest)	—	(6.0)	(67)	(90)	(83)	(78)	(58)	(41)	(25)	(8)
Total Debt Service:	85	157	247	278	576	651	610	565	253	236
(Principal)	(44)	(44)	(43)	(54)	(362)	(468)	(469)	(462)	(217)	(216)
(Interest)	(41)	(113)	(204)	(224)	(214)	(183)	(141)	(103)	(36)	(20)
% of 1977 Exports of goods and services	0.64%	1.2%	1.9%	2.1%	4.3%	4.9%	4.6%	4.2%	1.9%	1.8%

Assumptions:

(1) *Drawdown March 31, 1978, interest rate at 9% p.a. Interest calculated on calendar year basis.*

(2) *Drawdown Schedule:—250 million October 30, 1978*
250 million December 31, 1978
500 million March 31, 1978.

Interest rates calculated on following basis:
9% first [illegible] years.
9½% for remaining [illegible] years.

Source: Federal Ministry of Finance.

LITIGATION

The Cement Question

In 1975, the Nigerian Federal Ministry of Defence contracted with 109 overseas suppliers to purchase 16 million metric tonnes of cement to be delivered within approximately one year. The Ministry was prompted to contract for so much partly because previous experience had shown that performance of such contracts had generally been less than 20%.

In pursuance of these contracts, the Federal Ministry of Finance requested the Central Bank of Nigeria to open letters of credit in favour of the suppliers. The maximum tonnage of cement which could be discharged in the Nigerian ports in 1975 did not exceed 4.5 million tonnes. Unfortunately in 1975 there was a slump in world shipping and this resulted in an unusually large number of ships being available to freight cement to Nigeria.

It was therefore impossible for the port facilities to discharge all the cement ordered. As a result, Nigerian ports became heavily congested by the middle of 1975, with over 400 ships awaiting berthing of which over 260 carried cement. After the government change in July 1975, the new administration took steps to remedy the situation. These measures included the suspension of further cement imports, the limitation of payments on demurrage, a request to suppliers to renegotiate their contracts in order to reschedule deliveries over a longer period and an order making it obligatory for shippers to obtain official clearance before sending their ships to Nigeria. The Federal Ministry of Finance also instructed the Central Bank of Nigeria to suspend payments for transactions under letters of credit for cement, pending further discussions with cement suppliers. Most of the 109 suppliers agreed to new terms and this resulted in the reduction of the quantity ordered to 4 million metric tonnes. However, certain others continued sending ships to Lagos, probably in order to claim demurrage. When the Federal Military Government refused to pay any further demurrage to such shippers, some of them commenced legal proceedings against the Central Bank in Paris, Frankfurt/Main, Zurich, London and New York. The Federal Military Government was named as a co-defendant in five lawsuits commenced in New York. In some cases, suppliers also attached or sought to attach funds held by the Central Bank.

Most of the lawsuits have been settled. The suits against the Central Bank still pending are for a total amount of approximately $91 million, out of which a total of approximately $24 million also name the Federal Republic of Nigeria as co-defendant.

Update on cases

Trendtex Trading Corporation Ltd. as claimant against Central Bank of Nigeria. Amount claimed is $13,968,190. The court of appeals gave judgment in favour of the plaintiff, but the Central Bank of Nigeria has appealed to the House of Lords. This has now been settled out of court for $8,000,000.

Following suits still pending or in final stages of settlement:

1. Exportadora Espanola de Cementos Portland as claimant against Central Bank of Nigeria. Amount claimed is $34,000,000. The matter has been adjourned pending the ruling of the House of Lords in the Trendtex case. Negotiations for an out of court settlement are taking place following the settlement of the Trendtex case.

2. Hispano-American Mercantile S.A. and William Tegtmeyer as claimants against Central Bank of Nigeria. Amount claimed is $17,073,230. Status: Recently, the company has requested an out of court settlement on a revised claim of $5,000,000.

3. Establissement Esefka International Anstalt as plaintiff against Central Bank of Nigeria. Amount claimed is $7,566,318. The matter has been adjourned pending the decision of the House of Lords in the Trendtex case. No change since the settlement of the Trendtex case.

4. Fralis S.R.L. as plaintiff against Central Bank of Nigeria. Amount claimed is $3,010,080 and/or damages, and interest. Status: similar to (2) above. No further developments.

In all the above cases, solicitors for the Central Bank of Nigeria are Messrs. Hedleys, 15 St. Helen's Place, Bishopsgate, London EC3A 6DJ.

Actions pending in the United States District Court for the Southern District of New York are:

1. National American Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria for $14,876,350, which was subsequently revised to be $11,471,113.82, has again been revised to $6,000,000. Case was heard in December/January 1978. Judgment was rendered in favour of the Central Bank. The company has appealed.

2. National Bank and Trust Company of North America Ltd. v. J.L.M. International Inc., Federal Republic of Nigeria, Central Bank of Nigeria and Interexporte S.A.R.L. for $1,272,510. The company has requested an out of court settlement.

3. East Europe Import-Export, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria for $6,980,000. Also requested an out of court settlement.

4. Decor by Nikkei International, Inc. doing business as Nikkei International, Inc., v. Federal Republic of Nigeria and Central Bank of Nigeria for $3,102,000. Statements of claim and defence have been filed—no further developments.

5. Chenax Majesty, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria for $1,433,680 as above.

6. Reale International v. Federal Republic of Nigeria and Central Bank of Nigeria.

The Plaintiff has sued the Defendants in a New York Court of US $14,400,000. This is a recent case and although statements of claim and defence have been filed no date has been fixed for hearing.

7. Texas Trading & Milling Corporation v. Federal Republic of Nigeria and Central Bank of Nigeria.

Plaintiff has taken out a summons in a New York Court. Plaintiff demands US $3,765,000.67 from Defendants. Defendant compiling necessary papers for our defence.

Counsel for the Central Bank of Nigeria and the Federal Republic of Nigeria in New York are Messrs. Kissam, Halpin and Genovese, 120 Broadway, New York, N.Y. 10005.

The following arbitrations are pending or being settled:

1. Ipitrade International Inc. against Federal Republic of Nigeria. Amount claimed is FF 4 million (approximately $820,000). Award has been made by the International Chamber of Commerce, Paris. The Cement Contracts Negotiating Committee has agreed to meet with Ipitrade to work out payments.

2. Planta AG against Federal Republic of Nigeria. Amount claimed is SFrs. 7,300,000 (approximately $3,320,000) in Zurich. Award has been made by the International Chamber of Commerce, Paris, and Planta seeking to recover funds.

EXHIBIT V TO PLAINTIFF'S LETTER - JULY 23, 1980
LETTER FROM B. H. HOENIGER TO Y. DERAINS OF THE
ICC COURT OF ARBITRATION

BERTHOLD H. HOENIGER
ATTORNEY AT LAW
505 PARK AVENUE
NEW YORK, N. Y. 10022
(212) 838-5324

July 23, 1980

M. Yves Derains
Secretary General
ICC Court of Arbitration
38 Cours Albert Ier
75008 Paris
France

Dear M. Derains:

I am writing you at the suggestion of Mr. Neil Sultzer of the ICC U.S. Council in New York.

I represent one party -- the supplier -- to an international commodities contract, involving approximately U.S. $15 million. The other party to the contract (the buyer) has breach the same.

The contract contains a provision that

> "all disputes .. which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, France, in accordance with its Rules at the date thereof."

The contract

(a) is between two parties neither of which is French, and neither of which uses French as its native language;

(b) is written in English;

(c) calls for payment in U.S. dollars through a U.S. bank;

(d) stipulates as the governing law the laws of a country other than France; and

ARTHOLD H. HOENIGER

(e) has no contact whatsoever with France, either by its own terms or in terms of the underlying transaction.

Finally, I may mention that the contract was a form contract of adhesion prepared by the buyer, so that, at least under U.S. laws, any ambiguities would normally be resolved against the buyer, which drafted the contract.

The buyer contends that the quoted arbitration clause calls for ICC arbitration in Paris, France. I believe that the words "Paris, France" simply describe the location of the ICC's world headquarters and secretariat, and do not fix the place of arbitration.

Could you, therefore, please furnish me with the answer to the following three questions as quickly as possible:

1. Under Article 12 of the Rules for the ICC Court of Arbitration, is the quoted arbitration clause an agreement by the parties that the place of arbitration shall be Paris, France, or does "Paris, France," merely describe the address of the ICC's headquarters, so that the place of arbitration is to be fixed by the Court of Arbitration?

2. Are there any decisions, awards or preliminary advices by the Court of Arbitration or its secretariat, or by national courts, interpreting similar clauses? If so, could you please airmail me copies.

3. Is there a procedure (other than this inquiry) for obtaining a preliminary ruling on this question? If so, what is it, and what is the cost?

I enclose check for $100 to cover any expenses or disbursements on your part. Should this be insufficient, any balance will be promptly remitted.

Please send me your answer by night cable or via Air France or an international courier service; there is great time urgency.

BERTHOLD H. HOENIGER

Thank you most warmly in advance for your courtesy.

Sincerely yours,

Berthold H. Hoeniger

BHH:rho
Encl.

CC: M. Alexander Schill
(ICC Court of Arbitration)

EXHIBIT W TO PLAINTIFF'S LETTER - CABLE MESSAGE FROM Y. DERAINS TO B. H. HOENIGER

ZCZC SKC0982 FUP516 QBA910 PHU414 001086

UPSK CO FRXX 075

PARIS086 75/69 26 1150

BERTHOLD H HOENIGER

ATTORNEY AT LAW

505 PARK AVENUE

NEWYORK(NY/10022)

RYL JULY 23

1. FACED WITH ARBITRATION CLAUSE QUOTED IN YL COURT OF ARBITRATION WLD FEEL FREE FIXING PLACE OF ARBITRATION UNDER ARTICLE 12 OF ITS RULES AS IT WOULD CONSIDER THAT PARIS JUST DESCRIBE ICC'S ADDRESS

2. IT IS THE COMMON PRACTICE OF THE COURT IN SIMILAR CIRCUMSTANCES

3. NO OTHER PROCEDURE EXISTS FOR PRELIMINARY RULING

YVES DERAINS

COL 10022 23 1. 12 2. 3.

PLAINTIFF'S LETTER TO JUDGE HAIGHT, DATED AUGUST 20, 1980

BERTHOLD H. HOENIGER
ATTORNEY AT LAW
505 PARK AVENUE
NEW YORK, N. Y. 10022
(212) 838-5324

PISSAM, HALPIN & GENOVESE
RECEIVED
AUG 20 1980
Refer JGS
Disposition By hand

BY MESSENGER

August 20, 1980

Hon. Charles S. Haight, Jr., U.S.D.J.
United States Courthouse
Foley Square
New York, New York 10007

Re: Reale International, Inc. v.
Federal Republic of Nigeria
and Central Bank of Nigeria
78 Civ. 0023 (CSH)

Dear Judge Haight:

Judge Pierce has just rendered his decision in the consolidated East Europe/Nikkei/Chenax action. A copy of the opinion is enclosed herewith. We have confirmed with Judge Pierce' chambers that the word "plaintiff" on page 29, third-to-last line, was a typographical mistake and should read "defendant;" and that change has been made in ink.

Judge Pierce found that there was subject matter jurisdiction with respect to the claim of each of the three plaintiffs against both Nigeria and Central Bank, and that there was personal jurisdiction over both defendants. Judge Pierce's discussion is found at pages 21 through 30. On the merits, Judge Pierce granted East Europe judgment which, with interest, will aggregate slightly more than $2.5 million, and granted Nikkei judgment, with interest for over $2.3 million.

On behalf of the plaintiff herein, Reale International, Inc., I respectfully submit that the jurisdictional determination by Judge Pierce constitutes collateral estoppel against the defendants herein from relitigating that same issue in this action and requires the summary dismissal of defendants' renewed "suggest

BERTHOLD H. HOENIGER

of lack of subject matter jurisdiction. Parklane Hosiery Company v. Shore, U.S. , 99 S.Ct. 645(1979), affirming 565 F.2d 815 (2d Cir. 1977); Blonder-Tongue v. University of Illinois, 402 U.S. 313, 91 S.Ct. 1434(1971); Zdanok v. Glidden, 327 F.2d 944 (2d Cir. 1964).

Accordingly, plaintiff respectfully requests that

(1) defendants' "suggestion" of lack of subject matter jurisdiction be summarily rejected;
(2) defendants' appeal from Magistrate Gershon's order requiring defendants to produce two documents be denied, and the Magistrate's order affirmed; and
(3) thereafter, a date be fixed for the conclusion of discovery (including the production by defendants of said two documents), for the submission of the final joint pretrial order, and for a conference with Your Honor at which a tentative trial date may be established. Such conference is respectfully requested because both sides estimate that the trial may take three weeks, and both sides contemplate the calling of overseas witnesses.

Respectfully yours,

Berthold H. Hoeniger
Attorney for Plaintiff

BHH/is
encl.

cc: James G. Simms, Esq.
Mitchell M. Bailey, Esq.

DEFENDANTS' LETTER TO JUDGE HAIGHT, DATED AUGUST 25, 1980

KISSAM, HALPIN & GENOVESE
120 BROADWAY
NEW YORK, N.Y. 10005

212 ...2 2000
CABLE "LEKISSAM"
TELEX 424939 LEK UI

BY HAND

August 25, 1980

Hon. Charles S. Haight, Jr.
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Reale International, Inc.
v. Federal Republic of Nigeria
and Central Bank of Nigeria,
78 Civ. 0023 (CSH)

Dear Judge Haight:

We reply to the August 20, 1980 letter to your Honor from B. H. Hoeniger, Esq., attorney for plaintiff Reale International, Inc. (Reale).

Mr. Hoeniger argues that the recent opinion by Judge Pierce of this Court in the three consolidated cement contract/letter of credit actions against Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank), operates as collateral estoppel against Nigeria and Central Bank herein on the issue of whether this Court has subject matter jurisdiction of Reale's action.

Nigeria and Central Bank respectfully submit that F.R.Civ.P., Rule 12(h)(3), requires each Court to determine whether subject matter jurisdiction exists as to the action before it, and compels the Court to dismiss the action whenever it appears by suggestion of the parties or otherwise that the Court lacks subject matter jurisdiction.

The Law of Collateral Estoppel

The undisputed facts herein relevant to the jurisdictional issue are far different from those found by Judge Pierce to exist in the three consolidated cases; we explain this further below. Unless the facts and issues are identical, the doctrine of collateral estoppel can have no application. Further, even if the facts and issues relating to jurisdiction in the three cases before Judge Pierce were identical to those herein, collateral estoppel should not be invoked against Nigeria and Central Bank.

Mr. Hoeniger cites as his principal support for the argument on collateral estoppel the United States Supreme Court opinion in Parklane Hosiery Co., Inc. v. Shore, ___ U.S. ___, 99 S.Ct. 645 (1979) affirming 565 F.2d 815 (2d Cir. 1977).

Mr. Justice Stewart, writing for the eight member majority in Parklane, defined the issue before the Court:

> "Specifically, we must determine whether a litigant who was not a party to a prior judgment may nevertheless use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding." Id. at page 649.

Mr. Justice Stewart explained the difference between "offensive" use of collateral estoppel, where a plaintiff who was not a party to the prior proceeding invokes the doctrine against the defendant who had litigated and lost against another plaintiff, and "defensive" use of the doctrine, where a plaintiff may be estopped from asserting a claim that it had previously litigated and lost against another defendant. His Honor discussed the several reasons why the two situations should be treated differently.

In the instant case, Reale seeks to use the doctrine offensively against Nigeria and Central Bank.

Mr. Justice Stewart held that the offensive use of collateral estoppel can be unfair to the defendant, and described three situations where such unfairness would result, one of which is directly relevant to the instant case:

> "Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied

upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." Id. at page 651.

The holding of the Court is stated at pages 651-652:

"We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff can easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." (Emphasis added).

The Court in Parklane permitted the offensive use of the doctrine because it found, in part, that:

"The judgment in the [first] action was not inconsistent with any previous decision." Id. at page 652

Judge Pierce's decision as to the existence of subject matter jurisdiction pursuant to Section 1605 (a)(2) of the Foreign Sovereign Immunities Act is inconsistent with that of Judge Weinfeld in Verlinden B.V. v. Central Bank of Nigeria, 488 F.Supp. 1284 (S.D.N.Y. 1980) - the decision has just been officially reported, a copy of Judge Weinfeld's Slip Opinion is Exhibit 2 to our letter of June 24, 1980 on this application. Judge Pierce at page 30 of his Honor's Opinion, acknowledges that his decision is directly contrary to that of Judge Cannella in Texas Trading & Milling Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria, 78 Civ. 2395, Slip Op. (S.D.N.Y., July 16, 1980) - Exhibit 1 to our letter of July 15, 1980 on this application. By Memorandum and Order dated August 18, 1980, a copy of which is Exhibit 1 hereto, Judge Cannella amended the statement of facts in two respects. The second amendment is pertinent to the discussion herein.

Nigeria and Central Bank respectfully submit that even if the jurisdictional issue before Judge Pierce were identical to that in Reale's action, the offensive use of collateral estoppel should not be permitted. However, the issues are not identical.

The Differences in the Issues

Judge Pierce found that subject matter jurisdiction of the three consolidated actions existed because the exception to immunity defined as the third situation in Section 1605(a)(2) was present, i.e., that the three actions before him were based upon acts performed by Nigeria and Central Bank abroad having a "direct effect" in the United States. Judge Pierce's legal conclusion as to subject matter jurisdiction was based upon his findings of fact with respect to how the three letters of credit had been established and how payments thereunder were to be made. The facts found by Judge Pierce are different from those herein.

Mr. Antonio Reale, President of plaintiff Reale, has testified in detail at depositions herein as to the establishment and operation of the Reale letter of credit. This testimony is vital to a consideration of the differences in the facts and issues present herein as compared to those found by Judge Pierce. Appended hereto as Exhibit 2 are the following pages from Mr. Reale's deposition testimony: pages 149; 229-246; 258-268; and 549-553. Copies of the Reale cement contract and letter of credit at issue are Exhibits 7 and 8 respectively to our letter of June 24, 1980. The parenthetical references in the paragraph that follows are to the pages of Mr. Reale's deposition testimony.

The provision in the Reale cement contract, at page 2, paragraph 1(v), that the letter of credit would be established in favor of Reale through Banco de Bilbao of Oviedo, Spain, was proposed by Mr. Reale (page 149). The Reale letter of credit was advised through Banco de Bilbao in Spain and was available to Reale there. Mr. Reale understood that because Nigeria had no direct business in Spain at that time, Central Bank had to go through Morgan Guaranty Trust Company of New York (Morgan Guaranty) to establish the letter of credit at Banco de Bilbao in Spain (pages 230-231). Documents in support of payments under the letter of credit were to be presented at

Banco de Bilbao and transmitted to Morgan Guaranty (pages 231-234). All documents actually presented, whether in support of payments for cement or demurrage, were submitted by Reale or its subcontractors to Banco de Bilbao in Spain (pages 234-246). Banco de Bilbao was Reale's bank in Spain and was the bank of Reale's subcontractors (pages 231, 240). No documentation in support of payments was ever presented by Reale or its sub-contractors at Morgan Guaranty; all documents, even sight drafts prepared by Reale in Connecticut, were presented at Banco de Bilbao (pages 245-246). Reale made its arrangements at Banco de Bilbao for the assignment of proceeds under the letter of credit to its subcontractors (pages 258-261). All payments under the letter of credit were made to Banco de Bilbao in Spain (page 268). As to such payments, Banco de Bilbao credited Reale's account in Spain or, at Reale's request, sent funds by its own checks to Reale in Connecticut; Banco de Bilbao met all requests for payment according to the letter of credit and no payments under the letter of credit were made in New York (pages 261, 265, 553). Mr. Reale testified at page 552:

> "Banco de Bilbao was representing - my bank was bank for Reale International, Inc. The letter of credit was requested by me personally to Morgan Trust direct to the Banco de Bilbao. Then the Banco de Bilbao transferred the letter of credit to [Reale's sub-contractors] together."

At page 553, Mr. Reale confirmed that all payments under the letter of credit were to be made directly to Reale's account in Spain and that no money was to be paid in New York.

Mr. Reale's testimony confirms that the Reale letter of credit was established in accordance with Mr. Reale's request that it be made available to Reale in Spain; that Nigeria and Central Bank complied with this request; that all presentments for payment were made in Spain; and that all payments under the letter of credit were made in Spain.

The facts found be Judge Pierce in the three consolidated cases are significantly different (the parenthetical references are to page numbers of Judge Pierce's slip opinion):

Judge Pierce found that each of the three cement contracts before him provided that a letter of credit was to be established through the following banks: in the case of Nikkei, at First National City Bank in New York City (5); in the case of

East Europe, at First National City Bank in New York City (7); and in the case of Chenax, at Schroeder, Muenchmeyer, Hengst & Co. in Hamburg, West Germany (7). Judge Pierce found that contrary to the terms in the cement contracts Nigeria unilaterally established letters of credit in favor of each of the plaintiffs with defendant Central Bank of Nigeria and advised plaintiffs thereof through Morgan Guaranty (8). There is no finding that the letters of credit were ever advised through or available to the plaintiffs at the banks designated in the cement contracts. Further, Judge Pierce found that Nigeria's unilateral establishment of the three letters of credit in such manner resulted in their being payable in New York so that upon the repudiation of the letter of credit obligations, the injury resulting to each plaintiff was sustained in New York (29). This latter finding, i.e., New York as the locus of the injury, satisfied one of the two requirements which Judge Pierce held were prerequisite to sustaining jurisdiction pursuant to the third situation of Section 1605(a)(2) - (27-28). Judge Pierce acknowledged that the cement which was to be delivered "did not originate in or pass through the United States"; only "payment therefor was to occur in New York at the insistence of defendant Nigeria." (29).

Thus, the finding by Judge Pierce that the third exception to immunity defined by Section 1605(a)(2) was satisfied rests on his factual determination that payments under those letters of credit were to be made in New York and that Nigeria had unilaterally disregarded the instructions of the plaintiffs to have payments made to the banks each had designated. In the instant case, Reale's own instructions were complied with and payments under the letter of credit were made and were to be made in Spain.

The establishment and operation of the Reale letter of credit was substantially identical to that reviewed and discussed by Judge Weinfeld in Verlinden. On this application, Reale has never disputed this fact nor attempted to distinguish Judge Weinfeld's analysis of the relevant provisions of the Immunities Act which Reale has invoked herein.

The place of payment of proceeds due and owing under the letter of credit was determinative in Verlinden on the issue of whether the third situation defined by Section 1605(a)(2) provided a basis of jurisdiction. Judge Weinfeld held that payment of the proceeds outside the United States precluded the finding of "direct effect". Judge Cannella acknowledged this as well in his opinion in Texas Trading at pages 14-15.

The following page references of Judge Weinfeld's opinion in Verlinden confirm that the arguments now advanced by Reale, especially as to the designation of Morgan Guaranty as a paying and advising bank under the letter of credit, were reviewed by Judge Weinfeld and found by his Honor not to support jurisdiction under any of the exceptions to immunity pertinent herein: 488 F.Supp. at pages 1287, 1294-1300; Slip opinion (Exhibit 2 to our letter of June 24, 1980) at pages 3, 21-30, 32-36.

With respect to the due process requirements imposed by the Immunities Act, Judge Pierce held at pages 29-30 of his Honor's opinion, that the necessary minimum contacts were present because payment under each of the letters of credit was to be made in New York pursuant to Nigeria's unilateral establishment of the letters of credit in the manner described above. At page 30, Judge Pierce acknowledges that his determination conflicts directly with that of Judge Cannella in Texas Trading.

In Texas Trading, the letter of credit was to be payable through Fidelity International Bank in New York, and the letter of credit was so advised; see, Judge Cannella's ord of August 18, 1980 at pages 2 and 3, Exhibit 1 hereto. Judge Pierce and Judge Cannella differ on the issue of whether the payment of money due and owing in New York with respect to a transaction that otherwise has no connection with the forum is sufficient to satisfy due process requirements so as to confer in personam jurisdiction pursuant to the Immunities Act. Nige and Central Bank respectfully submit that Judge Cannella's conclusion is correct and is supported by authorities interpreting long-arm statutes even more liberal than the Immunitie Act. The New York State long-arm statute was the basis for the following determinations that payment alone of money due a owing in the State with respect to transactions otherwise to b performed outside the State cannot confer in personam jurisdiction over the foreign defendant: National American Corp. v Federal Republic of Nigeria and Central Bank of Nigeria, 425 F Supp. 1365, 1370 (S.D.N.Y. 1976); Wirth v. Prenyl, 29 A.D.2d 373, 288 N.Y.S.2d 377 (1st Dept. 1968); Hubbard, Westervelt & Mottelay v. Harsh Building Co., 28 A.D.2d 295, 284 N.Y.S.2d 87 (1st Dept. 1967). Even if payments to Reale were to be made in New York rather than Spain, this fact would not suffice to satisfy the due process requirements of the Immunities Act wi respect to conferring subject matter jurisdiction and in personam jurisdiction of the defendants in the instanct actio

Further support for the conclusion that no collateral estoppel results herein from Judge Pierce's opinion, is the fact that the provision of the Immunities Act discussed by Judge Pierce (the third situation defined in Section 1605(a)(2)), requires an analysis by the Court of the acts by the defendants and the effect of those acts upon the particular plaintiff. The relationship between the particular parties, and the terms of the particular cement contracts and letters of credit at issue, therefore, are pertinent to the jurisdictional issue. The Court is required in each instance to determine whether the standards of the Immunities Act confer jurisdiction as to the claims of each plaintiff.

Issues Present Herein and Not Discussed by Judge Pierce

In the application before your Honor, Nigeria and Central Bank have raised the following issues with respect to subject matter jurisdiction pursuant to the Immunities Act, none of which is discussed by Judge Pierce:

- The Reale cement contract was an agreement that bound only Nigeria; and the Reale letter of credit was an agreement that bound only Central Bank. Thus, the Court must determine separately as to each agreement and each defendant whether any of the exceptions to immunity invoked by Reale are satisfied. See, Verlinden, 488 F.Supp. at 1301, Slip opinion, at pages 39-40, and Texas Trading at page 20, Footnote 6.

- For jurisdiction to exist pursuant to the third situation defined by Section 1605(a)(2), the acts of the defendants performed abroad and having a "direct effect" in the United States must be commercial acts and not governmental acts; see, Harris v. VAO Intourist, Moscow, 481 F.Supp. 1056, 1062 (E.D.N.Y. 1979) - Exhibit 1 to our letter of June 24, 1980, and Texas Trading at page 9. Judge Pierce does not discuss this requirement. Nigeria and Central Bank note, however, that Judge Pierce has identified as the acts of breach the suspension by Nigeria of the importation of cement by virtue of the ports congestion and the embargo imposed by Nigeria in the Fall of 1975 (4, 11, 12-13 - [quoting from the letter dated September 30, 1975 from Morgan Guaranty, the same notification which Reale cites as the act of breach herein, which transmitted the instructions of Central Bank that the embargo regulations required compliance with the additional terms], 15, 19, 34, footnote 4 at page 46). The imposition and implementation of the embargo and of the embargo regulations were clearly governmental activity of Nigeria and Central Bank.

- In Verlinden and in Texas Trading the Courts found that the activities of Morgan Guaranty as a paying and advising bank on the letters of credit pursuant to the terms of the Uniform Customs and Practice for Documentary Credits, 1962 Revision, International Chamber of Commerce, Brochure No. 222 (which govern the Reale letter of credit as well), were solely ministerial and these activities of Morgan Guaranty did not provide a basis for jurisdiction pursuant to the Immunities Act.

Conclusion

Nigeria and Central Bank respectfully submit that the findings and analysis in Verlinden and Texas Trading are directly relevant to the facts and issues herein, and that Judge Pierce's different findings with respect to the establishment and operation of the letters of credit before his Honor preclude an application of Judge Pierce's analysis of the Immunities Act to the issues on this application.

Notices of appeal have been filed by the plaintiffs in Verlinden and Texas Trading and the jurisdictional issue will soon be before the United States Court of Appeals, Second Circuit. Once judgments are entered in the consolidated cases decided by Judge Pierce, Nigeria and Central Bank will file notices of appeal with respect to the jurisdictional issues and issues relating to the merits as well. Reale, Nigeria and Central Bank have all previously requested that, should your Honor deny the pending application to dismiss, your Honor certify the issue for immediate appeal pursuant to 28 U.S.C. Section 1292(b), and stay all further proceedings until the jurisdictional issue is finally determined. The conclusion in Mr. Hoeniger's most recent letter of August 20, 1980 is a departure from Reale's previous request for certification of the jurisdiction issue; see, previous Hoeniger letter dated August 4, 1980, at page 2, paragraph 3.

Nigeria and Central Bank respectfully submit that the findings and conclusions in Verlinden and Texas Trading compel a dismissal of the Reale action for lack of subject matter jurisdiction.

Respectfully submitted,

KISSAM, HALPIN & GENOVESE

JGS/sl
#2836

By James G. Simms
James G. Simms
Attorneys for Defendants

cc: B. H. Hoeniger, Esq.
M. M. Bailey, Esq.
Attorneys for Plaintiff

EXHIBIT 1 TO DEFENDANTS' LETTER - MEMORANDUM AND ORDER OF JUDGE CANNELLA IN TEXAS TRADING ACTION AMENDING PRIOR ORDER OF JULY 16, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

TEXAS TRADING & MILLING CORP.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

----------X

MEMORANDUM AND ORDER

78 Civ. 2395 (JMC)

CANNELLA, D.J.:

Defendants' motion to amend the statement of facts contained in the Court's Memorandum and Order of July 16, 1980, is granted.

On July 16, 1980, the Court granted the defendants' motion to dismiss the complaint for lack of subject matter and personal jurisdiction. Fed. R. Civ. P. 12(b)(1), (2). In a letter dated July 22, 1980, the defendants requested amendment of two factual statements contained in that Memorandum and Order. The plaintiff responded in a letter dated August 1, 1980. The amendment of these factual statements is the sole issue properly before the Court, and consequently will be the sole issue addressed in this Memorandum and Order.

After a review of the pertinent documents, the Court amends its July 16, 1980 Memorandum and Order as follows:

Page 2, line 18, which states

> The contract provided for the payment of demurrage at a rate of $4,000 per diem per vessel, whenever the discharge of cargo was not completed at the rate of at least 1,000 tons per diem, provided the seller gave notice to the buyer of the departure from the port of loading of each consignment.

is amended to read:

> The contract provided for the payment of demurrage not exceeding $4,000 per diem per per vessel, whenever the discharge of cargo was not completed at the rate of at least 1,000 tons per diem, provided the seller gave notice to the buyer of the departure from the port of loading of each consignment.

Page 3, line 17, which states

> Contrary to the contract terms, the confirmed, irrevocable letter of credit was advised and made payable through Morgan Guaranty Bank in New York ["Morgan"].

is amended to read:

> The confirmed, irrevocable letter of credit was advised and made payable through Morgan

Guaranty Trust Company ["Morgan"] in New York, with instructions that the credit be advised through Fidelity International Bank in New York.

SO ORDERED.

Dated: New York, N.Y.
August 18, 1980.

John M. Cannella
JOHN M. CANNELLA
United States District Judge

EXHIBIT 2 TO DEFENDANTS' LETTER - EXCERPTS OF DEPOSITION TESTIMONY HEREIN BY A. REALE, PRESIDENT OF PLAINTIFF

A That was delayed, so they say instead of 14 days, they want an extra week.

MR. HOENIGER: There was a delay to issue letters of credit.

Q As I understand what you told me--correct me if I am wrong--Mr. Lakin-Smith said that we can't give you the letter of credit within 14 days because the bank is doing a lot of other work for other people, and we want 21 days?

A That's correct.

Q Okay. Now, in that same paragraph it states that the letter of credit would be established in favor of the seller for the total purchase price through Banco de Bilboa of Oviedo, Spain.

Who proposed that term?

A I did.

Q Did Mr. Lakin-Smith have any problem with that term?

A No.

Q Then the next paragraph VI, "Shipment," the contract states that shipment was to commence within 30 days after receipt of the letter of credit in Oviedo, Spain by the seller.

Now, with respect to that sentence, did you

Q And you have a duplicate copy of that in front of you?

A Yes.

Q This letter from Morgan Guaranty was the first notification you received of the establishment of an irrevocable letter of credit by Central Bank of Nigeria?

A Yes.

MR. SIMMS: Mr. Reale, I want to have marked for identification a three page document dated May 1, 1975 on the letterhead of Central Bank of Nigeria, entitled "Documentary Credit," addressed to the president of Morgan Guaranty Trust Company, 23 Wall Street, New York, credit number CBN/BO/75/89; and I tell you that this document was identified as Exhibit G in the first series of interrogatories and requests to admit that were served upon our firm by Mr. Hoeniger.

(Three page document dated May 1, 1975 marked Defendants' Exhibit 20 for identification as of this date.)

(Discussion off the record.)

Q Mr. Reale, I show you the document which

we have marked Defendants' Exhibit 20 for identification.

Would you look at it and tell me if you have ever seen it before?

A No.

Q Please look at the whole document.

A I already did. We duplicated a copy. I never saw this document before.

MR. HOENIGER: I will state for the record that that was obtained by me in discovery from Morgan Guaranty as a non-party witness.

Q Mr. Reale, let's go back to document number 19 for identification, the letter from Morgan Guaranty to you dated May 8, 1975. And would you also look at the cement contract with Nigeria, Defendants' Exhibit 2 for identification.

Would you turn to page two of the cement contract, the same paragraph on terms of payment, v.

A Yes.

Q That provision states that the letter of credit to be established in favor of you would be for the total purchase price, and be established through Banco de Bilbao of Oviedo, Spain; correct?

A Yes.

Q When you received the document from Morgan

Guaranty dated May 8, 1975, which we have marked Defendants' Exhibit 19 for identification, did you understand that the letter of credit was being established through Banco de Bilbao in Oviedo, Spain?

A What do you mean, through?

Q Through.

A Yes, because Banco de Bilbao was my bank.

Q Correct. In other words, was it your understanding that the letter of credit the Central Bank was establishing in your favor was being established through Banco de Bilbao in Oviedo, Spain?

A Not direct, indirect.

Q What do you mean by indirect?

A Because Spain doesn't have direct business to do at that time by Nigeria Central Bank. Central Bank has to go through Morgan Trust Company, and Morgan Trust Company established a letter through Banco de Bilbao.

Q When you received the document which we have marked Defendants' Exhibit 19 for identification, the letter from Morgan Guaranty, did you understand, Mr. Reale, that the documents that had to be presented with respect to payments for cement or demurrage could be presented to Banco de Bilbao in Oviedo, Spain?

A Yes.

Q Did you also understand that these documents for payment of cement or demurrage could also be presented to Morgan Guaranty here in New York?

A For payment, yes.

Q Documents for--I am talking now about presentments of documents under the letter of credit for payment of either cement or demurrage.

Do you understand the question?

MR. HOENIGER: I am going to instruct you, before you answer that question, to please read carefully the last paragraph of Exhibit 19 for identification.

(Witness complies.)

MR. HOENIGER: The reason I am making that request is that I read that paragraph, I do not see any provision for presentation to Banco de Bilbao. I see provision only for presentation to Morgan.

MR. SIMMS: I object to Mr. Hoeniger's instructing his witness in this way.

The document does say what it says. I am asking Mr. Reale about his understanding as to whether presentments of documents could be

made for payment of cement or demurrage under this letter of credit. And he already testified that documents could be presented at Banco de Bilbao in Spain.

And my pending question is, did he also understand that they could be presented at Morgan Guaranty.

A Let me answer to you the question, what you said to be presented for Banco de Bilbao.

Banco de Bilbao, if we present a document, have no authority to pay anybody unless the document be presented to Morgan Trust Guaranty.

Q If you presented documents to Banco--if you had presented documents to Banco de Bilbao, would they have transmitted the documents to Morgan Guaranty?

A That's correct.

Q Yes, I understand that.

Now, you had the opportunity to present the documents either to Banco de Bilbao or Morgan Guaranty?

A No, sir.

Q Why not?

A Because Banco de Bilbao would not pay us a dollar unless Morgan Guaranty paid for the shipment.

Q Now you're confusing two points, Mr. Reale, under these letters of credit.

Is it your understanding that only Morgan Guaranty could make the payment?

A Yes.

Q However, I am not talking about the making of the payment, I am talking about the places where you could have presented the documents for payment.

A The only way you can present the document was the place where we all concern, me as Reale International, Inc., the ship agent and the cement supplier, they were all from north Spain.

So we appoint Banco de Bilbao to do on behalf of all three concerned supplies.

Q Right. So that you could present the documents to Banco de Bilbao, if you were requesting payment for a consignment of cement, the letter of credit required you to present a bill of lading and an insurance certificate; is that correct?

A Yes.

Q And those documents could have been presented to Banco de Bilbao?

A They were presented to Banco de Bilbao. But Banco de Bilbao, when they accumulated all the

documentation, immediately they transmitted or sent to Morgan Trust.

Q With respect to this letter of credit, were all documents for payment of cement or demurrage presented at Banco de Bilbao in Spain?

A For payment first, yes.

Q No documents were submitted directly to Morgan Guaranty?

A From whom?

Q From you or any of your subcontractors.

A No.

Q The bills of lading and other documents for payment of cement consignments were all submitted to Banco de Bilbao in Spain?

A Yes.

Q And the documents with respect to demurrage on the vessels that went to Nigeria were all submitted to Banco de Bilbao in Spain?

A Yes.

Q With respect to those documents that were presented, do you know who physically presented them to the bank in Spain?

A What document physically?

Q Who took the documents into the bank?

A I don't know.

Q Was it you?

A Not me, no.

Q You never rpesented any documents yourself?

A What do you mean about documents?

Q I am talking now about the physical act of taking the documents--let's take, as an example, to make it easier, the documents with respect to a consignment of cement on one of the six ships that we had talked about earlier.

When those ships were loaded, the bill of lading was prepared, the insurance certificate was prepared, and whatever other documents that were necessary for payment were prepared.

A Can I stop you a minute? Regarding insurance, insurance I sent myself to Morgan Trust, because my insurance company was from United States.

Q That's what I am talking about now. I am talking about how the documents were physically presented to the banks for payment; okay?

A Yes.

Q With respect to the payments for cement, look at Defendants' Exhibit 19 for identification.

A I would like to state that, if you don't mind,

I told you before, Banco de Bilbao was my bank.

Q I understand.

A So documentation that the bank was doing was on my behalf. Regarding any responsibility, they wouldn't pay me anything unless they got money from Morgan Trust.

Q What you're really telling me is that Banco de Bilbao was operating under the terms of the letter of credit?

MR. HOENIGER: What Mr. Reale has told you is whatever he has told you.

Q Let's go on.

Look at document 19 for identification, the letter that you got from Morgan Guaranty dated May 8, 1975.

A Yes.

Q After the statement of the amount of the letter of credit at the top paragraph, it says that this amount is available upon presentation to us of your drafts at site on us for 100 per cent of the CIF invoice value, accompanied by commercial invoice in quadruplicate--describing the merchandise as indicated below--an insurance certificate in duplicate, and it describes what has to be included in

the insurance certificate.

The next paragraph says full set (2/2), clean on-board bills of lading issued to order, blank, endorsed, marked notify the permanent secretary, Ministry of Defense, Lagos, marked freight prepaid, dated latest June 15, 1976, evidencing shipment of-- and then it goes on to describe the type of cement and the price at which the cement would be paid for.

Was it your understanding that if you were to make a presentment for payment of any part of the cement covered by your cement contract, that you would have to present documents, including the site draft, the commercial invoice in quadruplicate, the insurance certificate, the full set of clean on-board bills of lading?

A Yes.

Q Four types of documents?

A Yes.

MR. SIMMS: Mr. Reale, we will take a lunch break now and continue after lunch.

(Whereupon, a luncheon recess was taken at 1:05 p.m.)

oOo

AFTERNOON SESSION

2:05 p.m.

(Documents 7 through 18 marked respectively Defendants' Exhibits 7 through 18 for identification as of this date.)

A N T O N I O R E A L E, having been previously duly sworn, resumed the stand and testified further, as follows:

MR. SIMMS: At the lunch break xerox copies of the original documents that were deemed marked Defendants' Exhibits 7 through 18 were duplicated and marked by the reporter, and the copies compared against the originals.

EXAMINATION (Cont'd.)

BY MR. SIMMS:

Q Mr. Reale, we were talking just before the lunch break about Defendants' Exhibit 19 for identification, which is the letter to Reale from Morgan Guaranty dated May 8, 1975, and also about the types of documents that were required to be presented for payment of a consignment of cement under the letter

of credit.

With respect to the six ships that sailed from Spain to Nigeria with cement under your contract with the Ministry of Defense, can you tell me, please, who prepared the sight draft?

A What do you mean by sight draft? When all the documents are collected it--

Q Do you know what a sight draft is?

A I know what it is.

Q It looks like a check.

A I am not sure 100 per cent, let's put it this way.

You see, what we did there, we made an arrangement.

Q Who is "we"?

A Me, the cement company and the ship agent.

Q Reale International, Tudela Veguin and Alvargonzalez?

A Banco de Bilbao was the bank, my bank, the cement bank and the ship agent bank.

Q Tudela Veguin, Alvargonzalez and Reale International all had accounts in Banco de Bilbao in Oviedo, Spain?

A Yes. So everyone presented their own invoice.

I presented mine, the ship agent presented his, and the cement presented his, gave it to the bank, and the bank made all copies, whatever has to be done according to the letter of credit, and was sent to New York Morgan Trust for collecting the funds.

That is as far as I know.

Q You said each one prepared his own set of invoices, so that you had separate invoices prepared by Alvargonzalez, Tudela Veguin and Reale International?

A That's correct.

Q Would you look at Exhibit 19 for identification?

When you say "invoices," are those the commercial invoices in quadruplicate that are identified in that letter?

A That's correct.

Q Who prepared the insurance certificate with respect to the shipment?

A We hire, you know, we insure the ship by an insurance company from United States.

Q What is the name of that company?

A I don't remember.

MR. HOENIGER: I have it.

I am putting in front of Mr. Reale some papers from the Firemen's Fund Insurance Company.

A The answer to you is Firemen's Fund Insurance Company.

Q And with respect to each of the six ships that sailed, Firemen's Fund prepared the insurance certificate here in the United States?

A That's correct.

Q What office of Firemen's Fund, what city?

A It was an agent, CIA, they call it, Central Insurance Agency. And the location was in Silas Dean Highway in Weathersfield.

Q Connecticut?

A Yes.

Q But the company that prepared the insurance certificate was an agency of Firemen's Fund and the agency is located in Weathersfield, Connecticut?

A That's correct.

Q And they prepared an insurance certificate on each of the six vessels?

A That's correct.

Q Who provided the agency with information about the vessels?

A I provided to them.

Q You did?

A And also the Bank of Bilbao sent them a

letter or telex of the status of the ship, how many tons, and what the requirement for the insurance has to be, the name, and the quantity the ship was carrying.

Q Did Banco de Bilbao send the details about the ships directly to the agency by telex, or did they send you a telex which you delivered to the agency?

A . No, direct to the agency.

Q Did you get copies of the telexes that were sent?

A I don't know.

Q What documents did you provide to the agency or what information did you provide to the agency so that they could prepare the insurance certificate?

A None.

Q I'm sorry, I thought you had said that both Reale and Banco de Bilbao had sent information to the Central Insurance Agency.

A No. The reason is, when I received the information, the quantity, the ship was going; also the insurance agent was agent for me for all my entities that I owned.

Q For all of the related companies that you

described the last time we met?

A That's correct. So he came to me, and with his information and with my information, then he made sure that when he sent the insurance certificate it was exactly right, with no mistake at all.

MR. HOENIGER: So that the record will be clear, what I have also understood from Mr. Reale is that his various companies had a blanket policy, and--

THE WITNESS: No.

MR. HOENIGER: I'm sorry, then I am wrong?

THE WITNESS: The agent was representing me for other things. This was a separate policy because it first was an international policy and the rules was different from the insurance rules we have in this country.

Q Mr. Reale, when the insurance certificate was prepared by the Central Insurance Agency, did the Central Insurance Agency transmit or send the insurance certificate to Banco de Bilbao directly or did you?

A No, they did it direct to Banco de Bilbao.

Q In each case?

A Every ship.

Q The next item that's discussed in Defendants' Exhibit 19 for identification is the full sets of clean on-board bills of lading.

Who prepared the bills of lading with respect to each of the ships?

A As far as I know, it was prepared by the ship agent, Alvargonzalez.

Q As far as you know, they were prepared by Alvargonzalez?

A That's right.

Q In Spain?

A That's right.

Q And they were then delivered by Alvargonzalez to whom?

A To the Banco de Bilbao.

Q Getting back to the sight draft that accompanied these documents, who prepared the sight draft?

A We prepared the sight draft.

Q Meaning Reale International?

A That's correct.

Q In Connecticut?

A Yes.

Q Where was that sent?

A Sent to Banco de Bilbao.

THE WITNESS: Excuse me, off the record.

(Discussion off the record.)

Q Mr. Reale, do you remember when the first shipment of cement sailed from Spain to Nigeria?

A The date?

Q Approximately.

A I remember the month. I think it was June.

Q Before the first shipment was made in June of 1975--it was 1975; right?

A That's right.

Q Between the time that you received this letter from Morgan Guaranty, Defendants' Exhibit 19, dated May 8, 1975, and the time of the first shipment of cement to Nigeria, did Reale International make any request for any amendment to the terms of the letter of credit?

A If I look at my file, I think we do make some request, but I don't remember.

Q Do you have any recollection about the type of amendment that was requested or what it related to?

A If you give me a minute, I will go to my file.

A It's not part. I requested a full letter of credit be transferred to Banco de Bilbao.

Q You requested that the letter of credit be transferred to Banco de Bilbao?

A Complete letter of credit transferred to Banco de Bilbao.

Q So that you wanted Banco de Bilbao to be the beneficiary of the letter of credit?

A No. You asked me a question where you said to me a part of the letter of credit.

Q Maybe I phrased the question in a way that was confusing to you.

When Central Bank of Nigeria established its letter of credit, it named Reale International, Inc. as the beneficiary of the letter of credit.

A That's correct.

Q And according to the terms of the letter of credit, Reale International would be paid the sum of $59.50 per ton of cement shipped to Nigeria--

A That's correct.

Q (continuing)-- upon the presentation of the types of documents we've discussed.

A Yes.

Q Did you ever make a request that a part of

that $59.50 per ton be paid to some other company other than Reale International?

A Not to Morgan Trust Guaranty, no.

Q Did you ever make a request to any other bank--

A Banco de Bilbao, yes.

Q And what was your request to Banco de Bilbao?

A The request to Banco de Bilbao was that-- as a matter of fact, I have a copy on record where I transfer part of this for $10,280,000 to Tudela Veguin, the cement company, together with the ship agent.

Q By ship agent, you mean--

A Alvargonzalez.

Q Mr. Reale, you said you made a request to Banco de Bilbao that out of the total amount of $14,280,000 that would be paid for the cement at the rate of $59.50 per ton, that up to the total of $10,280,000 be paid to both Tudela Veguin--

A I never said the amount.

Q I thought in your answer you sand 10 million.

A No.

Q What I am trying to find out from you is, Reale International was entitled to 59.50 per ton of cement shipped?

A That's right.

Q As a result of your request for a transfer to Tudela Veguin and Alvargonzalez, how much of the 59.50 would be paid for each ton of cement shipped to Tudela Veguin, to Alvargonzalez and Reale International?

A $50.85 a ton.

Q To whom?

A To both, the cement company and the ship agent.

Q Do you mean that when Banco de Bilbao was to issue a check, it would be issued jointly to Tudela Veguin and Alvargonzalez, or would they break it down and issue one check to Tudela Veguin and one to Alvargonzalez?

A No. As far as I know, when I transfer part of the letter of credit, I transferred to Tudela Veguin. Tudela Veguin was paying the ship by themselves. I paid $50.85, and Tudela Veguin was paying $19.60 for the ship agent, and the rest was for the cement price.

Q All right. Let me see if we can just restate it a little bit, what you just testified to.

You made a request to Banco de Bilbao that for every ton of cement that was shipped, for which

Reale was entitled to get $59.50, Banco de Bilbao would pay $50.85 to Tudela Veguin; and the remainder, which by my calculation is $8.65, to Reale International?

A Yes.

Q So that therefore, I assume--you don't have to comment on this--that Banco de Bilbao would issue two checks, one check to Reale, one to Tudela Veguin?

A Also on $8.65 per ton, there was taken the bank fee and other fee that was charged to Reale International, and the net money was sent to me in the United States.

Q So is it a fact that you here in Connecticut received checks from Banco de Bilbao for that part of the payment that was to come to you as a result of this transfer arrangement that you had requested?

A Yes, sir.

MR. HOENIGER: Checks or cables?

THE WITNESS: Checks.

Q With respect to the payment that Banco de Bilbao made to Tudela Veguin, which was at the rate of $50.85, it is your understanding that Tudela Veguin would pay to Alvargonzalez out of each payment $19.60 for each ton shipped?

A Yes.

Q And keep for itself $31.25?

A Yes.

Q And that the payment that went to Alvar-gonzalez was to pay Alvargonzalez for the shipping costs?

A Yes.

Q Pursuant to the charter arrangements it had made with the ship owners?

A Yes.

Q And the 31.25 was to be retained by Tudela Veguin for the cement that they were selling to you?

A Yes.

Q Were these rates of 31.25 for cement and 19.60 for shipping the same amounts that you had agreed on in your agreements with Tudela Veguin and Alvargonzalez?

A Yes.

Q Mr. Reale, just to finish up this one point, you had said earlier that in connection with your request for transfer to Tudela Veguin, the request was made to Banco de Bilbao only, and that you never notified Morgan Guaranty of this transfer arrangement; is that correct?

A No.

Q I'm sorry. Did you notify Morgan Guaranty here in New York about the fact that you had made the request for transfer through Banco de Bilbao?

A I don't understand the question.

Q Okay, let me stop you there. Don't say anything more.

We have just discussed in the last several minutes the arrangements that you had made with Banco de Bilbao for payments to Tudela Vequin and to Reale International for cement that was shipped under the contract, that with respect to each consignment Banco de Bilbao would pay to Tudela Vequin $50.85 per ton, and it would pay to Reale International $8.65 per ton, less bank charges and fees.

A The answer is no, because--

Q The answer to what is no?

A Morgan Trust, when I tell them to transfer the letter, the entire letter was transferred to Banco de Bilbao. So it was not their business to know what I did with Banco de Bilbao, how many times--I can't divide the letter.

Q I understand what you're telling me. I just

want to confirm that the only request you made to Morgan Guaranty was to transfer the entire letter of credit to Banco de Bilbao.

A Yes.

Q When you made the arrangements with Morgan Guaranty, did you fill out a document at Morgan Guaranty?

A I don't remember.

Q Did you request Morgan Guaranty to make all payments under the letter of credit to Banco de Bilbao?

A Mr. Simms, I don't know if it works the way you say.

Q Mr. Reale, the way I understand the word "transfer" as it's used with respect to letters of credit, when you're talking about a transferable letter of credit, such as the type that was established by Central Bank in favor of Reale, it permits the beneficiary of the letter of credit, which was Reale in this case, to transfer all or a part of the letter of credit to some other person or entity, and then the transferee becomes either a second--becomes a second beneficiary under the letter of credit.

A But I stated before that the whole entire letter of credit was transferred to Banco de Bilbao.

Banco de Bilbao, because it represented Reale International, they met all requests for payment according to the letter of credit.

Q Was your request to Morgan Guaranty that all payments be made into your account at Banco de Bilbao?

A Sure.

Q That was the request you made?

A My request--not in writing. I don't know if I requested through my bank, or requested by that I met Morgan Trust and I told them; I don't recall.

MR. HOENIGER: Mr. Reale, is there anything in your file reflecting an instruction from you to Morgan on this subject?

THE WITNESS: I don't think I have it anymore that I remember, that I instructed.

Q Mr. Reale, you described what your arrangement was through Banco de Bilbao on the payments to be made for cement with regard to the payment to go to Tudela Veguin, and the remainder to Reale International.

Apart from this arrangement or transfer that you made through Banco de Bilbao, did you make any other requests for payments to be made--for Banco de

Bilbao to make payments to any other entity, apart from yourself and Tudela Veguin?

A No.

Q That was the only arrangement you had?

A To Tudela Veguin and to Reale International, the money for every ship that left.

Q The arrangement that we have talked about had to do with the payment for cement under the letter of credit.

What arrangement did you have, if any, with respect to the payment of demurrages that would be made under the letter of credit?

A The letter of credit specifically said that if the demurrage occurs, that it should pay $4100 per day.

Q I understand what the letter of credit says.

I am asking whether you made any arrangement with Banco de Bilbao or Morgan Guaranty to pay all or a part of demurrage to someone other than Reale International.

A I want it specific. You say arrangement. Arrangement means paper to be signed.

Q Say transfer.

A I didn't even transfer at all. Because when

you hire a cement ship agent, and you hire a cement manufacturer, they know that the contract has to be according to the letter of credit.

The letter of credit doesn't say that they're going to pay me upon said draft with the cement about the demurrage, because when a ship leaves Spain, you don't know when it arrives in Lagos, if you have demurrage or not.

So I did not make any arrangement prior to the demurrage occurring.

Q With respect to the six vessels that sailed to Nigeria under your contract, did any of them accrue demurrage in Lagos?

A Yes.

Q Did all of them accrue demurrage in Lagos?

A Yes.

Q With respect to the payments for demurrage on these six vessels, did you make any arrangement with Banco de Bilbao for the payment by Banco de Bilbao of the demurrage amounts to any company other than yourself?

A Banco de Bilbao was instructed before that if any demurrage will occur, that they will submit paper--

Q Who is "they"?

A Banco de Bilbao, to Morgan Trust for payment.

Q And when the payment was made, who would receive the payment for demurrage?

A Banco de Bilbao.

Q And when Banco de Bilbao received a payment for demurrage, to whom would they transmit the payment?

A I believe to Romualdo Alvargonzalez.

Q Under your agreement with Alvargonzalez, if you look at it, Defendants' Exhibit 6 for identification, paragraph 15, that talks about demurrage at maximum, $4100 a day.

Was it your understanding that that provision entitled Alvargonzalez to collect whatever demurrage was paid on the vessels that accrued demurrage in Lagos?

A Yes.

Q Mr. Reale, when Alvargonzalez proceeded to charter ships in order to transport your cement to Nigeria, do you know whether they entered into separate charter party arrangements with the ship owners?

A No, I don't.

Q Did you ever see copies of any charter party

What attorney are you referring to there, Mr. Harding?

A Either it would have been Mr. Harding or Mr. Hutenski.

Q And who is he?

A He was a partner of the firm.

Q A partner of the firm of Mr. Harding?

A That's right.

Q Mr. Reale, can you turn now to page 10 of that document?

A Yes.

Q Page 10 sets forth interrogatory number 8, which is a long interrogatory, it goes from paragraph 8-A to 8-M on the next page.

The whole interrogatory, by the way, relates to what is said in paragraph 12 of the complaint in this action.

Do you have a copy of the complaint?

MR. HOENIGER: Yes, I'm putting it in front of Mr. Reale.

Q I will tell you, Mr. Hoeniger doesn't have to agree with my characterization, but paragraph 12 of the complaint basically sets forth what Reale did to perform the cement contract and letter of

credit with Nigeria.

MR. HOENIGER: I am going to instruct Mr. Reale to just skim paragraph 12 of the complaint.

MR. SIMMS: Maybe that is a good idea. It goes from page 5 to the top of page 7 of the complaint.

MR. HOENIGER: Yes, it's a long one.

Q Now you have looked at paragraph 12 of the complaint?

MR. HOENIGER: Briefly.

Q Briefly?

A Yes.

Q And would you look at page 10 of the interrogatory answers, and particularly paragraph 8-G, where it says "Identify the partial transfer of plaintiff's letter of credit to S.A. Tudela Veguin referred to in paragraph 12-C of the complaint."

You see that 12-C of the complaint says that "Reale caused $12,204,000 out of the plaintiff's $14,280,000 credit to be transferred to Tudela Veguin in payment for the supply of $31.25 per ton and delivary at $19.60 per ton of said 240,000 tons of cement."

Now, in your answer which is on page 10 you say that "the transfer is that reflected in the document produced by plaintiff to defendants and marked by defendants as Defendants' Exhibit 22 for identification."

I show you the document.

MR. HOENIGER: I have put a copy in front of Mr. Reale.

Q It's a Banco de Bilbao form, I believe, dated June 9, 1975.

Now, Mr. Reale, is there any other document that reflects this transfer of the letter of credit to or partial transfer of the letter of credit to Tudela Veguin?

A No, sir.

MR. HOENIGER: I would like to amend that, as Mr. Reale's attorney.

I believe that among the documents that Morgan Guaranty produced pursuant to my subpoena, of which we both received copies, Morgan's Reale letter of credit file, my recollection is that there is also one or more documents relating to that transfer.

MR. SIMMS: I asked Mr. Reale that

question, Mr. Hoeniger, because previously when we got into this area he said he could not recall whether he had ever notified Morgan Guaranty of this transfer to Tudela Veguin; and I know from my review of the Morgan Guaranty documents that they never had a request from Mr. Reale to transfer a part of this letter of credit to Tudela Veguin. And their payment records show that all payments were made to Mr. Reale alone, that there was no second beneficiary on the letter of credit.

MR. HOENIGER: To Mr. Reale, Banco de Bilbao.

THE WITNESS: Banco de Bilbao was repressnting--my bank was bank for Reale International, Inc. The letter of credit was requested by me personally to Morgan Trust direct to the Banco de Bilbao. Then the Banco de Bilbao transferred the letter of credit to Tudela Veguin and Alvargonzalez together.

MR. HOENIGER: You have testified to that at great length.

THE WITNESS: All full letter was transferred to Banco de Bilbao.

BY MR. SIMMS:

Q And that is why the cement contract at page 2 lists Banco de Bilbao as your bank?

A That's correct.

Q So that the payments, all the payments under the letter of credit were going to go—were to be made by Morgan to your account in Spain at Banco de Bilbao; and you weren't going to get any money in New York, all the money was going to be paid directly to your account in Spain?

A Yes. The letter to Spain, then my bank would send to me any money as I requested to my bank over here in New York.

MR. HOENIGER: Off the record.

(Discussion off the record.)

Q Now, Mr. Reale, going back to page 10 of this document, in question 8-K we had asked you to identify all the payments made by plaintiff to Tudela Veguin, Alvargonzalez or any other person with respect to the plaintiff's performance of the terms and conditions of the cement contract, and to then describe what each payment represented.

And your answer to K is at page 12 of the document.

PLAINTIFF'S LETTER TO JUDGE HAIGHT, DATED SEPTEMBER 10, 1980

BERTHOLD H. HOENIGER
ATTORNEY AT LAW
505 PARK AVENUE
NEW YORK, N.Y. 10022
(212) 838-3324

KISSAM, HALPIN & GENOVESE
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BY HAND

September 10, 1980

Hon. Charles S. Haight, Jr., U.S.D.J.
United States Courthouse
Foley Square
New York, New York 10007

Re: Reale International, Inc. v.
Federal Republic of Nigeria
and Central Bank of Nigeria
78 Civ. 0023 (CSH)

Dear Judge Haight:

This letter responds to the nine-page letter dated August 25, 1980 from Mr. Simms to Your Honor, in which defendants set forth their arguments why collateral estoppel effect should not be given to Judge Pierce's determination in the East Europe, Nikkei and Chenax actions that subject matter jurisdiction exists. This response constitutes plaintiff's reply memorandum as to why such collateral estoppel effect should be accorded to Judge Pierce's decision and the final judgments thereon.

Since this letter will thus complete the exposition by both sides of their respective positions, I would most respectfully suggest that Your Honor enter an order, or otherwise direct counsel for both sides, that there are to be no further substantive communications to Your Honor with respect to defendants' Rule 12(h)(3) "suggestion" of lack of subject matter jurisdiction.

Before turning to the substantive issue of whether defendants' "suggestion" of lack of subject matter jurisdiction is foreclosed by collateral estoppel, I believe it may be useful to Your Honor to list the prior submissions herein.

BERTHOLD H. HOENIGER

I. THE PRIOR SUBMISSIONS

A. By letter dated June 24, 1980, and apparently prompted by Judge Weinfeld's Verlinden opinion, defendants originally made their "suggestion" of lack of subject matter jurisdiction. Annexed to this 14-page letter were eight exhibits, as follows:

1. Judge Jack B. Weinstein's opinion in Harris v. VAO Intourist, Moscow;

2. Judge Weinfeld's opinion in Verlinden;

3. Complaint in this action;

4. Stipulation and order herein, dated May 16, 1978 and So Ordered by Your Honor on May 18, 1978, in which defendants stipulated and agreed that Judge Pierce's decision of defendants' motion to dismiss the East Europe, Nikkei and Chenax actions on the grounds of lack of jurisdiction under the Foreign Sovereign Immunities Act and by reason of the act of state doctrine

> "shall be deemed in all respects applicable to this action, as if identical moving and opposing papers had been submitted herein and this Court had made a disposition of said motion herein identical to that to be made by the District Court in East Europe, Chenax Majesty, and Nikkei with respect to the defendants' motions to dismiss and for summary judgment in those three actions."

BERTHOLD H. HOENIGER

5. Magistrate Schreiber's Report and Recommendation dated September 19, 1978 in East Europe/Nikkei/Chenax;

6. Your Honor's Memorandum Opinion and Order No. 48121 herein, dated January 19, 1979 and filed January 22, 1979, in which Your Honor stated in part:

"By order of November 6, 1978, Judge Pierce denied defendants' motions.

Subsequent to Judge Pierce's decision, defendants filed an answer in this case asserting as their first, second, third and ninth affirmative defenses, the grounds previously rejected by Judge Pierce. Plaintiff has now moved for an order, pursuant to F.R.Civ.P. 12(f), striking the above-mentioned affirmative defenses.

Defendants represent that they are not attempting to relitigate the issues raised by these affirmative defenses, but rather are acting to insure that the defenses are preserved for appellate review in this case. Defendants have accomplished this by virtue of their answer. However, pursuant to the parties' stipulation, Judge Pierce's decision constitutes the law of this case with respect to the matters raised in these affirmative defenses. Accordingly, plaintiff's motion is granted.

Defendants' first, second, third and ninth affirmative defenses are hereby stricken."

7. Cement contract between plaintiff herein and Nigeria, dated March 8, 1975; and

8. Documentary letter of credit No. CBN/BO/1975/89 issued by Central Bank of Nigeria in favor of plaintiff under date of 1 May 1975, and addressed to The President, Morgan Guaranty Trust Co., 23 Wall Street, New York, U.S.A., for advice to plaintiff and for payment.

B. Plaintiff's response, by my letter dated July 15, 1980, to Your Honor with exhibits A through S annexed as follows:

A. Your Honor's Memorandum Opinion and Order of January 19, 1979 (same as Exhibit 6 to Mr. Simms' letter of June 24, 1980);

B. Cement contract between Reale International and Nigeria (same as Exhibit 7 to Mr. Simms' letter of June 24, 1980);

C. Rules of the ICC Court of Arbitration;

D. Brochure, The International Solution to International Business Disputes -- ICC Arbitration (portions only);

E. Foreign Sovereign Immunities Act of 1976;

F. Legislative history of the Act;

G. Letter from Morgan Guaranty to CBN, dated April 15, 1975, responding to CBN's credit inquiry concerning Reale.

BERTHOLD H. HOENIGER

Hon. Charles S. Haight, Jr.,
U.S.D.J. -5- September 10, 1980

H. Transmittal letter from CBN to Morgan, dated 29th April 1975, confirming Morgan's prior cable advice as to the opening of an irrevocable documentary letter of credit in favor of Reale, and instructing Morgan to

> "debit our [CBN's] account ... with the amount of payments effected thereunder ...",
>
> and requesting Morgan to
>
> 'attach the original of our [CBN's] letter of credit to your advice to the beneficiary.'

I. Pages 308-32 of the trial minutes of National American Corp. v. Nigeria and CBN before Judge Goettel, embodying portions of the testimony of George W. Ryan, an official of the Federal Reserve Bank of New York, showing that at all relevant times, Nigeria maintained between $500 million and over $1 billion at the Federal Reserve Bank of New York, and that Morgan Guaranty had unlimited drawing rights thereon to replenish CBN's account with Morgan.

J. Pages 209-231 of the National American trial minutes, embodying portions of the testimony of Paul Winston Fitzpatrick, a Morgan vice president.

K. Letter of advice dated May 8, 1975 from Morgan to Reale, stating in part:

> "Your drafts ... under the aforementioned Irrevocable Credit ... must be presented to our Commercial Credits De-

partment, 15 Broad Street, New York, N.Y. 10015 with specified documents ...".

L. Pages 9-16, and 536-541, of the trial minutes, and defendants' Second Trial Memorandum, in the East Europe/Nikkei/Chenax actions, showing defendants' position therein that all three of said letters of credit were governed with respect to the issues of repudiation and damages by New York law, and the agreement of all three plaintiffs with that position.

M. Insurance certificate covering approximately 10,000 tons of cement shipped by Reale to Nigeria under the cement contract (one of six such shipments), issued by Fireman's Fund Insurance Company, 110 Williams Street, New York, N.Y. 10038.

N. Selected Morgan correspondence, memos and other documents.

O. Decision by the New York Court of Appeals dated April 3, 1980 in Ehrlich-Bober & Co., Inc. v. The University of Houston.

P. Decision of the New York Supreme Court, Trial Term (N.Y. Co.) dated April 13, 1979 in Mirabella v. Banco Industrrial de la Republica Argentina.

Q. Decision by England's Court of Appeal in Trendtex Trading Corporation v. Central Bank of Nigeria.

BERTHOLD H. HOENIGER

Hon. Charles S. Haight, Jr.,
U.S.D.J. -7- September 10, 1980

R. Decision of the Landgericht (District Court) for Frankfurt/Main, West Germany, dated 25th August 1976, in Youssef M. Nada Establishment v. Central Bank of Nigeria.

S. ICC arbitration award dated April 25, 1978 in Ipitrade International, S.A. v. Federal Republic of Nigeria.

C. Defendants replied by means of Mr. Simms' letter dated July 25, 1980 to Your Honor, annexing thereto two exhibits as follows:

1. Memorandum and Order of Judge Cannella dated July 16, 1980 in Texas Trading & Milling Corp. v. Nigeria and CBN.

2. Selected portions of the ICC brochure, The International Solution to International Business Disputes -- ICC Arbitratrion.

D. Plaintiff replied by means of my letter dated August 4, 1980 to Your Honor. To said letter were annexed five exhibits, as follows:

T. Plaintiff's deposition of Morgan Guaranty in Verlinden (three volumes).

U. Portions of Confidential Information Memorandum dated September 1978, embodyuing representations made by the Federal Republic of Nigeria in connection with a $750 million Eurocurrency loan, and admitted by Judge Pierce into evidence in the East Europe/Chenax/Nikkei trial as plaintiffs' joint exhibit PJ-1.

BERTHOLD H. HOENIGER

V. My letter dated July 23, 1980 to M. Yves Derains, Secretary General, ICC Court of Arbitration, inquiring whether the arbitration clause in the cement contracts involved in this and all other cement contract/letter of credit actions in this Court means -- as Judge Weinfeld held in Verlinden -- that such arbitration must take place in Paris, France, or whether it means that the arbitration is to take place in such country as the ICC Court of Arbitration may select (including, if so selected, by the Court of Arbitration, the U.S.).

W. Cable reply from M. Yves Derains advising that, pursuant to the ICC Court of Arbitration's established practice in similar circumstances, the arbitration clause does not fix Paris as the place of arbitration, but rather that the place of arbitration thereunder is to be fixed by the ICC Court of Arbitration.

X. Original, printed version in its entirety of the brochure, The International Solution to Business Disputes -- ICC Arbitration.

This completed the original briefing with respect to defendants' renewed "suggestion" of lack of subject matter jurisdiction. However, on August 18, 1980, following a three-week trial in September 1979, Judge Piece rendered his decision in the East Europe/Nikkei/Chenax actions, specifically reaffirming his prior determination (which adopted Magistrate Schreiber's Report and Recommendation) that there was both subject matter and personal jurisdiction, and that the act of state doctrine was not applicable. As a result, the following further submissions to Your Honor ensued.

BERTHOLD H. HOENIGER

E. My brief letter dated August 20, 1980 to Your Honor, enclosing a copy of Judge Pierce's Opinion in East Europe/ Nikkei/Chenax, and suggesting that Judge Pierce's determination that subject matter jurisdiction exists in all three actions collaterally estops the defendants from raising that issue again herein by way of Rule 12(h)(3) suggestion.

F. Mr. Simms' letter, on behalf of defendants, dated August 25, 1980, arguing that collateral estoppel effect should not be given to Judge Pierce's decision. Annexed to said letter are two exhibits, as follows:

1. Judge Cannella's Memorandum and Order dated August 18, 1980 in Texas Trading, amending his prior Memorandum and Order of July 16, 1980 in certtain respects.

2. Pages 149, pages 229-246, 258-268, and 549-553, from the transcript of defendants' pretrial deposition herein of plaintiff.

G. My brief letter to Your Honor of August 29, 1980, requesting until September 10, 1980 to reply to defendants' arguments, as contained in Mr. Simms' August 25 letter, with respect to collateral estoppel.

H. Mr. Simms' letter of August 29, 1980 to Your Honor, arguing that plaintiff should not be given the opportunity to further respond substantively to Mr. Simms' August 25 letter.

Subsequently, I was advised by Your Honor's law secretary, Richard L. Klein, Esq., that my request to be given until September 10 for a substantive response had been

BERTHOLD H. HOENIGER

Hon. Charles S. Haight, Jr.,
U.S.D.J. -10- September 10, 1980

granted. Accordingly, there is respectfully submitted herewith

I. The present letter to Your Honor, dated September 10, 1980, with four exhibits attached as follows:

Exh. Y - Affidavits of Richard L. Trotman and Richard H. Webber in Texas Trading, submitted by Texas Trading in oppostion to the second branch of defendants' motion (1) to dismiss for sovereign immunity/lack of jurisdiction, and (2) for summary judgment on the merits.

Exh. Z - Relevant pages of the testimony of Morgan Guaranty by Alfred Koebel, at the East Europe/Nikkei/Chenax trial and at pretrial deposition in this action.

Exh. AA - Memorandum decision of the Second Circuit in East Europe Domestic International Sales Corp. v. Terra.

Exh. BB - Decision of the Court of Appeal, England, in Hispano-Americana Mercantil S.A. v. Central Bank of Nigeria (1979).

BERTHOLD H. HOENIGER

II. THE PRESENT ISSUE AND SUB-ISSUE

F.R.Civ.P. 12(h)(3) relates solely to subject matter jurisdiction. The only broad issue now before Your Honor is whether this Court has subject matter jurisdiction. Issues of personal jurisdiction and the act of state doctrine have been disposed of at the District Court level by the Stipulation and Order herein dated May 16 and 18, 1978 (Exhibit 4 to Mr. Simms' letter to Your Honor of June 24, 1980), by Judge Pierce's subsequent adoption and So Ordering of Magistrate Schreiber's Report and Recommendation, and by Your Honor's Opinion and Order dated January 19, 1979 (Exhibit A). These determinations of the issues of personal jurisdiction and the act of state doctrine constitute the law of the case herein; as Your Honor noted in Exhibit A, these issues have been duly preserved by defendants for appellate review.

Within the issue of subject matter jurisdiction, the remaining sub-issue, addressed herein, is whether collateral estoppel effect should be given to Judge Pierce's decision after trial in the East Europe/Chenax/Nikkei actions, and the judgments entered thereon, or whether defendants are free to relitigate that issue of subject matter jurisdiction herein.

The collateral estoppel effect of Judge Pierce's decision on issues other than subject matter jurisdiction herein is not presently before Your Honor, and need not be considered at this time.

III. JUDGE PIERCE'S DECISION COLLATERALLY ESTOPS THE DEFENDANTS FROM RELITIGATING THE ISSUE OF SUBJECT MATTER JURISDICTION HEREIN

The rapid evolution of offensive collateral estoppel culminated in the Supreme Court's decision last year in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 58 L.Ed. 2d 552, 99 S.Ct. 645 (1979). Parklane approved

the offensive use of collateral estoppel in all types of civil litigation, and vested a broad discretion in the Federal District Courts to refuse the application of such offensive collateral estoppel in situations where it would be unfair to hold defendant estopped by a prior determination. The Supreme Court gave a number of examples of such possible instances of unfairness. One such situation which the Supreme Court said called for the exercise of a sound discretion, rather than the mechanical application of collateral estoppel, is that in which the judgment relied on by plaintiff is inconsistent with one or more prior judgments.

1. Defendants' Contentions

Defendants, in Mr. Simms'August 25, 1980 letter, contend that there are two reasons why Your Honor should decline to give collateral estoppel effect on the issue of subject matter jurisdiction to Judge Pierce's recent post-trial determination in the consolidated actions by East Europe, Nikkei and Chenax. The first reason, defendants argue, is that Judge Pierce's determination is inconsistent with the prior determinations by Judge Weinfeld in Verlinden and Judge Cannella in Texas Trading. Defendants' second contention is that the issue of subject matter jurisdiction herein and in the East Europe/Nikkei/Chenax actions, and the underlying jurisdictional facts, are different.

Both contentions are unsound.

2. On the Issue of Subject Matter Jurisdiction -- The Sole Open Jurisdictional Issue Herein -- Verlinden is Wholly Consistent with Judge Pierce's Decision.

In Verlinden -- an action solely against CBN, and not naming Nigeria -- Judge Weinfeld clearly and expressly found that there was subject matter jurisdiction.

BERTHOLD H. HOENIGER

I respectfully refer in that regard to my letter of July 15, 1980 to Your Honor, pp. 2-3.

Thus, Judge Weinfeld's decision and the judgment of dismissal for lack of personal jurisdiction in Verlinden are wholly consistent with, and indeed reinforce, Judge Pierce's determination that subject matter jurisdiction exists in East Europe/Nikkei/Chenax.*

---

* Judge Weinfeld's holding of lack of personal jurisdiction, despite the presence of subject matter jurisdiction, is presently on appeal to the Second Circuit. Cf. 28 U.S.C. §1330(a) and (b), part of the Immunities Act.

Previous letters from me to Your Honor have noted that Judge Weinfeld's holding that the arbitration clause in the cement contract did not carry over to CBN, the agency and instrumentality of Nigeria which effected the letter of credit as the payment term of that cement contract, is questionable. See the cases cited at the bottom of page 10 of my letter of August 4, 1980. In that letter, I further submitted definitive proof (Exhibits V and W) that Judge Weinfeld's reading of that clause as calling for arbitration in Paris, France was simply wrong, and that under the clause, the ICC Court of Arbitration may fix any place in the world as the place of arbitration, including the United States, just as was the case in Libyan American Oil, 482 F.Supp. 1175, 1178 (D.C. 1980).

My prior letters to Your Honor have also noted that Judge Weinfeld's holding that there is no personal jurisdiction (and Judge Cannella's holding in Texas Trading) result in denying jurisdiction, and in granting sovereign immunity, in situations where prior to the Immunities Act, there was unquestionably quasi-in-rem jurisdiction.

The foregoing points will, of course, be argued to the Second Circuit in the pending Verlinden appeal. None of them in any way take away from the fact that Judge Weinfeld expressly held that there was subject matter jurisdiction, and that his decision is thus wholly consistent with Judge Pierce's.

BERTHOLD H. HOENIGER

3. Judge Cannella's Decision in Texas Trading That There Was Not Subject Matter (Nor Personal) Jurisdiction in Effect Represents a Default Judgment and Hence, In the Exercise of This Court's Sound Discretion, Should Not Be Deemed Such a "Previous Inconsistent Judgment" as Would Call for Refusing Collateral Estoppel Effect to Judge Pierce's Post-Trial Decision and Judgments.

In Texas Trading, defendants made a two-branch motion: to dismiss on the ground of sovereign immunity (i.e., for asserted lack of subject matter and personal jurisdiction); and for summary judgment on the merits.

In opposition to this two-branch motion, Texas Trading submitted the affidavit of Richard L. Trotman, its president, comprising three and one-half pages, and the affidavit of Richard H. Webber, comprising two and one-half pages. The two affidavits are annexed hereto as Exhibit Y. Both affidavits address only the second branch of defendants' motion, for summary judgment on the merits; neither one sets forth a single jurisdictional fact in opposition to defendants' motion to dismiss on the ground of sovereign immunity, i.e., for lack of subject matter (and personal) jurisdiction. With respect to the motion to dismiss, the sole submission by Texas Trading was a memorandum of law, Point I (pp. 5-14) of which argues, on the basis of decisions in other cases and of the legislative history of the Immunities Act, that there is subject matter (and personal) jurisdiction.

In short, the plaintiff in Texas Trading elected to adduce no evidence whatever in opposition to defendants' motion to dismiss for alleged lack of jurisdiction. This election by plaintiff deprived Judge Cannella of a wealth of relevant jurisdictional facts. In effect, this default by Texas Trading resulted in what is in substance a default judgment of dismissal for lack of jurisdiction.*

---

* In my letter of August 4, 1980 to Your Honor, at pp. 5 and 6, I tabulated some of the most significant differences in jurisdictional facts stated in Judge Cannella's Texas Trading decision on the one hand, and in this case, the Chenax action, and others, on the other hand. For example, Judge Cannella states (Slip op., p. 13):

(footnote continued on next page)

ERTHOLD H. HOENIGER

In Parklane, the Supreme Court summarized the arguments for and against permitting offensive use of collateral estoppel. In summarizing the arguments contra, the Court said (99 S.Ct. at 651):

(continuation of footnote from prior page)

* "A letter of credit payable in New York is an accommodation to plaintiff."

On the other hand, Judge Pierce laid emphasis on the fact that the three cement contracts before him all called for the establishment by Nigeria of confirmed letters of credit through specified banks -- two of them New York banks and one, in the Chenax contract, a German bank, but that (a) Nigeria unilaterally chose to establish the letters of credit through CBN, and that (b) CBN unilaterally chose to have them advised and made payable at and by, but not confirmed by, Morgan in New York. Judge Pierce then went on (slip op., p. 29):

"Since defendant chose New York as the place of payment, the burden of litigating in this forum should not be overly burdensome."

Of course, failure of Texas Trading to adduce any facts in opposition to defendants' motion to dismiss left Judge Cannella no choice but to accept the defendants' contentions and statements in support of dismissal as true.

In fn. 7, Judge Cannella declined to follow the recommendation of Magistrate Schreiber, and Judge Pierce's adoption thereof, in the East Europe/Nikkei/Chenax actions. Judge Cannella noted that "defendants, however, have renewed their sovereign immunity arguments in their post-trial memoranda, and those actions are currently sub judice. Since there has been no final judgment in the consolidated actions before Judge Pierce, [Texas Trading's] contention that the Magistrate's finding should collaterally estop the defendants from relitigating the issues decided therein is without merit." As this Court knows, exactly 33 days later Judge Pierce issued his post-trial decision, not merely reaffirming his prior decision based on Magistrate Schreiber's recommendation, but substantially expanding thereon. Clearly, if Judge Pierce's decision had come first, Judge Cannella would have given it collateral estoppel effect.

BERTHOLD H. HOENIGER

> "Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.[14]"

Footnote 14 by the Court reads in full text as follows:

> "14. In Professor Currie's familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel shold not be applied so as to allow plaintiffs 27 through 50 automatically to recover. B. Currie, Mutuality of Estoppel: Limits of the Bernhard Doctrine, 9 Stan.L.Rev. 281, 304 (1957). See Restatement (Second) of Judgments (Tentative Draft No. 2, 1975) § 88(4)."

Having summarized the arguments pro and contra, the Supreme Court then stated:

> "C
>
> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." (Footnote omitted.)

We respectfully submit that here, that "broad discretion" should be exercised so as not to deny collateral estoppel effect to Judge Pierce's post-trial decision by reason of what amounts to a default judgment of dismissal in Texas Trading. In the East Europe/Nikkei/Chenax actions, voluminous evidentiary material (affidavits,

BERTHOLD H. HOENIGER

depositions, documents and interrogatory responses) was submitted to Magistrate Schreiber and formed the basis of his decision. Further, in the course of the three-week trial of those actions, substantial additional evidence relevant to the jurisdictional issue was received, even though proffered for other purposes. By contrast, no evidence whatever (even by affidavit) on the issue of jurisdiction was submitted by plaintiff in Texas Trading. Furthermore, footnote 7 to Judge Cannella's opinion indicates that if Judge Pierce's post-trial decision had already been rendered when Judge Cannella decided the motion to dismiss, Judge Cannella would have accorded collateral estoppel effect to such post-trial decision by Judge Pierce, since the defendants had a full and fair opportunity to litigate the jurisdictional issue in the East Europe/Nikkei/Chenax actions, and took every advantage of that opportunity. Finally, and again in sharp contrast to Texas Trading, Judge Pierce's final determination was made after consideration of defendants' voluminous post-trial submissions, substantially parallelin their submissions to Your Honor herein. Under these circumstances, denying collateral estoppel effect to Judge Pierce's decision, because technically Judge Cannella's granting of defendants' motion to dismiss in Texas Trading is a previous inconsistent judgment, would constitute exactly the kind of mechanical jurisprudence which the Supreme Court rejected in Parklane, calling instead for a broad discretion by the trial court.

Following Parklane, the Supreme Court again addressed the issue of collateral estoppel in Montana v. United States, U.S. , 99 S.Ct. 970 (1979). The Court said at 99 S.Ct. 974:

> "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Parklane Hosiery

v. Shore, U.S. , , 99 S.Ct. 645, 649, 58 L.Ed.2d n.5; Scott, Collateral Estoppel by Judgment, 56 Harv.L.Rev. 1, 2-3 (1942); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. Southern Pacific Railroad, supra, 168 U.S. at 49, 18 S.Ct., at 27; Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299, 37 S.Ct. 506, 507, 671 L.Ed. 1148 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."
(Footnote omitted.)

The Court further said, at 975:

"To determine the appropriate application of collateral estoppel in the instant case necessitates three further inquiries: first, whether the issues presented by this litigation are in substance the same as those resolved against the United States in Kiewit I; second, whether controlling facts or legal principles have changed significantly since the state-court judgment; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion.
(Emphasis added.)

BERTHOLD H. HOENIGER

Indeed, after Shepardizing Parklane, we have found only one case in which collateral estoppel effect was denied to a judgment because of previous inconsistent judgments. That case is Cheers v. Secretary of Health, Education & Welfare, 610 F.2d 463, 469 (7th Cir. 1979). There, collateral estoppel effect was denied to a District Court decision which had held certain HEW regulations invalid, because that decision was

> "inconsistent with numerous decisions that have found in favor of the Secretary on this issue."*

Thus, Cheers v. Secretary of HEW is precisely the kind of situation referred to in fn. 14 of Parklane -- and precisely the kind of situation that is not presented here.

Collateral estoppel effect was given to prior determinations, over the defendants' objections that the issues were not the same or that the application of collateral estoppel would otherwise be unfair to them, in the following post-Parklane cases:

> Continental Can Company, U.S.A., v. Ray Marshall, Secretary of Labor, 603 F.2d 590 (7th Cir., 1979 -- the same Court which decided Cheers);
>
> Starker v. United States, 602 F.2d 1341 (9th Cir., 1979);
>
> Bank of Heflin v. Landmark Inns of America, 604 F.2d 354 (5th Cir. 1979);
>
> Seaboard Coast Line Railroad Company v. Union Camp Corporation, 613 F.2d 604 (5th Cir., 1980);
>
> Consolidated Express, Inc., v. New York Shipping Association, 602 F.2d 494 (3d Cir. 1979);
>
> W.J. Roberts & Co., Inc. v. S. S. Hellenic Glory, 471 F.Supp. 1002 (S.D.N.Y. 1979);
>
> Maidman v. O'Brien, 473 F.Supp. 25 (S.D.N.Y. 1979 -- a decision by Your Honor, involving the defensive rather than offensive use of collateral estoppel);
>
> Mooney v. Fibreboard Corporation, 485 F.Supp. 242 (E.D. Texas 1980); and
>
> Pinto Trucking Service v. Motor Dispatch, Inc., 485 F.Supp. 484 (N.D. Ill. 1980).

* Emphasis added.

BERTHOLD H. HOENIGER

Hon. Charles S. Haight, Jr.,
U.S.D.J. -20- September 10, 1980

Two of the above cases have particular relevance to defendants' claim that collateral estoppel effect should be denied to Judge Pierce's post-trial determination in the East Europe, Nikkei and Chenax actions because of the prior inconsistent determination by Judge Cannella in Texas Trading. In Mooney, supra, 485 F.Supp at 247-48, the Court rejected a similar contention in a products liability case, and granted plaintiff's motion for partial summary judgment on the issue of liability. The Court said:

> "More troublesome is the claim of the defendants that there have been several asbestosis cases which have gone to judgment in the defendants' favor. The defendants argue that to allow the plaintiff to estop the defendant from relitigating whether asbestos products are defective and unreasonably dangerous when there have been several asbestosis cases decided in their favor is unfair. Of course, for this Court to select a judgment in favor of the defendants and use it to preclude the plaintiff from litigating the issue of whether products containing asbestos are defective and unreasonably dangerous would be a violation of due process since the plaintiff would not have been a party to the prior action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, n.7, 58 L.Ed.2d 552 (1979) (citing cases).
>
> Be that as it may, this Court believes that the argument of the defendants is flawed. In none of the cases brought to the Court's attention have any of the defendants shown that the determination in Borel that asbestos products are defective and unreasonably dangerous is in itself inconsistent with another determination. See Restatement (Second) of Judgments § 88(4) (Tent. Draft No. 2, 1975). All that the defendants have shown this Court is that of the two thousand filed asbestosis cases in this country perhaps a dozen or so have

BERTHOLD H. HOENIGER

> gone to judgment in favor of the defendant and that in these cases the plaintiff evidently failed to prove one or more elements essential to his cause of action. To follow the defendants' reasoning, one frivolous lawsuit would preclude courts from using modern principles of collateral estoppel in cases where an issue has clearly been determined adversely to a defendant in other actions. On balance, the defendants' failure to show that any of the cases which they advance are clearly inconsistent with the determination in Borel on the issue of whether asbestos products are dangerous and unreasonably defective, coupled with considerations of judicial economy in deciding mass torts, persuade this Court to rule in favor of the offensive use of collateral estoppel in this action."
> (Emphasis added.)

It would be difficult to find words more apposite to Texas Trading. As has been shown, not only did Texas Trading fail to prove one or more elements essential to establish subject matter jurisdiction; it made no effort whatever to do so, but rather in substance defaulted on that issue.

The other case of particular relevance is Starker v. United States; it is discussed in more detail in connection with defendants' second argument that the issue of subject matter jurisdiction in East Europe/Nikkei/Chenax and in this action is different.

Summarizing with respect to defendants' first contention:

First, Verlinden is not inconsistent, but wholly consistent, with Judge Pierce's determination in East Europe/Nikkei/Chenax that subject matter jurisdiction exists.

BERTHOLD H. HOENIGER

Hon. Charles S. Haight, Jr.,
U.S.D.J. -22- September 10, 1980

Second, in light of plaintiff's failure in Texas Trading to present any evidence whatever tending to establish subject matter jurisdiction, Judge Cannella's determination in that case, necessarily based on the defendants' uncontroverted assertions, is not the kind of previous inconsistent judgment which, in the exercise of a broad and sound discretion by this Court, should lead to denial of collateral estoppel effect to Judge Pierce's determination and final judgments, reached after (a) the presentation of voluminous evidence to Magistrate Schreiber, and (b) a three-week trial at which additional evidence incidentally bearing on the jurisdictional issue was received, and which led Judge Pierce to expand substantially on the Report and Recommendation of Magistrate Schreiber which he had previously adopted in denying defendants' motion to dismiss. Indeed, Judge Pierce, having received parallel post-trial suggestions and submissions as have been made to Your Honor herein, devoted pp. 20-30 of his opinion to further findings of jurisdictional facts and further discussion and determination of the jurisdictional issue.

Third, the defendants here, after having first thoroughly reviewed all relevant Morgan documents in connection with Reale, solemnly stipulated to be bound by the result reached by Judge Pierce on their motion to dismiss in the East Europe/Nikkei/Chenax actions,

> "as if identical moving and opposing papers had been submitted herein and this Court had made a disposition of said motion herein identical to that to be made by the District Court in East Europe, Chenax Majesty, and Nikkei with respect to the defendants' motions to dismiss and for summary judgment in those three actions."
> (Stipulation and order of May 16, 1978 herein, So Ordered by Your Honor on May 18, 1978; Exhibit 4 to Mr. Simms' letter of June 24, 1980 to Your Honor.)

BERTHOLD H. HOENIGER

Further, in responding to Reale's motion to strike these affirmative defenses of sovereign immunity, act of state, and lack of subject matter and personal jurisdiction, from defendants' answer after Judge Pierce had ruled adversely on these defenses in East Europe et al., the defendants expressly represented to Your Honor that they did not intend to relitigate those issues at the District Court level, but only to preserve them for appellate review. That representation is specifically set forth in Your Honor's memorandum opinion and order dated January 19, 1979 (Exhibit A).

In light of their solemn stipulation herein, and of their express representations to Your Honor and to the plaintiff, it is particularly inappropriate for the defendants here to argue that to give Judge Pierce's final, post-trial determination and judgments collateral estoppel effect would be unfair to them under Parklane. Clearly, the issue of subject matter jurisdiction was most thoroughly litigated in the East Europe/Nikkei/Chenax actions. The defendants should not be permitted to escape either their solemn stipulation and representation herein, or the general law of collateral estoppel, by being permitted to use what amounts to a default determination in Texas Trading to obtain the opportunity to once again relitigate anew the issue of subject matter jurisdiction.

IV. THERE ARE NO SIGNIFICANT DIFFERENCES IN THE JURISDICTIONAL FACTS HERE AND IN THE EAST EUROPE/NIKKEI/CHENAX ACTIONS.

At pages 4 through 9 in Mr. Simms' letter of August 25, 1980 to Your Honor, defendants make a convoluted and tortured argument that there are significant differences in the jurisdictional facts here and in the East Europe/Nikkei/Chenax actions.

The argument does not withstand analysis.

BERTHOLD H. HOENIGER

East Europe's cement contract provided that the performance by Nigeria -- payment -- was to be accomplished through Nigeria's establishment of an irrevocable confirmed letter of credit at First National City Bank in New York (Judge Pierce's slip opinion, p. 7). The Nikkei cement contract contained exactly the same undertaking by Nigeria (id., p. 5). The Chenax contract provided for payment by Nigeria through the establishment of such irrevocable confirmed letter of credit at a named bank in Hamburg, West Germany (id., p. 7). In precisely analogous fashion, the Reale cement contract (Exhibit B) provides that Nigeria's performance thereunder -- payment -- is to be effected through an irrevocable confirmed letter of credit to be established by Nigeria at Banco de Bilbao of Oviedo, Spain. (Similarly, under the Verlinden cement contract, Nigeria's payment was stipulated to be effected through the establishment of such irrevocable confirmed letter of credit at a named Dutch bank.)

Judge Pierce, at p. 8, found:

> ....."Contrary to the terms of these contracts, no letters of credit were ever established by Nigeria at any of the banks listed in the three cement contracts Instead, Nigeria unilaterally established individual letters of credit in favor of each of the plaintiffs with defendant CBN and advised plaintiffs thereof through Morgan Guaranty Trust Company of New York ("Morgan"). These letters of credit could only be drawn upon at Morgan."

This is, of course, precisely what Nigeria did here. It established the letter of credit in favor of Reale, not at Banco de Bilbao, but through Central Bank of Nigeria, which in turn caused the same to be advised to Reale by, and to be made payable solely at, Morgan Guaranty Trust Company of New York. Further, Central Bank's transmittal letter to Morgan (Exhibit H) made clear that the letter of credit was to be paid out of funds in Central Bank's account at Morgan (i.e., funds held in the United States and in New York by Central Bank), and that Morgan was to debit Central Bank's account with Morgan therefor. See my letter of July 15, 1980 to Your Honor, pp. 11-13, items 4 through 8.

Thus, here as in the case of Chenax, although a foreign bank had been requested and stipulated in the cement contract, the defendants unilaterally chose to have such letter of credit advised and payable by Morgan in New York, and solely out of Central Bank's funds in New York. The following Morgan testimony conclusively shows that this is so with respect to all 14 of the cement letters of credit, including those of Reale and of East Europe, Nikkei and Chenax and of Verlinden.

At the East Europe/Nikkei/Chenax trial, Alfred Koebel, an assistant vice president of Morgan who is in charge of its technical letter of credit department, testified as follows (trial minutes, pp. 729-30):

"Q Mr. Koebel, I'd like to clear up one point with you that has come up in prior testimony. I notice that in EE4 in evidence, that is the Central Bank documentary credit in favor of East Europe, there is a typed item on the bottom of page 2 which states:

'Credit to be advised First National City Bank, 40th Street and Broadway, New York.'

What is your understanding of that particular language and what is its effect, as far as you know?

A. That we would not mail the credit directly to the beneficiary, but we would mail our advice of the credit to First National City Bank, ask them -- and we would include a copy of the credit. We would ask them to send the original to the beneficiary and to maintain a copy for their files.

Q Does that clause mean that East Europe, the beneficiary, could, if it wanted to, present documents to First National City in the first instance under the letter of credit or make presentments to First National City?

A They could make presentments there, but it's not payable there.

Q And if they made a presentment at First National City, First National City would then have to come and re-present to you, is that correct?

A That's correct.

Q Because you got the money. Okay."

A short while later, Chenax's attorney, Mr. Sandler, elicited the following testimony from Mr. Koebel. (Schroeder, Munchmeyer, Hengst & Co., Hamburg, is the West German bank which Chenax's cement contract stipulates to provide the confirmed, irrevocable letter of credit in favor of Chenax, which, however, Nigeria caused to be issued by Central Bank and which Central Bank caused to be advised by and to be made payable at Morgan in New York.) The testimony appears at trial minutes, p. 753:

"Q Mr. Koebel, I show you now the Chenax letter of credit and call your attention -- this is C4, your Honor -- call your attention to the fact that the credit was to be advised through beneficiary's banker, Schroeder, Munchmeyer, Hengst & Co., Hamburg.

You were asked certain questions by Mr. Hoeniger relating to presentations under the East Europe letter of credit in which the advising bank was First National City Bank of New York. I ask you the same questions relating to this Chenax letter of credit: what would have happened if Chenax had presented its document to Schroeder, Munchmeyer? Would Schroeder, Munchmeyer have had to send them to Morgan in New York for payment?

A. Yes."

BERTHOLD H. HOENIGER

In my pretrial deposition of Morgan, through Mr. Koebel, in this action, taken on April 18, 1979, Mr. Koebel testified as follows at p. 36:

"Q Did there come a time, Mr. Koebel, when CBN instructed Morgan not to make any further payments under the Reale credit?

A They put up -- they established various restrictive measures which prohibited us from making payment.

Q And were those instructions limited to the Reale credit?

A No.

Q They applied to all fourteen cement credits?

A Yes."

Thus, in all of these actions involving any of the 14 irrevocable (but not confirmed) letters of credit issued by Central Bank and caused by Central Bank to be advised and to be made payable at Morgan out of Central Bank's funds in New York, Morgan was the sole paying bank. Presentments under these letters of credit could be made either through the beneficiary's own bank, which would then transmit them to Morgan, or directly to Morgan. Advice of each original letter of credit, as established, was sent by Morgan both to the beneficiary directly and to the beeficiary's named bank, i.e., in the case of East Europe and Nikkei, First National City Bank, in the case of Chenax, Schroeder Munchmeyer in Hamburg,. and in the case of Reale, Banco de Bilbao. Subsequent amendments by Central Bank were similarly notified by Morgan both to the beneficiary directly and to each beneficiary's named bank. Presentments were or would have been accepted either directly by Morgan or through the conduit of the beneficiary's named bank. If there is any question with respect to the accuracy of these statements, plaintiff hereby offers to prove the same through both documentary and testimonial evidence.

BERTHOLD H. HOENIGER

Finally, the fact that Reale transferred its entire letter of credit to Banco de Bilbao in Spain is in no wise a distinguishing fact. Chenax did exactly the same thing. As Judge Pierce found at page 18 of his opinion:

> "On May 13, 1975, Chenax requested that Morgan transfer the entire letter of credit to Transcommerce, and Morgan complied with that request."

Despite these transfers by Chenax and Reale (and partial transfers by East Europe and Nikkei), Morgan remained the sole paying bank. All presentments had to be made to it, whether by the first beneficiary or its transferee; and all payments under these letters of credit could and would only be made upon such presentment to Morgan at its Commercial Credits Department, 15 Broad Street, New York, New York (Exhibit K, next-to-last paragraph). Although Reale, like Chenax, had requested Nigeria to establish the letter of credit through a foreign bank, Nigeria chose to establish it through its Central Bank,and Central Bank chose to make Morgan the sole paying (and advising) bank.*

Thus, Judge Pierce's holding (pp. 29-30) is equally, and precisely, applicable here, with the possible substitution of "Connecticut" for "New York" in one or two sentences:

---

* The relevant pages of Morgan's trial and deposition testimony, above referred to, are collectively annexed hereto as Exhibit Z.

Further, Reale's profit of $8.65/ton -- the difference between the $59.50 purchase price and the FOB cost of cement in Spain and freight to Nigeria -- was retained by Reale International and remitted to it in Connecticut by Banco de Bilbao. At page 261 of defendants' deposition of Reale International (attached to Mr. Simms' letter of August 25 to Your Honor), Reale testified as follows:

> "Q So that therefore, I assume -- you don't have to comment on this -- that Banco de Bilbao would issue two checks, one check to Reale, one to Tudela Veguin?
> A Also on $8.65 per ton, there was taken the bank fee and other fee that was charged to Reale International, and the net money was sent to me in the United States.
> Q So is it a fact that you here in Connecticut received checks from Banco de Bilbao for that part of the payment that was to come to you as a result of this transfer arrangement that you had requested?
> A Yes, sir."

"The alleged breaches of each of the three cement contracts and three letters of credit by the defendants caused substantial, foreseeable, and immediate injury to plaintifs in New York. Each plaintiff is a New York corporation and payment was to be made to each plaintiff in New York through Morgan Guaranty Trust Company under the letters of credit. Similarly, the three cement contracts were effectively amended to provide for payment thereunder in New York by Nigeria's unilateral establishment of the letters of credit with CBN, all of which were payable in New York.. Cf. Verlinden B.V. v. Central Bank of Nigeria, supra at 34; National American Corp. v. Federal Republic of Nigeria, 448 F.Sup. 622, 639 (S.D.N.Y. 1978), aff'd. 597 F.2d 314 (2d Cir. 1979). The necessary minimum contacts were also present. Again, payment under each of these contracts and under each letter of credit was to be made in New York. Although the cement which was to be delivered to Nigeria under the cement contracts did not originate in or pass through the United States, payment therefor was to occur in New York at the instance of defendant Nigeria. Since defendant chose New York as the place of payment, the burden of litigating in this forum should not be overly burdensome. Moreover, Congress has indicated that in enacting the Foreign Sovereign Immunities Act it intended to ensure that 'our citizens will have access to the courts in order to resolve ordinary legal disputes ' House Report at p. 6605. Finally it is clear that the plaintiffs have a substantial interest in a convenient and effective resolution of their individual claims which they may not, under the circumstances, otherwise obtain elsewhere."

In effect, therefore, Judge Pierce's holding accords with that of Judge Goettel in National American Corp. v. Nigeria and Central Bank, 448 F.Supp 622, 639 (S.D.N.Y. 1978), aff'd., 597 F.2d 314 (2d Cir. 1979):

BERTHOLD H. HOENIGER

Hon.Charles S. Haight, Jr.,
U.S.D.J. -30- September 10, 1980

> "There remains only the application of the Act's standards to the events underlying this suit. The breach of the letter of credit having a New York beneficiary, advised by and payable through New York banks, would appear to satisfy the last criteria of 28 U.S.C. § 1605(a)(2) that jurisdiction exists over claims arising from an act committed outside the United States committed in the course of commercial activity having 'a direct effect in the United States.'"

The National American holding was reaffirmed by the Second Circuit in East Europe Domestic Sales Corp. v. Terra (Exhibit AA hereto), in the following words:

> "Finally, although National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. 622 (S.D.N.Y.), aff'd, 597 F.2d 314 (2 Cir. 1979), is somewhat similar to this case, it is distinguishable on several grounds. There was no New York correspondent bank in this case; there was no provision stating that New York law governed the contract; and there were no partial shipments or payments."

In this case, there is a New York correspondent, advising and paying bank, Morgan, unilaterally inserted by defendants, thus invoking the protection and benefits of U.S. and New York law and making it totally foreseeable that defendants' breach would result in litigation in New York. Similarly, in this case, although the letter of credit does not specify any governing law, the defendants and the three plaintiffs expressly agreed in East Europe/Nikkei/Chenax that New York law governs breach and damages (see Exhibit L). Finally, in this case there were partial shipments -- some 58,000 metric tons of cement -- and there were partial payments through Morgan, aggregating approximately $3.4 million for cement and millions of dollars for demurrage on the six vessels which carried that cement to Nigeria.

In short, even if precise identity of the jurisdictional issue, or of the underlying jurisdictional facts, were required for collateral estoppel, such precise identity exists here. But, of course, this is not necessary. As the Supreme Court said in Montana v. United States, supra, the question is rather

"whether the issues presented by this litigation are in substance the same as those resolved against the United States in [the prior litigation];"
(99 S.Ct. at 975),

or whether

"controlling facts or legal principles have changed significantly since the [prior] judgment...";
(99 S.Ct. at 976.)

and finally:

"Because the factual and legal context in which the issues of this case arise has not materially altered since Kiewit I, normal rules of preclusion should operate to relieve the parties of 'redundant ligitation [over] the identical question of the statute's application to the taxpayer's status.' Tait v. Western Maryland R. Co., 289 U.S. 620, 624, 53 S.Ct. 706 707, 77L.Ed. 1405 (1933). See United States v. Russel Manufacturing Co., 349 F.2d 13, 18-19 (CA2 1965)."
(99 S.Ct. at 978; emphasis in all three excerpts added.)

Similarly, in Starker v. United States, supra, 602 F.2d at 1346, the Ninth Circuit said:

" The Supreme Court's recent decision in Montana v. United States ... held collateral estoppel applicable even though some facts differed in the two cases at issue, because the differing facts were not 'essential to the judgment' or 'of controlling significance' in the first case. 440 U.S. at 158, 99 S.Ct. at 976."

BERTHOLD H. HOENIGER

In determining whether the allegedly differing facts were essential to the prior judgment or of controlling significance in the first case, the Court of Appeals, at 1344, said:

> "While there is a sizeable body of authority on the other aspects of the government's collateral estoppel arguments, there is little clear precedent on the scope of a legal 'issue'. However, the emerging Restatement (Second) of Judgments, now in draft, marks the way through this murky area. Section 68 of Tentative Draft No. 4 (1977) states four factors to be considered by the court in deciding what the issue decided in the prior action was:
>
> (1) Was there a substantial overlap betwen the evidence or argument advanced in the second proceeding and that advanced in the first?
>
> (2) Does the new evidence or argument involve the application of the same rule of law as that involved in the prior proceeding?
>
> (3) Could pretrial preparation and discovery in the first proceeding reasonably be expected to have embraced the matter to be presented in the second?
>
> (4) How closely related are the claims?"

Applying these tests, the Court found the claims and issues sufficiently related so as to give collateral estoppel effect to the prior judgment in Starker.

To summarize with respect to this point: Plaintiff submits that there are no differences in the issue of subject matter jurisdiction here and in the East Europe/Nikkei/Chenax actions, nor in the underlying facts governing subject matter jurisdiction. Plaintiff further submits that if there are any such differences, they are wholly insignificant under the tests established by Montana and Starker , so that Judge Pierce's final post-trial determination clearly collaterally estops the

BERTHOLD H. HOENIGER

defendants from once again seeking to relitigate the issue of subject matter jurisdiction herein.

V. POLICY CONSIDERATIONS

No judge or tribunal other than Judge Cannella in Texas Trading has found a lack of subject matter jurisdiction and hence upheld the claim of sovereign immunity on that basis. (The only other judge to uphold sovereign immunity, but for lack of personal jurisdiction, is Judge Weinfeld in Verlinden.) England's Court of Appeal in its Trendtex decision (Exhibit Q) denied sovereign immunity to Central Bank, which had caused another of the infamous cement letters of credit to be advised through and made payable at and by its English correspondent bank in favor of the plaintiff Trendtex, a Swiss corporation. More recently, in Hispano-American Mercantile S.A. v. Central Bank of Nigeria, England's Court of Appeal once again denied sovereign immunity in another such action, this time brought by a Spanish corporation; the decision is annexed hereto as Exhibit BB.

In Nada, the Frankfurt/Main District Court denied sovereign immunity in an action by a Liechenstein plaintiff against Central Bank, which had caused the cement letter of credit there to be advised and to be made payable through its West German correspondent bank (Exhibit R).

In Ipitrade, a Swiss lawyer, appointed as arbitrator by the ICC Court of Arbitration, and applying Swiss law, denied Nigeria's claim of sovereign immunity for breach of its cement contract with a French corporation. The arbitrator's award was subsequently enforced in Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F.Supp. 824 (D.C. 1978).

In passing the Immunities Act, Congress intended to codify and to broaden the restrictive principle of sovereign immunity. It adopted a scheme under which the touchstones for jurisdiction and for the denial of sovereign immunity are one and the same, so that a holding under the Act that there is lack of subject matter (or personal) jurisdiction is ipso facto a determination to accord sovereign immunity. It would be ironic indeed if the Congressional intent were to be frustrated by a series of "jurisdictional" decisions which broaden,

rather than restrict, the scope of sovereign immunity in cases arising out of commercial activity. It would be even more ironic if the result of Congress' passage of the Immunities Act were to grant immunity, and to deny jurisdiction, in cases where there clearly would have been no such immunity, and where there would have been quasi-in-rem jurisdiction, prior to the Act and its ban of jurisdictional attachments and its substitution therefor of what Congress obviously intended as the most expansive possible grant of long-arm in personam jurisdiction.

Yet is it that perverse result for which defendants here contend, and through which they seek to escape the effects of their own stipulation herein, of their representations to Your Honor, and of the collateral estoppel effect which results from their having fully litigated this issue before Judge Pierce, and having lost.

VI. PLAINTIFF'S POSITION

Mr. Simms, in his August 25 letter to Your Honor, states that plaintiff has apparently changed its prior position with respect to the appropriate disposition of defendants' Rule 12(h)(3) "suggestion" of lack of subject matter jurisdiction. This is correct. The change came about through Judge Pierce's final post-trial determination and its collateral estoppel effect.

Plaintiff's position is this:

As a matter of law, Judge Pierce's post-trial determination and the final judgments entered thereon constitute collateral estoppel on the issue of subject matter jurisdiction. As a matter of law and/or of the broad and sound discretion vested in Your Honor by Parklane, defendants are precluded from once again relitigating that issue. If Your Honor so determines, then this action can finally move forward through the last stages of discovery and on to trial.

If, on the other hand, Your Honor determines not to give collateral estoppel effect to Judge Pierce's post-trial determination, but instead determines to examine the issue of subject matter jurisdiction de novo, plaintiff respectfully requests an evidentiary hearing. Bernstein v. Universal Pictures, 517 F.2d 976, 979-80 (2d Cir. 1975). Plaintiff notes in that regard that in the actions which have been tried -- National American and East Europe/Nikkei/Chenax -- sovereign immunity has been denied, and jurisdiction upheld; whereas in Texas Trading (and in Verlinden as to personal jurisdiction), where that issue was disposed of on motion without evidentiary hearing or trial, sovereign immunity was upheld and jurisdiction denied.

BERTHOLD H. HOENIGER

Hon. Charles S. Haight, Jr.,
U.S.D.J. -35- September 10, 1980

There is yet a further reason for such evidentiary hearing if Your Honor is to redetermine the issue of subject matter jurisdiction de novo. Neither Judge Cannella in Texas Trading, nor Judge Pierce in East Europe/Nikkei/Chenax, addressed the question of implicit waiver of immunity under 28 U.S.C. §1605(a)(1) at all. Judge Weinfeld did address it in Verlinden, but his holding (which we believe to be questionable, and for which he cited no authority) was that such waiver, if any, was only one by Nigeria under the cement contract and not one by Central Bank (the sole defendant in Verlinden) under the letter of credit. As we have repeatedly noted, Judge Weinfeld's further statement -- either dictum or alternative holding -- that the arbitration clause called for arbitration in Paris, France is simply wrong. Further, it is apparent that there cannot be any Constitutional due process requirement of minimum contacts with respect to implicit waiver, since jurisdiction in such a case depends on consent. Since this entire issue of waiver is a virtually virgin one, an evidentiary hearing would produce additional relevant evidence with respect thereto.

Respectfully submitted,

/s/

Berthold H. Hoeniger

BHH:rho

CC: James G. Simms, Esq.
Mitchell M. Bailey, Esq.

EXHIBIT 2 TO PLAINTIFF'S LETTER - EXCERPTS OF TESTIMONY BY A. KOEBEL, OFFICER OF MORGAN GUARANTY TRUST CO. GIVEN AT TRIAL OF EAST EUROPE, NIKKEI AND CHENAX ACTIONS AT PRETRIAL DEPOSITION HEREIN

THE COURT: Are they in evidence?

MR. HOENIGER: They are all in evidence, your Honor.

And to Exhibits N12 through N17 in evidence relating to transfers under the Nikkei letter of credit.

Q Mr. Koebel, under documentary letters of credit such as the ones we're discussing this morning which Morgan has adviced and which are payable through Morgan, when a presentment of documents is made to Morgan under that letter of credit, sight draft and whatever documents are required, what does Morgan do with the original documents that accompany the sight draft?

A The documents are examined against our record of the letter of credit, and if the documents are -- if we find that the documents do not agree with the letter of credit we contact the beneficiary on the points under which the documents don't agree with the letter of credit.

If in fact we determine that the documents do agree with the letter of credit, we charge our customer, send him the documents, and pay the beneficiary.

Q And that was also true in 1975?

A Yes.

MR. HOENIGER: I next respectfully call to the Court's attention Exhibit N19, 20, 25 and 26 in evidence, evidencing presentment under the Nikkei letter of credit and payment by Morgan thereunder I think party to Goodsons-Fontanet and partly to Nikkei.

I next respectfully call the Court's attention to Exhibits EE15 through 19 in evidence, evidencing a presentment by East Europe including EE15, the transmittal letter, and including as EE17 a bill of lading showing the loading of the vessel MV Toreania with 10,500 metric tons of Portland cement, conforming to BSS12/1958, dated 10 October 1975.

Mr. Simms, I believe it is conceded that those documents were presented to Morgan?

MR. SIMMS: To this extent: these documents, I believe, came from the files of Morgan Guaranty. For that reason I did not object to their admissibility. They are not the originals.

We concede that Morgan Guaranty received the originals on October 10, 1975 or thereabouts, and did not make payment against these documents.

Q Mr. Koebel, let me show you Exhibits EE15 through 19 in evidence, or a copy thereof.

THE COURT: All in evidence. All right.

MR. HOENIGER: Also in that same sequence, your Honor, I respectfully call attention to EE55 in evidence.

5 / Q Mr. Koebel, I'd like to clear up one point with you that has come up in prior testimony. I notice that in EE4 in evidence, that is the Central Bank documentary credit in favor of East Europe, there is a typed item on the bottom of page 2 which states:

"Credit to be advised First National City Bank, 40th Street and Broadway, New York."

What is your understanding of that particular language and what is its effect, as far as you know?

A That we would not mail the credit directly to the beneficiary, but we would mail our advice of the credit to First National City Bank, ask them -- and we would include a copy of the credit. We would ask them to send the original to the beneficiary and to maintain a copy for their files.

Q Does that clause mean that East Europe, the beneficiary, could, if it wanted to, present documents to First National City in the first instance under the letter of credit or make presentments to First National City?

A They could make presentments there, but it's not payble there.

Q And if they made a presentment at First National City, First National City would then have to come and re-present to you, is that correct?

A That's correct.

Q Because you got the money. Okay.

I would like next to discuss with you the construction of the demurrage clause in the three letters of credit which are here in suit. Let's turn specifically to the East Europe one, and I am holding, Mr. Koebel, and you are very free to refer to it, and maybe one of my colleagues will give me copies for you, EE10 in evidence, which is the cable from Central Bank to Morgan, with a received stamp, I believe, September 5, 1975, reflecting these amendments by Central Bank; and EE11 is a Morgan letter to East Europe dated September 8th, advising that these amendments have been made.

If you want to look at them, Mr. Koebel, just tell me.

A I would like to see them, if I may.

Q Certainly. I think I may need to give you one other document also, and that is EE8 in evidence, Morgan's credit to Central Bank of August 15, 1975 (hand-

Q And Nikkei would have had the money available to it under its letter of credit?

A The credit would have reverted.

Q Back to Nikkei?

A Back.

Q Mr. Koebel, I show you now the Chenax letter of credit and call your attention -- this is C4, your Honor -- call your attention to the fact that the credit was to be advised through beneficiary's banker, Schroeder, Munchmeyer, Hengst & Co., Hamburg.

You were asked certain questions by Mr. Hoeniger relating to presentations under the East Europe letter of credit in which the advising bank was First National City Bank of New York. I ask you the same questions relating to this Chenax letter of credit: what would have happened if Chenax had presented its document to Schroeder, Munchmeyer? Would Schroeder, Munchmeyer have had to send them to Morgan in New York for payment?

A Yes.

MR. SANDLER: Thank you.

No further questions.

THE COURT: Any other plaintiff's counsel have any questions of Mr. Koebel?

file and I saw in one case where the beneficiary I believe requested specific ports for shipment.

Q Did there come a time, Mr. Koebel, when CBN instructed Morgan not to make any further payments under the Reale credit?

A They put up -- they established various restrictive measures which prohibited us from making payment.

Q And were those instructions limited to the Reale credit?

A No.

Q They applied to all fourteen cement credits?

A Yes.

MR. SIMMS: I object to the last question on the ground that it exceeds the ruling by Judge haight, the last question.

Q And the original amount of the credits affected by those instructions, including the Reale credit was approximately two hundred million; is that correct?

MR. SIMMS: I object to the question. It goes beyond Judge Haight's ruling.

MR. HOFFMAN: And I object on the same basis, also it is unfair. I think you should get a ruling, and if the Judge rules that you are entitled to ask the question, we will be happy to add them up for you,

EXHIBIT AA TO PLAINTIFF'S LETTER - MEMORANDUM DECISION OF UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, IN EAST EUROPE DOMESTIC INTERNATIONAL SALES CORP. V. TERRA, CIV. 79-7365; NOT OFFICIALLY REPORTED

(FOLLOWING PAGE)

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of October, one thousand nine hundred and seventy-nine.

Present:

HON. LEONARD P. MOORE
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

17-1208

UNITED STATES COURT OF APPEALS
FILED
OCT. 29 1979
SECOND CIRCUIT

EAST EUROPE DOMESTIC INTERNATIONAL SALES CORP.,

Plaintiff-Appellant,

v.

Civ. 79-7365

Terra,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Cooper's opinion of March 13, 1979.

On this appeal from a judgment, entered on defendant's motion for summary judgment, dismissing the action for lack of in personam jurisdiction, the essential issue is whether defendant's acts have a direct effect in the United States, thereby establishing personal jurisdiction pursuant to the Foreign Sovereign Immunities Act. We hold that §1605(a)(2) of the Act does not allow for personal jurisdiction in this case.

Preliminarily, we believe that Judge Cooper's reliance on cases construing the District of Columbia long arm statute was proper. The legislative history states that the Act is patterned after the District of Columbia statute. Although appellant may be correct that §1605(a)(2) is not identical to the District of Columbi statute, nothing in the legislative history referred to by appellant indicates that the reasoning of the District of Columbia cases is inappropriate here.

We also find appropriate the district court's reliance on Carey v. National Oil Corp., 592 F.2d 673 (2 Cir. 1979) (per curiam). In both that case and this one, the product never entered or left the United States market place. We believe that appellant's reliance on Carey is misplaced in arguing that the cancellation of the contract had a direct effect in the United States. Lost commercial profits which occur in the United States only because the plaintiff is domiciled or doing business here are an insufficient basis for personal jurisdiction. See Lehigh Valley, Inc. v. Birenbaum, 527 F.2d 87 (2 Cir. 1975) (construing the New York long arm statute).

Finally, although National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. 622 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2 Cir 1979), is somewhat similar to this case, it is distinguishable on several grounds. There was no New York correspondent bank in this case; there was no provision stating that New York law governed the contract; and there were no partial shipments or payments.[c]*

Moreover, we do not believe that a series of telexes relating to cement that never was supposed to leave Romania satisfies the requirements of minimal jurisdictional contacts.

Judgment affirmed.

Leonard P. Moore

William H. Timbers

Ellsworth A. Van Graafeiland

Circuit Judges.

COURT OF APPEAL

Apr. 24 and 25, 1979

HISPANO AMERICANA MERCANTIL S.A.
v.
CENTRAL BANK OF NIGERIA

Before Lord Justice DENNING, M.R.,
Lord Justice WALLER and
Lord Justice CUMMING-BRUCE

Practice—Injunction—Sovereign immunity—Letter of credit—Bank failed to honour letter of credit—Whether bank could claim sovereign immunity—Whether injunction should be continued—United States Foreign Sovereign Immunities Act, 1976—State Immunity Act, 1978.

The Nigerian Ministry of Defence ordered a large quantity of cement from inter alia the plaintiffs. Payment was to be by irrevocable letter of credit, and on Apr. 22, 1975, a letter of credit was issued by the Midland Bank on the advice of the Central Bank of Nigeria in Lagos (the defendants).

The defendants advised the beneficiaries that they had opened a letter of credit in favour of the sellers on account of the Ministry of Defence.

The Midland Bank were undoubtedly put in considerable funds to meet the letters of credit when they fell due. The defendants however failed to honour their obligations under the letter of credit and the plaintiffs claimed damages.

Held, by DONALDSON, J., that pending an appeal, an injunction would be granted to restrain the defendants from removing the funds out of the jurisdiction and preventing them from being disposed of.

The plaintiffs appealed, the defendants contending that this was not a case for an injunction in that whatever the position was at the date of the *Trendtex* case which was identical in all material respects to the present case, the position today was different because of the statutes which had since come into force i.e., the State Immunity Act, 1978, and the United States Foreign Sovereign Immunities Act, 1976.

Held, by C.A. (Lord DENNING, M.R., WALLER and CUMMING-BRUCE, L.JJ.), that (1) the 1978 Act did not apply retrospectively but only applied to transactions which took place after it came into force, i.e. November, 1978 (*see* p. 279, col. 2); in this case the law applicable was the law as it stood when the contracts were made in 1975 and when the case was heard in 1976 (*see* p. 280, col. 1); and the 1978 Act did not apply to the transactions in this case (*see* p. 279, col. 2; p. 280, col. 1);

(2) the American Act of 1976 did not apply to this case at all in that it could be argued that the funds were not being held by the defendants "for its own account" as required by that Act, but for the activities of government departments in Nigeria (*see* p. 279, col. 2);

(3) the latest statutes of the United States and the U.K. Parliament were not sufficient to alter the international law as stated in the *Trendtex* case and that decision had not been given per incuriam (*see* p. 279, col. 2);

(4) the proper course for this Court to take was to follow the *Trendtex* case and hold that there was no sovereign immunity and that the injunction should be continued pending an ultimate decision (*see* p. 279, col. 2; p. 280, col. 1);

Trendtex Trading Corporation v. Central Bank of Nigeria, [1977] 1 Lloyd's Rep. 581 applied.

Appeal allowed. Leave to appeal to House of Lords granted.

The following cases were referred to in the judgments:

Miliangos v. George Frank (Textiles) Ltd., (H.L.) [1976] 1 Lloyd's Rep. 201; [1976] A.C. 443; (C.A.) [1975] 1 Lloyd's Rep. 587; [1975] 1 Q.B. 487.

Trendtex Trading Corporation v. Central Bank of Nigeria, (C.A.) [1977] 1 Lloyd's Rep. 581; [1977] 1 Q.B. 529;

Uganda Co. (Holdings) Ltd. v. Government of Uganda, [1979] 1 Lloyd's Rep. 481.

This was an appeal by the plaintiffs, Hispano Americana Mercantil S.A. from the decision of Mr. Justice Donaldson given in favour of the defendants, Central Bank of Nigeria. The defendants had failed to honour their obligations under a letter of credit which had been issued by them in favour of the plaintiffs in respect of a contract for the purchase by the Nigerian Ministry of Defence of a large quantity of cement, and the plaintiffs claimed damages.

Mr. David Hunt (instructed by Messrs. Theodore Goddard & Co.) for the plaintiff appellants; Mr. David Kemp, Q.C., and Mr. A. G. Guest (instructed by Messrs. Hedleys) for the defendant respondents.

The further facts are stated in the judgment of Lord Denning, M.R.

JUDGMENT

Lord DENNING, M.R.: This is another case arising out of the troubles in Nigeria. In 1975 the port of Lagos was crowded with shipping. It was completely congested. There were 300 or 400 ships waiting outside the port—full of cement—with demurrage running up continually in huge sums.

Orders had been given by the ministries in Nigeria for this cement. It came largely from Europe. Far too much had been ordered. That was why the port was congested with ships.

The transactions were financed by way of letters of credit issued by the Central Bank of Nigeria. We had an instance in *Trendtex Trading v. Bank of Nigeria*, [1977] 1 Lloyd's Rep. 581; [1977] 1 Q.B. 529. That was a letter of credit which was issued on July 24, 1975. In this case we have one issued on Apr. 22, 1975. It was issued by the Midland Bank here on the advice of the Central Bank of Nigeria in Lagos. It was an irrevocable letter of credit. It was not confirmed by the Midland Bank here: they were only the correspondents. The Central Bank of Nigeria advised the beneficiaries that they had opened an irrevocable letter of credit in favour of the sellers on account of the Permanent Secretary to the Ministry of Defence in Lagos. It was in the sum of U.S. $14,400,000. There had to be shipment accordingly. Finally they advised:

> Settlement under this credit will be by means of our sight draft on New York.

The Midland Bank, no doubt, had been put in very considerable funds by the authorities in Nigeria in order to meet these letters of credit when they fell due. The beneficiaries of the letters of credit in these cases have now sued the Central Bank of Nigeria on these letters of credit.

In the *Trendtex* case the point was taken by the Central Bank of Nigeria that they had sovereign immunity: and that was elaborately argued here. They put it on two grounds. First, that the Central Bank of Nigeria was merely an alter ego or an organ of the State of Nigeria. That argument was overruled by the whole of the Court, which said that the Central Bank of Nigeria was not a mere alter ego or organ of the State of Nigeria: and for that reason alone would not qualify for sovereign immunity. Apart from that, by a majority of two to one in this Court, it was held that in regard to a commercial transaction of this kind (which was within the territorial jurisdiction of the U.K. by means of the letters of credit) there was no sovereign immunity.

The decisions on those points are not challenged in the hearing before us today. In the *Trendtex* case the Court did grant an injunction (what is often called in these Courts a *Mareva* injunction) to restrain the bank from moving the funds out of the jurisdiction and preventing them from being disposed of. In the course of my judgment in that case, I said on that point at pp. 595 and 561:

> It was said that the money standing to the credit in the books of the Midland Bank was money belonging to the Federation of Nigeria: and that it was not subject to seizure or to an injunction. This point seems to me to depend on precisely the same grounds as those considered earlier. If the Central Bank is entitled to immunity from being sued, so also can the funds be immune from being seized. Otherwise not.

It was the word "not" which applied there. If the bank was not immune from being sued, the funds were not immune from being seized.

Lord Justice Stephenson adhered to that view in his very last sentence. He said:

> I do not therefore dissent from Lord Denning M.R.'s opinion on this point that it depends on precisely the same grounds as those considered earlier and that we should continue the injunctions.

Lord Justice Shaw equally said at the end of his judgment:

> If the bank is to be regarded as part of that government yet not immune from suit (and a fortiori if it is not so regarded) it is a reasonable corollary that those funds should be preserved within the jurisdiction so long as there is a possibility that the action may survive and succeed. [—And he added (because we had some information in that case)—]: I am much encouraged to this view by the brash intimation given to Trendtex in Lagos in October, 1975 that they would not receive any payment. I would continue the injunction.

So the whole Court in the *Trendtex* case granted an injunction to prevent the funds being moved out of England so that the creditors could not get them.

But in the case today (which is identical in all material respect to the *Trendtex* case) Mr. Kemp has come before us and urged that it was not a case for an injunction. He said that the Court made a mistake in the *Trendtex* case in granting the injunction. He said that it is not in conformity with modern law for an injunction to be granted in such a case as this—especially against the funds or property of a central bank.

Mr. Kemp urged that whatever the position was at the date of the *Trendtex* case, the position today is different even in international law because of statutes which have since come into force. On Oct. 21, 1976, the Foreign Sovereign Immunities Act of 1976 came into force in the U.S.: and on July 20, 1978, the State Immunity Act, 1978, of our own Parliament came into force. Mr. Kemp urged that international law has been changed by those statutes: and we ought to recognise that alteration today. He also drew our attention to a decision by Mr. Justice Donaldson in *The Uganda Company (Holdings) Limited v. The Government of Uganda*, [1979] 1 Lloyd's Rep. 481, in which he held that the *Trendtex* case was a departure from earlier cases.

In both those statutes there are provisions which say that, so far as the property of a foreign central bank is concerned, it ought not to be taken in execution. Further that an injunction ought not to be issued so as to impair the dealings of a foreign central bank with its funds.

There is, however, a difference between the United States statute and the English statute. The United States statute says that—

> . . . the property of a foreign state shall be immune from attachment and from execution if—(1) the property is that of a foreign central bank or monetary authority held for its own account.

What do the words "held for its own account" mean? There is an explanatory memorandum attached to the Bill of Congress. It says:

> [The immunity] applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states.

Stopping there, it can well be argued that the funds which are in question here are not held in connection with the central banking activities of the Central Bank of Nigeria but are being used to finance the commercial transactions of other entities: for example, the Ministry of Defence, the Ministry of Housing and the like which were ordering cement for use in Nigeria at the time.

The reason given for this in the explanatory memorandum is this:

> If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

Those are no doubt reasons which would appeal to commercial interests in the City of London equally as they would in the City of New York. No doubt for similar reasons s. 13 (2) and (4) coupled with s. 14 (4) of our statute make it clear that the property of the central bank of a foreign State ought not to be seized: and an injunction ought not to be granted to prevent the bank dealing with it.

But I stress this, that this Act does not apply retrospectively. It only applies to transactions which took place after it came into force—which was in November, 1978. Before that date merchants will have conducted their transactions and entered into contracts under the law as it previously was and not under the law as it is now embodied in the 1978 statute.

So I would say that the English Act is not applicable to the transactions in this case. So far as the American statute is concerned, it seems to me that it does not apply to this case at all because it can be argued that these funds are not being held by the Central Bank of Nigeria "for its own account". They are held not for its own central banking activities but for the activities of Government departments in Nigeria.

Apart from those two grounds, it seems to me that the international law remains as I stated it in the *Trendtex* case. We had before us a decision of the Provincial Court of Frankfurt in which (in a precisely similar case to ours) an injunction had been granted: and in the *Trendtex* case (operating as we thought in accordance with international law as it then stood) we granted an injunction. It seems to me that the latest statutes of the U.S. and of our Parliament are not sufficient to alter the international law as we stated it.

It was suggested that the decision in *Trendtex* was per incuriam. But we have again been referred to the authorities on what would amount to per incuriam: and especially to what was said by myself in *Miliangos v. George Frank (Textiles) Ltd.*, [1975] 1 Lloyd's Rep. 587; [1975] 1 Q.B. 487 and by Lord Simon of Glaisdale when the case reached the House of Lords in [1976] 1 Lloyd's Rep. 201; [1976] A.C. 443 at pp. 216 and 477. All I would say about that is that *Trendtex* was not decided per incuriam.

On the point of the injunction, as well as the point of sovereign immunity in regard to the Central Bank of Nigeria, *Trendtex* governs this case. It is precisely in point on an almost identical situation. The proper course for this Court to take is simply to follow *Trendtex* and hold that there is no sovereign immunity and

that a *Mareva* injunction should go pending the ultimate decision.

This is clearly a case in which we should give leave to appeal to the House of Lords on all points. The *Trendex* case did not go to the House of Lords because it was settled. We are told that the German case did not go higher because that was settled.

It seems to me the right course would be to continue the injunction and give leave to appeal on all points to the House of Lords. I would allow the appeal accordingly.

Lord Justice WALLER: I agree. This case was originally heard in March, 1976, and there has been an injunction since that time. It was heard at approximately the same time as the *Trendtex* case, and Mr. Kemp accepts that in all substantial respects the two cases are similar. He has submitted that in a sense it is an essential step to appeal the whole case to the House of Lords; but submits that this Court should remove the injunction which was imposed by the learned Judge in March, 1976.

As an important part of his submissions he has drawn attention to two Acts—the enactment of the U.S. and the State Immunity Act, 1978—as showing that international law would grant immunity in such a case as this. But in my view, as my Lord has already said, we should look at this case as the law stood when the contracts were made in 1975, and when the case was heard in March, 1976: and in those circumstances the learned Judge imposed this injunction, and I do not think that we should interfere with it. If I were in doubt, I would still come to the same conclusion in the result because where there has been an injunction in force for three years, if this Court were to say it should be removed, there would immediately be an application (as we have been told by Mr. Hunt) for it to be reimposed pending his appeal against the removal going to the House of Lords. In those circumstances this Court, I would have thought, would inevitably have to reimpose the injunction until the House of Lords decided upon the matter.

I entirely agree that the appeal should be allowed in toto.

Lord Justice CUMMING-BRUCE: I agree.

[Order: Appeal allowed with costs here and below. Application for leave to appeal to the House of Lords granted.]

COURT OF APPEAL

Feb. 17, 1978

CAST SHIPPING LTD.

v.

TRADAX EXPORT S.A.

(THE "HELLAS IN ETERNITY")

Before Lord Justice MEGAW and Lord Justice BROWNE

Practice — Limitation of time — Arbitration — Charter-party dispute — Substantial delay in appointing arbitrator — Whether application for extension of time should be granted — Whether Judge exercised his discretion properly — Arbitration Act, 1950, s. 27.

The claimants applied for an extension of time under s. 27 of the Arbitration Act, 1950, for the appointment of an arbitrator under a charter-party between themselves and the respondents, the issues in dispute relating to events that happened on July 12, 1975, at a port on the St. Lawrence River in Quebec.

The application was dismissed by Mr. Justice Donaldson and the claimants appealed on the ground that the learned Judge had arrived at the wrong conclusion in that the amount of the claim was a very large one possibly about $800,000; that although there had been a very substantial delay beyond the contractual time in the appointing of an arbitrator, nevertheless in the circumstances of the case that was excusable; that the fault (in so far as there was fault) was excused by a substantial number of factors and that there was no real case here for suggesting that the delay had caused prejudice to the other party.

Held, by C.A. (MEGAW and BROWNE, L.JJ.), that having given all due weight to all the various submissions put forward by the claimants, the Court was unable to reach the conclusion that it had been shown that the learned Judge's exercise of his discretion was wrong by reason of any of the matters so clearly and carefully put forward (*see* p. 282, col. 1); and the Court was not satisfied that the way in which the learned Judge had exercised his discretion on the material before him was wrong (*see* p. 282, col. 1).

Appeal dismissed.

Per Lord Justice MEGAW (at p. 281): The position of this Court on an appeal of this nature is that, if it is satisfied that the learned Judge who has exercised his discretion below has failed to take into account some material matter which he ought to have taken into account in the exercise of his discretion or has taken into account some material matter which he ought not to have taken into account then this Court would review the whole

MEMORANDUM OPINION AND ORDER OF JUDGE HAIGHT DATED SEPTEMBER 30, 1980 DENYING DEFENDANTS' RENEWED MOTION FOR ORDER DISMISSING COMPLAINT, CERTIFYING JURISDICTIONAL ISSUES FOR INTERLOCUTORY APPEAL AND PLACING ACTION ON SUSPENSE DOCKET

(FOLLOWING PAGE)

RECEIVED
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KISSAM, HALPIN & GENOVESE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REALE INTERNATIONAL, INC.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

78 Civ. 23-CSH

MEMORANDUM OPINION AND ORDER

Recd 10-1-80
SERVED
FILED
DOCKET 10-1-80
DIARY

HAIGHT, District Judge:

The parties to this litigation have renewed, by an exchange of correspondence and exhibits which the Court has accepted in lieu of formal motion papers, jurisdictional issues which were first dealt with in the manner to be described below. The most recent communication is the letter of plaintiff's counsel dated September 10, 1980.

The captioned suit is one of several filed in this Court arising out of the sale of cement by the several plaintiffs to the Federal Republic of Nigeria, and the issuance by Central Bank of Nigeria of documentary letters of credit as the means for payment under the cement contracts. In each action, defendants have contested the Court's subject matter jurisdiction, together with personal jurisdiction over them, invoking in their challenge the provisions of the Foreign

Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2892. Defendants contended, in essence, that the act of state doctrine rendered plaintiffs' claims nonjusticiable, and that the Immunities Act, properly construed, did not afford plaintiffs a remedy.

Defendants in the captioned case intended to make such a motion. However, under date of May 16, 1978, counsel for plaintiff and the defendants presented to this Court for endorsement a stipulation and order. That stipulation recited that, in three consolidated actions then pending before Judge Pierce of this Court, identical motions had in fact been made on behalf of defendants, and were sub judice. Those three cases before Judge Pierce were: East Europe Import-Export, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria, 77 Civ. 2809(LWP); Chenax Majesty, Inc. v. Same, 77 Civ. 3045(LWP); and Decor by Nikkei International, Inc. v. Same, 77 Civ. 2348(LWP). Counsel recited in the stipulation their desire "to avoid unnecessary and duplicative effort on the part of this Court and on their part..." In consequence, the parties stipulated as follows:

> "IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the District Court's decision of defendants' aforesaid motion in East Europe, Chenax Majesty, and Nikkei shall be deemed in all respects applicable to this action, as if identical moving and opposing papers had been submitted herein and this Court had made a disposition of said motion herein identical to that to be made by the Dis-

> trict Court in East Europe, Chenax Majesty, and Nikkei with respect to the defendants' motions to dismiss and for summary judgment in those three actions."

This Court "so ordered" the stipulation on May 18, 1978.

By order dated November 6, 1978, Judge Pierce denied the defendants' jurisdictional motions in the three cases pending before him. Defendants in the captioned case thereafter filed an answer, asserting as affirmative defenses the jurisdictional objections which Judge Pierce had rejected. In view of the stipulation in the captioned case, plaintiff moved for an order striking those jurisdictional defenses. This Court granted that motion in a memorandum opinion and order filed on January 22, 1979, which read in part:

> "Defendants represent that they are not attempting to relitigate the issues raised by these affirmative defenses, but rather are acting to insure that the defenses are preserved for appellate review in this case. Defendants have accomplished this by virtue of their answer. However, pursuant to the parties' stipulation, Judge Pierce's decision constitutes the law of this case with respect to the matters raised in these affirmative defenses. Accordingly, plaintiff's motion is granted. Defendants' first, second, third and ninth affirmative defenses are hereby stricken."

Judge Pierce's cases were brought on for trial before the captioned case before this Court was reached for trial. After trial of Judge Pierce's cases had been com-

pleted, and decision was pending, counsel for defendants initiated by letter dated June 24, 1980 the most recent correspondence to which this memorandum is addressed. Counsel for defendants called the Court's attention to two recent decisions, Harris v. VAO Intourist, Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979), a decision by Judge Weinstein; and Verlinden, B.V. v. Central Bank of Nigeria, 79 Civ. 1150, S.D.N.Y., a decision by Judge Weinfeld, not yet reported. On the basis of those decisions, defendants sought to revive their jurisdictional motions in the captioned case. Peering into what ultimately proved to be a clouded crystal ball, defendants' counsel stated in their June 24 letter: "By virtue of Harris and Verlinden, Nigeria and Central Bank respectfully submit that Judge Pierce will be compelled to dismiss the three consolidated actions for lack of jurisdiction." In point of fact, Judge Pierce's decision dated August 18, 1980 sustained subject matter and personal jurisdiction over the defendants, and addressed the claims on the merits.

Plaintiff's counsel, responding to the initial letter of defendants' counsel, contended that the jurisdictional issue in the captioned case was foreclosed by Judge Pierce's original decision rejecting defendants' motion, that decision having been made applicable to the captioned case by the stipulation and orders quoted supra. Alternatively, plaintiff ad-

dressed the merits of defendants' renewed jurisdictional application. This gave rise to a relatively elaborate correspondence between counsel; but it is neither necessary nor appropriate that this Court adjudicate the jurisdictional issues. Whatever complications might have arisen had Judge Pierce reversed himself and dismissed the cases tried before him on jurisdictional grounds, the fact is that he adhered to his original decision, and sustained jurisdiction over the defendants. In the captioned case, defendants agreed to be bound by Judge Pierce's decision in those cases. No reason appears for abrogating that agreement.

Accordingly, defendants' renewed motion for an order dismissing the complaint herein for lack of jurisdiction, subject matter and personal, is hereby denied.

Counsel have called to my attention a stipulation and order presented to the United States Court of Appeals for the Second Circuit. That stipulation seeks to consolidate, for purposes of appeal, the Verlinden case referred to supra; a decision of Judge Cannella's in Texas Trading & Milling Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria, Court of Appeals docket no. 80-7703; the appeals from Judge Pierce's three cases, and the captioned case. As to the captioned case, the stipulation includes it within the boundaries of the proposed consolidated appeal if this Court's further decision was received in sufficient time.

A copy of the proposed stipulation in the Court of Appeals was forwarded to this Court as an enclosure to counsel's letter of September 19, 1980. This Court has given the matter priority, in order to facilitate joint consideration of these cases by the Court of Appeals, if the latter Court so desires.

Counsel for defendants have asked that, if this Court declines to dismiss the captioned action on jurisdictional grounds, a certification be made under 28 U.S.C. §1292(b). In view of the nature of the case, and the underlying statutory and jurisdictional questions, I regard such a certification as entirely appropriate. In consequence, I recite herewith my opinion that this order involves a controlling question of law, as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. My order denying defendants' renewed jurisdictional motion is accordingly certified for interlocutory appeal pursuant to §1292(b).

Pending resolution of the controlling jurisdictional issues in the Court of Appeals, this case is hereby placed upon the Suspense Docket of this Court, pursuant to Local Calendar Rule 20(A). Either party may apply for restoration of the case to the calendar of the undersigned upon written application, with notice to the other party.

It is So Ordered.

Dated: New York, New York
September 30, 1980

CHARLES S. HAIGHT, JR.
U. S. D. J.

DEFENDANTS' PETITION FOR PERMISSION TO APPEAL
PURSUANT TO 28 U.S.C. Section 1292(b)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REALE INTERNATIONAL, INC.,

Plaintiff-Appellee,

- against -

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants-Appellants.

Docket No. 80-

PETITION FOR PERMISSION TO APPEAL
PURSUANT TO 28 U.S.C. SECTION 1292(b)

Defendants Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank) petition this Court pursuant to 28 U.S.C. Section 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure for permission to appeal from the interlocutory order of the U.S. District Court for the Southern District of New York (Haight, J.) dated September 30, 1980 (Judge Haight's Order) a copy of which is Exhibit 1 hereto.

Judge Haight's Order at page 6 contains the statement prescribed by 28 U.S.C. Section 1292(b) certifying the issue of subject matter and personal jurisdiction for interlocutory appeal.

STATEMENT OF FACTS

Nigeria is a foreign sovereign state and Central Bank is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. Section 1603(b). The issues of subject matter jurisdiction of the claims alleged by plaintiff and of personal jurisdiction of the defendants are governed by the Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583,90 Stat. 2892 (Immunities Act).

Plaintiff Reale International Inc.(Reale) alleges claims for damages against Nigeria and Central Bank arising from alleged anticipatory breaches of an agreement with Nigeria for the sale of cement and of a documentary letter of credit established by Central Bank in favor of Reale. Reale alleges subject matter and personal jurisdiction pursuant to 28 U.S.C. Section 1330 and the exceptions to jurisdictional immunity defined in 28 U.S.C. Section 1605(a)(1) and (2).

The District Court denied the renewed motion by Nigeria and Central Bank for an order dismissing the Reale complaint for lack of subject matter and personal jurisdiction pursuant to the Immunities Act (Judge Haight's Order, page 5) and certified the jurisdictional issues for interlocutory appeal on the grounds that these same issues are presently on appeal in this Court in five actions brought against Nigeria and/or Central Bank relating to separate but similar cement contracts

and letters of credit. In all of these actions, there are common questions of law and fact with respect to the jurisdictional issues pursuant to the Immunities Act.

The other five actions have been consolidated for simultaneous hearing and a common briefing schedule pursuant to a stipulation of all the parties therein dated September 19,1980, which has been so ordered by this Court. The Stipulation and Order is Exhibit 2 hereto.

The Stipulation and Order is discussed in Judge Haight's Order at pages 5-6, wherein it is noted correctly that provision has been made herein for inclusion of an interlocutory appeal of the jurisdictional issues in Reale; see Stipulation and Order at paragraphs 5 and 8.

CONTROLLING QUESTIONS OF LAW ON APPEAL

1. Whether subject matter and personal jurisdiction exist pursuant to the Immunities Act; in particular, whether any of the exceptions to jurisdictional immunity defined in 28 U.S.C. Section 1605(a)(1) or (2) exist with respect to the claims of Reale.

2. Whether if such jurisdiction exists, the Act of State Doctrine precludes adjudication of Reale's claims.

DIFFERENCE OF OPINION ON THE QUESTIONS OF LAW

The U.S. District Court for the Southern District of New York has rendered conflicting opinions on the controlling questions of law set forth above, which are common to the five related actions described in the Stipulation and Order (Exhibi 2 hereto) and to the instant action:

In Verlinden the District Court (Weinfeld, J.) dismissed the action for lack of personal jurisdiction pursuant t the Immunities Act; in Texas Trading the District Court (Cannella, J.) dismissed the action for lack of subject matter and personal jurisdiction pursuant to the Immunities Act; and in East Europe, Nikkei and Chenax, which were consolidated bel the District Court (Pierce, J.) sustained subject matter and personal jurisdiction pursuant to the Immunities Act. In Real the District Court held that the determination by Judge Pierce in the three consolidated actions was determinative of the iss of subject matter and personal jurisdiction for the reasons se forth at pages 1-5 of Judge Haight's Order, Exhibit 1 hereto.

In Reale, the District Court held that an immediate appeal from Judge Haight's Order would materially advance the ultimate termination of the litigation, and, pending resolutio by this Court of the controlling jurisdictional issues, the

District Court placed the Reale action on the Suspense Docket (Judge Haight's Order, at page 6).

CONCLUSION

For the reasons set forth above, defendants Nigeria and Central Bank respectfully request that their petition for permission to appeal be granted.

New York,New York
October 6,1980

KISSAM,HALPIN & GENOVESE

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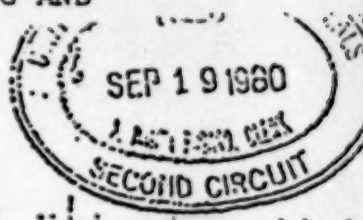
EXHIBIT 2 to DEFENDANTS' PETITION - STIPULATION AND ORDER OF CONSOLIDATION FOR BRIEFING AND HEARING APPEALS



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VERLINDEN, B.V.,

Plaintiff-Appellant,

v.

CENTRAL BANK OF NIGERIA,

Defendant-Appellee.

STIPULATION AN
ORDER

80-7413

Docket No. 80-74

TEXAS TRADING & MILLING CORP.,

Plaintiff-Appellant,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants-Appellees.

Docket No. 80-77

DECOR BY NIKKEI INTERNATIONAL, INC.,
d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff-Appellee,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants-Appellants.

Docket No. 80-7

CHENAX MAJESTY, INC.,

Plaintiff-Appellant,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants-Appellees.

Docket No. 80-

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff-Appellee,

v.

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants-Appellants.

Docket No. 80-7773

REALE INTERNATIONAL, INC.,

Plaintiff-Appellee,

v.

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants-Appellants.

Temporary Docket No. 80-8145

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the parties in the six above-captioned actions that:

1. The parties in the above-captioned actions jointly apply for a simultaneous hearing of the pending and forthcoming appeals in these actions on the grounds that common questions of law and fact exist with respect to the issues on appeal.

2. The defendants in all the actions are the Federal Republic of Nigeria (Nigeria), a foreign sovereign state, and/or Central Bank of Nigeria (Central Bank), an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. §1603(b).

In all the actions the issues of subject matter jurisdiction of the claims alleged and personal jurisdiction of the defendants are governed by the Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2892 (Immunities Act); these issues relate particularly to the exceptions to immunity defined in 28 U.S.C. §1605(a)(1) and (2).

3. The claims of all plaintiffs relate to separate but similar agreements with Nigeria for the sale of cement and to separate but similar documentary letters of credit established by Central Bank as the means for payment of Nigeria's obligations under the cement contracts. Each of the letters of credit, by its terms, was to be governed by the Uniform Customs and Practice for Documentary Credits, 1962 Revision, International Chamber of Commerce Brochure, No. 222 (UCP, 1962 Revision). As to each letter of credit, Morgan Guaranty Trust Company of New York was the "paying" and an "advising" bank as those terms are defined by UCP, 1962 Revision.

4. The appeals in the East Europe, Nikkei and Chenax actions will present common issues of law and fact with respect to the District Court's determination of the merits of the claims. These three actions were consolidated shortly after commencement and were tried as consolidated actions. The District Court rendered a single opinion dated August 18, 1980 with respect to the jurisdictional issues and the merits of these three actions, and three separate judgments were entered pursuant thereto.

5. The present status of each of these actions is as follows:

Verlinden - plaintiff on May 12, 1980 filed its Notice of Appeal from the judgment entered April 30, 1980 on the decision of the District Court dated April 21, 1980 (Weinfeld, J.), dismissing the action for lack of personal jurisdiction of the defendant pursuant to the Immunities Act.

Texas Trading - plaintiff on August 14, 1980 filed its Notice of Appeal from the judgment entered July 23, 1980 on the decision of the District Court dated July 16, 1980 (Cannella, J.) dismissing the action for lack of subject matter and personal jurisdiction of the defendants pursuant to the Immunities Act.

Chenax
Nikkei
East Europe - the decision of the District Court dated August 18, 1980 (Pierce, J.) sustained subject matter and personal jurisdiction of the defendants pursuant to the Immunities Act; dismissed the Chenax complaint on the merits; and granted to plaintiffs in Nikkei and East Europe part of the relief sought by them on the merits. Judgments were entered in Chenax on September 2, 1980; in Nikkei on September 11, 1980 and in East Europe on September 11, 1980. Defendants Nigeria and Central Bank will file notices of appeal with respect to the jurisdictional determination in all three actions and with respect to the determinations on the merits in Nikkei and East Europe. Plaintiff in Chenax will file a notice of cross-appeal with respect to the determination on the merits of its

claim, including damages. Plaintiffs in Nikkei and East Europe will file notices of cross-appeal with respect to certain determinations on the merits relating to damages.

Reale - there is at present sub judice before the District Court (Haight, J.) the application of defendants Nigeria and Central Bank to dismiss for lack of subject matter and personal jurisdiction pursuant to the Immunities Act. Nigeria and Central Bank have requested that should the District Court sustain jurisdiction, it certify the jurisdictional issue for appeal pursuant to 28 U.S.C. §1292(b); and Nigeria and Central Bank will request this Court to permit the appeal. Should the District Court dismiss for lack of subject matter or personal jurisdiction pursuant to the Immunities Act, plaintiff will appeal.

6. By virtue of the foregoing, each of the parties in the above-captioned actions respectfully requests this Court to order that:

(a) the appeals in the above-captioned actions be heard simultaneously;

(b) a joint appendix shall be prepared in each of the actions and shall be filed by October 20, 1980; except that in the East Europe/Nikkei/Chenax actions a single joint appendix may be submitted with respect to both the jurisdictional issues and the issues on the merits.

(c) as to the jurisdictional issues in each action: appellants' briefs shall be filed by October 20, 1980; answering briefs shall be filed by November 10 , 1980 and reply briefs shall be filed by November 21 , 1980. Defendants Nigeria and Central Bank may file a single brief where they are appellants or appellees in two or more actions. Plaintiffs in East Europe, Nikkei and Chenax may at their election file a single joint brief or separate briefs.

(d) as to the merits of the East Europe, Nikkei and Chenax actions: appellants' briefs shall be filed by December 12 , 1980; answering briefs shall be filed by January 12 , 1981 and reply briefs shall be filed by January 23, 1981. For purposes of this subparagraph, appellants are deemed to include plaintiffs in Nikkei and East Europe in the event they should appeal or cross-appeal with respect to the District Court's disallowance of certain claims for damages.

7. This stipulation and order shall supersede the previously entered Scheduling Orders in Verlinden and Texas.

8. The above schedule for submissions shall apply to any appeal taken or permitted in Reale, provided a notice of appeal has been filed or permission to appeal has been granted with respect to the District Court's jurisdictional

determination prior to October 20 , 1980, the date on which joint appendices are to be filed in the other actions.

9. The above appeals shall be ready for argument by January 26 , 1981 and argument will be heard on all the appeals at the same time and before the same panel of this Court.

Dated: New York, New York
September 19, 1980

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the record on appeal
in 80-7773 to be filed 10/10/80
in 80-7771 to be filed 10/10/80
in 80-7783 to be filed 10/10/80

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SO ORDERED: 9-23-80

PLAINTIFF'S RESPONSE TO DEFENDANTS' PETITION TO APPEAL PURSUANT TO 28 U.S.C. Section 1292(b)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

REALE INTERNATIONAL, INC., :

Plaintiff-Appellee, : Docket No. 80-

-against- :

FEDERAL REPUBLIC OF NIGERIA :
and CENTRAL BANK OF NIGERIA,

:

Defendants-Appellants.

----------x

PLAINTIFF'S RESPONSE TO DEFENDANTS' PETITION TO APPEAL PURSUANT TO 28 U.S.C. §1292(b)

1. Plaintiff does not oppose the defendants' petition for permission to appeal to this Court from the interlocutory order of the United States District Court for the Southern District of New York (Haight, J.) dated September 30, 1980, which denied defendants' renewed motion to dismiss the action for lack of jurisdiction, subject matter and personal.

2. Judge Haight's order does not address, or even mention, the act of state doctrine. Defendants' renewed motion which resulted in Judge Haight's order was in no way based on the act of state doctrine. Hence, if this Court grants defendants' petition, the appeal should be correspondingly limited, and defendants

should not now be permitted to inject an issue not presented by defendants in their renewed motion, and hence not addressed in the order which defendants seek leave to appeal.

3. If this Court grants defendants' §1292(b) petition, and if this Court does not affirm Judge Haight's order of September 30, 1980, either on the basis of the ground stated therein or on the basis of the collateral estoppel effect of Judge Pierce's post-trial determination and final judgments in the actions by Nikkei International, Chenax Majesty, and East Europe Import-Export against the defendants, then plaintiff respectfully calls attention to the fact that, in its various submissions to Judge Haight in opposition to defendants' renewed motion to dismiss for asserted lack of jurisdiction, plaintiff repeatedly requested an evidentiary hearing. Hence, plaintiff's lack of opposition to defendants' present petition should in no way be construed as a waiver of such request. It continues to be plaintiff's position that, if the facts relevant to jurisdiction are to be separately adjudicated herein, despite defendants' stipulation to be bound by the results in the Nikkei International/Chenax Majesty/East Europe Import-Export action, and despite the collateral estoppel effect to which plaintiff believes Judge Pierce's final determination of said three actions is en-

titled, then an adequate factual basis and record for such juris dictional determination requires an evidentiary hearing.

New York, New York
October 7, 1980

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SUPPLEMENTAL STIPULATION AND ORDER OF CONSOLIDATION FOR BRIEFING AND HEARING APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VERLINDEN, B.V., Plaintiff-Appellant, v. CENTRAL BANK OF NIGERIA, Defendant-Appellee.	SUPPLEMENTAL STIPULATION AND ORDER Docket No. 80-7413
TEXAS TRADING & MILLING CORP., Plaintiff-Appellant, v. FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants-Appellees.	Docket No. 80-7703
DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC., Plaintiff-Appellee, v. FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants-Appellants.	Docket No. 80-7783
CHENAX MAJESTY, INC., Plaintiff-Appellant, v. FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants-Appellees.	Docket No. 80-7771

EAST EUROPE IMPORT-EXPORT, INC., Plaintiff-Appellee, v. FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants-Appellants.	:	Docket No. 70-7773
REALE INTERNATIONAL, INC., Plaintiff-Appellee, v. FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA, Defendants-Appellants.	:	Temporary Docket No. 80-8145

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the parties in the six above-captioned actions that:

1. On September 19, 1980, the parties in these six actions executed and submitted to this Court a stipulation requesting a simultaneous hearing and a common briefing schedule with respect to the appeals then pending or forthcoming in the actions. On September 23, 1980, the stipulation was so ordered by Staff Counsel of this Court, Frank J. Scardilli, who amended the proposed stipulation by adding a provision for the filing by October 10, 1980 of the records on appeal in three of the actions: Chenax, Docket No. 80-7771; East Europe, Docket No. 80-7773; and Nikkei, Docket No. 80-7783. A copy of the Stipulation and Order, as amended, is Exhibit 1 hereto.

2. Since the filing of the Stipulation and Order, the following events occurred:

(a) On September 30, 1980, U. S. District Judge C. S. Haight, Jr. rendered his determination in Reale (Temporary Docket No. 80-8145), denying the application by defendants Federal Republic of Nigeria (Nigeria) and Central Bank of Nigeria (Central Bank) for an order dismissing the action for lack of jurisdiction pursuant to the Foreign Sovereign Immunities Act (Immunities Act). In his Order, Judge Haight certified the issues of subject matter and personal jurisdiction for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). On October 6, 1980, Nigeria and Central Bank filed their petition in this Court for permission to appeal, which petition is still pending before the Court. The Stipulation and Order, at paragraph 8, provides that the interlocutory appeal in Reale shall be prepared and heard in accordance with the schedule outlined for the other five actions, provided this Court grants the permission to appeal prior to October 20, 1980.

(b) The plaintiffs in each of the six actions, including Reale, have agreed among themselves to submit single joint briefs on the jurisdictional issues in the six actions. On the merits, East Europe and Nikkei shall submit a single joint brief whereas Chenax shall submit its own, separate brief.

(c) In the East Europe and Nikkei actions, wherein the District Court entered money judgments in favor of plaintiffs, there is still pending before U.S. District Judge L.W. Pierce the motion by Nigeria and Central Bank for a stay of execution pending appeal and the separate motions by Nikkei and East Europe for orders of execution upon their judgments. It is anticipated that Judge Pierce will rule shortly on these motions.

3. The Stipulation and Order, at Paragraphs 6(c) and (d), set forth the present schedule for the submission of separate briefs on the jurisdictional issues and the issues on the merits. This schedule provides for the filing of principal briefs by appellants, answering briefs by appellees and reply briefs by appellants; there is a separate briefing schedule for the jurisdictional issues (Paragraph 6(c)) and for the issues on the merits (Paragraph 6(d)). By virtue of Judge Haight's ruling in Reale and by virtue of the appeals and cross-appeals filed by the parties in these six actions, there are three separate appellants on the jurisdictional issues and four separate appellants on the merits: On the jurisdictional issues, Nigeria and Central Bank are appellants in East Europe, Nikkei, Chenax and Reale; plaintiff is appellant in Verlinden

and plaintiff is appellant in Texas Trading. On the merits, Nigeria, Central Bank and Chenax are appellants and Nikkei and East Europe are cross-appellants. If the present briefing schedule were implemented, there will be 21 separate briefs submitted on the consolidated appeals: on the jurisdictional issues - three briefs by the appellants, three anwering briefs and three reply briefs, for a total of 9 briefs; on the merits - four briefs by appellants, four answering briefs and four reply briefs, for a total of 12 briefs.

4. The parties agree that an effort should be made to minimize the total number of briefs submitted on these consolidated appeals. The parties also agree that by virtue of the common questions of law and fact relevant both to the jurisdictional issues in all six actions and to the issues on the merits in the East Europe and Nikkei actions, it is appropriate to suggest that single joint briefs be filed by plaintiffs and by defendants. The parties agree further that on the jurisdictional issues, several provisions of the Immunities Act must be considered with respect to the separate facts in each of the six actions, and that on the merits in the East Europe and Nikkei actions, numerous issues of law and fact must be discussed. The Chenax action contains the issue of Swiss law, requiring separate briefs in that action. Therefore, the parties respectfully request leave to file oversized joint briefs. At present, the parties estimate that each of the joint briefs will not exceed 75 pages, although the parties respectfully reserve the opportunity to amend these estimates pending preparation of actual

page proofs. This procedure will serve the interest of judicial economy by reducing the overall number of briefs and pages of briefing and by dispensing with the need for numerous and duplicative motions for this relief in each appeal.

5. The parties in East Europe, Nikkei and Chenax respectfully request that the present deadline for the filing of the Records on Appeal in these three actions be postponed until U.S. District Judge Pierce determines the pending motions with respect to execution upon the Nikkei and East Europe judgments, so that this determination may be included in the Record on Appeal.

6. Each of the parties in these six actions respectfully submits that the amendments to the Stipulation and Order which are set forth below will result in a saving of time, effort and expense to the Court and to the parties and will expedite the pending appeals. The total number of briefs will be reduced from 21 to 10.

7. By virtue of the foregoing, each of the parties in these six actions respectfully requests that the Stipulation and Order (Exhibit 1 hereto) be amended and modified as follows:

(a) Briefing Schedule

(i) As to the jurisdictional issues in each action: the six plaintiffs collectively and the defendants collectively shall file single joint principal briefs and single joint answering briefs; there shall be no reply briefs. The principal briefs shall be filed by November 21, 1980 and the answering briefs shall be filed by December 15, 1980. The total number of briefs shall be 4.

(ii) As to the merits in East Europe, Nikkei and Chenax: the plaintiffs and the defendants shall simultaneously file principal briefs and answering briefs; there shall be no reply briefs. The briefs of plaintiffs in East Europe and Nikkei and the briefs of the defendants shall be joint briefs. Only plaintiff in Chenax shall file separate principal and answering briefs. All principal briefs shall be filed by January 19, 1981; all answering briefs shall be filed by February 9, 1981. The total number of briefs shall be 6.

SIZE of BRIEFS on the merits may be 50 pages for principal briefs 25 pages for reply/answering briefs.

(b) Size of Briefs on JURISDICTIONAL ISSUE ONLY

Each of the principal ~~or answering~~ briefs may be up to 60 pages. Should the actual page proofs exceed these limits, the parties may apply for leave to file longer briefs and on such application will submit the actual page proofs. Each of the answering briefs on the jurisdictional issue may be up to 35 pages.

(c) Joint Appendices

A Joint Appendix shall be prepared in each of the actions and shall be filed by November 21, 1980; except that in the East Europe, Nikkei and Chenax actions, a single Joint Appendix shall be filed with respect to both the jurisdictional issues and the issues on the merits.

(d) Records on Appeal

The Records on Appeal in each of these actions, to the extent not already filed, shall be filed by October 31, 1980.

(e) Argument

The appeals in these six actions will be ready for argument during the week of February 16, 1981 and argument will be heard on all of the appeals at the same time and before the same panel of the Court.

IT IS FURTHER ORDERED that absent extraordinary circumstances for further extensions will be granted.

Dated: New York, New York
October 16, 1980

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SO ORDERED:

_____

Opposition

No. 81-920

DEC 12 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

VERLINDEN B.V.,

Petitioner,

v.

CENTRAL BANK OF NIGERIA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Question Presented

Is the provision of the Foreign Sovereign Immunities Act (the "Act"), 28 U.S.C. § 1330(a), which defines the original jurisdiction of the district courts in actions against foreign states, constitutional to the extent that it provides for subject matter jurisdiction to adjudicate a dispute between two aliens involving the breach of an agreement not governed by federal law?

TABLE OF CONTENTS

	PAGE
Question Presented	1
Table of Authorities	IV
Statement of the Case	1
Reasons for Denying the Writ	6
Point I—Background: the nature and structure of the Act	6
Point II—The Court of Appeals' determination that Verlinden's suit does not arise under federal law pursuant to principles developed in cases construing 28 U.S.C. § 1331 is correct and conforms to the decisions of this Court	8
Point III—The Court of Appeals' determination that the Constitution does not authorize federal subject matter jurisdiction with respect to Verlinden's suit is correct and conforms both to the Constitution and the intent of Congress underlying the Act.	11
A. Verlinden's theory of protective jurisdiction	11
B. The authority relied on by Verlinden is exceptional and not applicable to this case	11
C. The Court of Appeals' holding that § 1330 of the Act does not provide jurisdiction over suits of this type between two aliens conforms to the Constitution	14
D. The Court of Appeals' holding that § 1330 of the Act does not provide jurisdiction over suits of this type between two aliens conforms to the intent of Congress underlying the Act	17
Conclusion	18

TABLE OF AUTHORITIES

PAGE

Cases:

Gully v. First National Bank, 299 U.S. 109 (1936) 9, 14

Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) 8, 16

Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829) 16

Louisville & Nashville Ry. Co. v. Mottley, 211 U.S. 149 (1908) 9

Montalet v. Murray, 8 U.S. (4 Cranch) 46 (1807) 16
Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800) 16

National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) 8, 13, 14, 15

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 11, 12, 13, 14, 16

Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974) 9
Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) 9, 14

Sadat v. Mertes, 615 F.2d 1176 (7th Cir. 1980) 16, 17
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) 9, 10

Tennessee v. Davis, 100 U.S. 257 (1880) 11, 12–13
Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981) 5
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 10, 11, 13, 14, 16

Union Pacific Ry. Co. v. Meyers, *et al.*, 115 U.S. 1 (1885) 13

Williams v. Austrian, 331 U.S. 642 (1947) 13

PAGE

Statutes:

The Constitution, Art. III, sec. 2, cl. 1 ..... *passim*
28 U.S.C. § 1330 ..... *passim*
28 U.S.C. § 1331 ..... 9, 10, 11
28 U.S.C. § 1349 13
28 U.S.C. § 1441(d) 17
28 U.S.C. § 1603(b) 2
28 U.S.C. §§ 1605-1607 6
Judiciary Act of 1789, § 11 16

Legislative Materials:

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13 Wright, Miller & Cooper, *Fed. Prac. & Proc.*, § 3604 (1975) 16

No. 81-920

IN THE

Supreme Court of the United States

October Term, 1981

VERLINDEN B.V.,

Petitioner,

v.

CENTRAL BANK OF NIGERIA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Statement of the Case

Petitioner, Verlinden B.V. ("Verlinden"), is a Dutch corporation not doing business in the United States. Respondent, Central Bank of Nigeria ("Central Bank"), is the financial arm of the Federal Republic of Nigeria ("Nigeria"). In March 1979, Verlinden commenced this action against Central Bank in the District Court for the Southern District of New York, alleging jurisdiction pursuant to the Act, particularly 28 U.S.C. § 1330(a) and (b), on the ground

that Central Bank is an "agency or instrumentality" of Nigeria within the definition of the Act, 28 U.S.C. § 1603(b).

In April 1975, Verlinden had entered into an agreement with the Federal Ministry of Defense of Nigeria. The agreement was negotiated and executed in Nigeria, and required Verlinden to deliver to Nigeria a total of 240,000 metric tons of cement in monthly shipments which were to originate from European ports. Nigeria agreed to make payment for the cement pursuant to an irrevocable documentary letter of credit to be established through Slavenburg's Bank, Verlinden's bank in Amsterdam. The cement agreement provided that the laws of The Netherlands would govern the construction, validity and performance of the contract and that all disputes with respect to the contract would be submitted to the arbitration of the International Chamber of Commerce, Paris, France. Pursuant to the cement agreement, Central Bank, in June 1975, established its irrevocable documentary letter of credit in favor of Verlinden. The letter of credit was subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce Brochure No. 222, a set of rules and regulations recognized internationally with respect to the operation of documentary letters of credit. Central Bank advised the Verlinden letter of credit through its correspondent bank in the United States, Morgan Guaranty Trust Company of New York ("Morgan Guaranty"), and instructed Morgan Guaranty to advise the credit through Slavenburg's Bank in Amsterdam. Central Bank also instructed Morgan Guaranty to debit its account in New York with respect to payments made under the Verlinden letter of credit. The District Court found

that Morgan Guaranty had advised the letter of credit through Slavenburg's Bank; that all communications with respect to the letter of credit were transmitted to Verlinden through Slavenburg's Bank; and that all payments under the letter of credit would have been made into Verlinden's account at Slavenburg's Bank in Amsterdam. (37, 42-43a).*

In the New York action, Verlinden alleged claims against Central Bank arising out of an alleged anticipatory breach of the letter of credit, and sought money damages for lost profits and expenses with respect to the cement not delivered to Nigeria. The acts of breach cited by Verlinden in its complaint were the suspension by Nigeria of all cement shipments necessitated by the congestion of its ports and Central Bank's instruction to the advising banks that presentments of documents under the letter of credit must show compliance with Nigeria's regulations on sailings to its ports.

The Court of Appeals noted Verlinden's concession that its substantive claim was not governed by United States federal law. (12a). The letter of credit represents the payment end of the cement transaction. Although the District Court recognized the discrete obligations created by the cement contract and letter of credit (51-52a), Verlinden's claims against Central Bank with respect to the breach of the letter of credit are identical to the claims it could have asserted against Nigeria with respect to the breach of the cement agreement.

After the Court of Appeals had affirmed the District Court's dismissal of Verlinden's complaint for lack of

* Parenthetical references with the suffix "a" are to the Appendix accompanying Verlinden's Petition for a Writ of Certiorari.

jurisdiction, albeit on different grounds, and before filing the instant petition, Verlinden commenced an arbitration proceeding at the International Chamber of Commerce, Paris, France, asserting against Nigeria the same claims for damages it had asserted against Central Bank in the New York action. The arbitration proceedings are in the initial stages, and hearings will go forward in Brussels, Belgium. Verlinden's belated invocation of the agreement to arbitrate implies that its New York action was an exercise in forum shopping.

In its pending petition to this Court, Verlinden correctly states that its appeal from the District Court's dismissal was submitted to the Court of Appeals and heard jointly with appeals in five other actions against Nigeria and Central Bank, all of which presented issues with respect to the interpretation of the Act. (Pet. 5).* The facts in these other cases, however, were not "identical" to those in Verlinden's action, and the differences go beyond the citizenship of the other five plaintiffs as American corporations. The District Court made specific findings that the Verlinden letter of credit was ultimately payable in Amsterdam (37a), and that the nature of Morgan Guaranty's involvement in the letter of credit transaction was strictly ministerial. (42-43a).

As to each of the letters of credit involved in the six cases heard by the Court of Appeals, Morgan Guaranty performed the same function: it was solely an advising bank which transmitted payments to the account of each beneficiary at the bank the beneficiary had designated in its cement agreement. The significance of Morgan Guar-

* References to Verlinden's Petition for a Writ of Certiorari are cited herein as "Pet."

anty's role was the subject of the Court of Appeals' analysis in *Texas Trading* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), which opinion was rendered in four of the six cases. There is presently pending in this Court the petition by Nigeria and Central Bank, No. 81-885, for a writ of certiorari with respect to the Court of Appeals' analysis of the Act in *Texas Trading*. Should this Court grant the writ with respect to *Texas Trading*, a focal point of the review will be the Court of Appeals' findings with respect to Morgan Guaranty's involvement. Regardless of the outcome in *Texas Trading*, it is improper for Verlinden to imply that, apart from the constitutional issue as to which it seeks reveiw, subject matter jurisdiction of its claim is confirmed by the Court of Appeals' opinion in *Texas Trading*. (Pet. 5). In that opinion, the Court of Appeals specifically stated that the constitutional obstacles prevented it from determining whether the requirements of the Act were satisfied with respect to Verlinden's claim. 647 F.2d at 312; reproduced in the Appendix to Nigeria and Central Bank's Petition, No. 81-885, at pp. 25-26a. In *Texas Trading*, the Court of Appeals specifically declined to comment as to the existence of jurisdiction pursuant to the Act in instances where a foreign state has failed to pay a foreign corporation in the United States or to pay an American corporation overseas or, implicitly, to pay a foreign corporation overseas. *Id.*

Verlinden's instant petition seeks review solely of the constitutional issue decided by the Court of Appeals. In the briefs submitted to the Court of Appeals, Verlinden elected not to address the constitutional issue, but did so in its petition for rehearing, which contained a suggestion that the rehearing be in banc. Verlinden's petition for

rehearing, and that filed by counsel for the United States Government, to intervene and to address the constitutional issue, were transmitted to all of the active judges of the Second Circuit, and no judge requested that a vote be taken on the suggestion for rehearing in banc. (55a). Both petitions were denied. (55-57a).

Reasons for Denying the Writ

POINT I

Background: the nature and structure of the Act

Verlinden's petition concerns the provision of the Act which defines the original jurisdiction of the district courts with respect to civil actions brought against foreign states; 28 U.S.C. § 1330(a). The provision refers to "*any* nonjury civil action against a foreign state" as to which the foreign state is not immune from jurisdiction pursuant to the provisions of 28 U.S.C. §§ 1605-1607. (Emphasis added). Both the Court of Appeals (5-8a) and the District Court (25-34a) held that the provision is not limited to suits brought by Americans, although both Courts agreed that the legislative history of the Act indicated that Congress apparently did not consider whether an alien plaintiff had standing under the Act to sue in the district courts. (7-8a, 32a). The Court of Appeals held further that despite the broad and inclusive language of § 1330(a), Congress was without constitutional authority to confer upon the district courts jurisdiction over a suit between alien parties involving the breach of an agreement not governed by federal law. (8-20a).

The Report of the House Judiciary Committee on the provisions of the Act, which is identical to the Report of

the Senate Judiciary Committee (6a, n.8), appears in House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States,* H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Admin. News 6604 (*"House Report"*).

The *House Report* describes the Constitutional authority for the Act relied upon by Congress, and that recitation has a direct bearing upon the issue of whether Congress intended, or considered itself authorized, to confer upon the district courts jurisdiction over a suit such as Verlinden's. Congress cited only that part of Article III, section 2, clause 1 of the federal Constitution which defines the judicial power of the federal courts with respect to controversies between "a State, or the Citizens thereof, and foreign States . . ."; *i.e.,* the provision defining alienage jurisdiction. *House Report* at 6611. This clear reference supports the conclusion that Congress did not intend the jurisdiction of the district courts to exceed the limits of the provision cited.

The Court of Appeals held that Congress did not intend the Act to affect the substantive law of liability or to create any new federal causes of action. (12a). Neither does the Act provide an exclusive federal forum for suits involving a foreign state. State courts may adjudicate the rights of parties to a dispute involving a foreign state as defendant and may apply whatever state law or other non-federal law governs the substantive rights of the parties. State courts must apply the provisions of the Act only to the threshold issue of immunity from jurisdiction. *See, House Report* at 6610, 6611, 6616. However, Congress provided that "sovereign immunity is an affirmative defense which must be specifically pleaded . . .". *Id.* at 6616.

POINT II

The Court of Appeals' determination that Verlinden's suit does not arise under federal law pursuant to principles developed in cases construing 28 U.S.C. § 1331 is correct and conforms to the decisions of this Court.

Article III of the Constitution provides that the federal government's "judicial power" shall extend to nine enumerated classes of cases. Art. III, sec. 2, cl. 1. The classification is inclusive and many not be exceeded. *E.g., Hodgson* v. *Bowerbank,* 9 U.S. (5 Cranch) 303 (1809); *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582, 605-06 (1949) (Rutledge and Murphy, JJ., *concurring*), 635-37 (Vinson, C.J. and Douglas, J., *dissenting*), 646-49, 654 (Frankfurter and Reed, JJ., *dissenting*) (*"Tidewater"*). (8a). The Court of Appeals noted the Framers' intent with respect to the limitations of Article III by quoting Alexander Hamilton:

> The judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.

A. Hamilton, *The Federalist,* No. 83 at 541 (Modern Library ed.) (15-16a).

As relevant hereto the Constitution provides that "[t]he judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . [and] to controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Art. III, sec. 2, cl. 1. The above two enumerations define the federal question and alienage jurisdiction of the federal courts, respectively.

Federal question jurisdiction has been given statutory expression in 28 U.S.C. § 1331, which provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States."

This Court has held often that for a claim to "arise under" the laws of the United States, a right or immunity created by federal law must be an essential element of the plaintiff's cause of action. *Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125, 127 (1974) (*"Phillips Petroleum"*); *Gully* v. *First National Bank*, 299 U.S. 109, 112 (1936) (*"Gully"*). In other words, to invoke federal question jurisdiction, plaintiff must seek to vindicate a right created by federal law. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950) (*"Skelly"*); *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476, 483 (1933). The requisite federal question must appear on the face of the complaint, unaided by the answer. It does not suffice for jurisdictional purposes that plaintiff raises a federal question in anticipation of a defense. *Phillips Petroleum, supra*, 415 U.S. at 127-28; *Skelly, supra*, 339 U.S. at 672; *Gully, supra*, 299 U.S. at 113; *Louisville & Nashville Ry. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908).

Verlinden concedes that its claim for breach of the letter of credit is not governed by United States federal law; it seeks no vindication of a federally created right. (12a). Verlinden's suggestion that resolution of the question of Central Bank's jurisdictional immunity would involve federal substantive law is misplaced. (Pet. 10). The Act regulates judicial practice and is procedural in nature. *See, Skelly, supra,* 339 U.S. at 671-72, 674; *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 462 (1957) (Frankfurter, J., *dissenting*) (*"Lincoln Mills"*). The Act does not displace state or other non-federal law as the basis for resolving disputes involving foreign states. The Court of Appeals aptly noted, "[o]ne cannot sue for violation of the [Act]." (14a).

The Court of Appeals commented upon *Skelly, supra,* a case requiring the interpretation of a federal statute wherein "the right to be vindicated was State-created," 339 U.S. at 673, and not a right "arising under" federal law. The Court of Appeals stated: "That the conduit of jurisdiction was a federal statute did not create jurisdiction over the claim where none existed before. The same is true here." (14-15a).

The Court of Appeals was correct in holding that "Verlinden's suit does not 'arise under' federal law by principles developed in cases construing § 1331 . . ." (15a).

POINT III

The Court of Appeals' determination that the Constitution does not authorize federal subject matter jurisdiction with respect to Verlinden's suit is correct and conforms both to the Constitution and the intent of Congress underlying the Act.

A. Verlinden's theory of protective jurisdiction

Verlinden contends that § 1331 does not exhaust the judicial power conferred by the "arising under" provision of the Constitution and that the Act is a proper exercise of what has been termed federal "protective jurisdiction". (Pet. 10-12). *See, Lincoln Mills, supra,* 353 U.S. at 473 (Frankfurter, J., *dissenting*). Verlinden theorizes that the federal interest in the foreign affairs of the United States is such that Congress is entitled to extend jurisdiction pursuant to the "arising under" provision to any case involving a foreign state.

B. The authority relied on by Verlinden is exceptional and not applicable to this case.

In support of its theory of protective jurisdiction, Verlinden relies on *Osborn* v. *Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824) (*"Osborn"*) and a few subsequent decisions of this Court (Pet. 10-12), all which are distinguishable.

In *Osborn* and *Tennessee* v. *Davis,* 100 U.S. 257 (1880) (*"Davis"*), this Court sought to protect essential functions of the federal government from destructive action by still hostile state legislatures and courts. In both cases, states

sought to enforce against the United States local statutes which either imposed taxes against an instrumentality of the United States or deterred the government's agents from enforcing the internal revenue laws. It was only in light of what was perceived to be the most dire threats to the viability of the federal government, that Congress and this Court sought to afford a protective federal forum.

More specifically, in *Osborn*, the Court analogized the attempt by Ohio to tax the Bank of the United States to an attempt by a state to penalize an agent of the government for performance of his official duties. The Court felt that such a tax was equivalent to a situation in which the

> carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties from performance of their respective duties . . . but cannot avail [themselves] of the preventive justice of the nation to protect [themselves] . . . . Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws . . . .

22 U.S. at 847-48.

Similarly, in *Davis, supra*, this Court stated:

> "[T]he general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and

> brought to trial in a State court, for an alleged offence [*sic*] against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection; if their protection must be left to the action of the State court; the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. (citation omitted).

100 U.S. at 262-63.

Thus, in both *Osborn* and *Davis,* the federal interest at stake was the federal government's very survival and ability to function. The interest of the United States in every civil suit involving a foreign state simply does not rise to this level.

The three remaining cases cited by Verlinden are also readily distinguished. *Union Pacific Ry. Co.* v. *Myers, et al.,* 115 U.S. 1 (1885), has been largely repealed by statute, 28 U.S.C. § 1349, and is generally considered "a 'sport' in the law." Mishkin, *The Federal "Question" in the District Courts,* 53 Colum. L. Rev. 157, 160 n.24 ("Mishkin"). *Accord, Lincoln Mills, supra,* 353 U.S. at 481-82 (Frankfurter, J., *dissenting*). (20a n.26). *Tidewater, supra,* does not authorize an extension of protective jurisdiction. Indeed, only two justices discussed the concept in dicta. 337 U.S. at 614-15 (Rutledge and Murphy, JJ., *concurring*). *Williams* v. *Austrian,* 331 U.S. 642 (1947), a decision supporting federal jurisdiction over plenary suits in bankruptcy, may be distinguished by reference to the broad sweep of the

federal bankruptcy statutes. Protective jurisdiction may be available in exceptional circumstances where Congress has regulated comprehensively. Clearly, however, the Act lacks the extraordinary breadth of the federal bankruptcy laws. *See, Lincoln Mills, supra,* 353 U.S. at 483-84 (Frankfurter, J., *dissenting*).

To the extent that protective jurisdiction exists at all under the "arising under" provision of the Constitution, it is limited to the most unique circumstances. In decisions subsequent to *Osborn,* this Court has held that the doctrine is to be treated as exceptional and not to be extended. *Gully, supra,* 299 U.S. at 114; *Puerto Rico* v. *Russell & Co., supra,* 288 U.S. at 485. *Accord, Lincoln Mills, supra,* 353 U.S. at 470-71, 481-82, 483-84 (Frankfurter, J., *dissenting*).

C. The Court of Appeals' holding that § 1330 of the Act does not provide jurisdiction over suits of this type between two aliens conforms to the Constitution.

As previously noted, the alienage judisdiction defined in the Constitution extends only to cases "between a State or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. Const., Art. III, sec. 2, cl. 1. This provision does not empower federal courts to adjudicate disputes between two aliens. This formulation was adopted by the Framers with full appreciation of its implications with the foreign relations of the United States.

At the Constitutional Convention, the scope of federal judicial power was one of the most sharply debated and thoroughly examined issues. *Tidewater, supra,* 337 U.S. at 631-36 (Vinson, C.J., and Douglas, J., *dissenting*); 654 (Frankfurter and Reed, JJ., *dissenting*). Many states and

members of the Convention viewed a federal judiciary with deep distrust and were loath to yield to it the judicial power of the states. *Id.* at 631-35 (Vinson, C.J., and Douglas, J., *dissenting*); 647 (Frankfurter and Reed, JJ., *dissenting*). Other members of the Convention, however, vigorously propounded the need for an expanded federal judiciary. *Id.* at 631-33 (Vinson, C.J., and Douglas, J., *dissenting*). Consequently, the various proposals concerning this issue were subjected to severe attacks and intensive scrutiny both at the Constitutional Convention and the state conventions which followed. *Id.* at 632-35.

This debate culminated in a compromise which is embodied in Article III, section 2, clause 1 of the Constitution. *Id.* at 631, 633-34. The precise format of this provision, with its nine explicit enumerations of federally cognizable cases, represents the means adopted by the Framers to check both Congress and the courts from extending judicial power beyond its intended limits. *Id.* at 647 (Frankfurter and Reed, JJ., *dissenting*); *see id.* at 635 (Vinson, C.J., and Douglas, J., *dissenting*).

The alienage jurisdiction provision was formed in a crucible of intense debate and underwent many changes before achieving its final form. Among the numerous proposals advanced were some whose broad formulation would have authorized suits between two aliens, while others were far more restrictive. Thus, the Virginia Plan and Alexander Hamilton's Plan both provided for alienage jurisdiction in any case in which a foreigner was interested. 1 Farrand, *The Records of the Federal Convention of 1787*, 22 and 232 (1966 ed.) (*"Records"*). In contrast, the New Jersey Plan limited alienage jurisdiction to cases in which foreigners had an interest in the construction of a treaty.

1 *Records* at 247; 2 *Records* at 157 n.15 and related text. These contrasting views generated considerable discussion and the alienage jurisdiction provision did not emerge in its present form until after further deliberation before the Committee on Detail. 2 *Records* at 133, 600-01.

Throughout the debate, the Framers were aware that suits involving aliens could impact adversely on the foreign relations of the United States. *See,* A. Hamilton, *The Federalist,* No. 80 at 516-17 (Modern Library ed.); *Sadat* v. *Mertes,* 615 F.2d 1176, 1182 (7th Cir. 1980); 13 Wright, Miller & Cooper, *Fed. Prac. & Proc.,* § 3604 at 606-07 (1975). They did not deem this concern of sufficient magnitude to require federal jurisdiction in suits between two aliens. In a series of early cases, this Court expressed a similar view.

In 1789 Congress enacted the first Judiciary Act, Section 11 of which provided for federal jurisdiction in all cases in which an alien was a party. This Court refused to give effect to Section 11, finding that it was an unconstitutional extension of the alienage jurisdiction provision. *See, Jackson* v. *Twentyman,* 27 U.S. (2 Pet.) 136 (1829); *Hodgson* v. *Bowerbank, supra,* 9 U.S. (5 Cranch) 303 (1809); *Montalet* v. *Murray,* 8 U.S. (4 Cranch) 46 (1807); *Mossman* v. *Higginson,* 4 U.S. (4 Dall.) 12 (1800). It is important to note that while these cases are contemporaneous with *Osborn,* the Court made no effort to extend federal protective jurisdiction to suits between two aliens.

The Constitutional provision defining alienage jurisdiction is itself a type of protective jurisdiction. *See, Lincoln Mills, supra,* 353 U.S. at 474-75, 476 (Frankfurter, J., *dissenting*); Mishkin, *supra,* 53 Colum. L. Rev. at 185. It "was intended to provide the federal courts with a form of

protective jurisdiction over matters implicating international relations where the national interest was paramount." *Sadat* v. *Mertes, supra,* 615 F.2d at 1182. The precise point now raised by Verlinden was fully disposed of at the Constitutional Convention. The Framers long ago decided the extent to which protective jurisdiction would be provided to alien litigants.

The Article III provision defining alienage jurisdiction represents the compromise of the Framers after consideration of the national interest in litigation between foreigners. The provision withholds from federal courts the power to entertain suits between two aliens. To interpret the Act as an expansion of that power would be an unconstitutional violation of the Framers' clear intent.

D. The Court of Appeals' holding that § 1330 of the Act does not provide jurisdiction over suits of this type between two aliens conforms to the intent of Congress underlying the Act.

The Act by its terms permits suits against foreign states to be brought in and adjudicated by the state courts; it does not create an exclusive, protective federal forum. *See, House Report* at 6610. The structure of the Act conforms to the Constitutional authority cited by Congress for the enactment. As noted above, the sole provision of the Article III powers of the federal courts relied on by Congress is the alienage jurisdiction provision. *See, House Report* at 6611.

Congress defined the limits of the original jurisdiction of the district courts pursuant to the alienage jurisdiction provision; it may not be argued persuasively that the removal provision of the Act, 28 U.S.C. § 1441(d), authorizes more expansive jurisdiction.

The Court of Appeals noted that Congress "did not intend 'to open up our courts to all comers to litigate any dispute which any private party may have with a foreign sovereign anywhere in the world.'" (7a). With this in mind, Congress' intent to limit the original jurisdiction of the district courts to the scope of the alienage jurisdiction provision of Article III, aside from being required constitutionally, makes sense, since the Act then precludes forum shopping by an alien plaintiff whose dispute with a foreign state, as here, while having some contact with the United States, has far more substantial contacts with one or more foreign forums.

Conclusion

The Court of Appeals' decision that the District Court is without constitutional power to adjudicate Verlinden's claim against Central Bank is correct. Accordingly, Verlinden's petition for a writ of certiorari should be denied.

New York, New York
December 11, 1981

Respectfully submitted,

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Certificate of Service

I certify that, in accordance with Rule 28.3 of the Rules of this Court, three copies of the within Brief in Opposition have been served upon the following counsel of record for the Petitioner, by delivery to the offices of counsel of record:

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Dated: December 11, 1981

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Petitioner's Reply Brief

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No. 81-920

In The

Supreme Court of the United States

October Term, 1981

VERLINDEN B.V.,

Petitioner,

—v.—

CENTRAL BANK OF NIGERIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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CENTRAL BANK OF NIGERIA,

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PETITIONER'S REPLY BRIEF

The respondent's Brief in Opposition is addressed principally to the merits of the decision below, but it fails to advance any reason why that decision ought not to be reviewed by this Court. On the contrary, respondent suggests that the fundamental issue in this case is whether "the federal interest in the foreign affairs of the United States is such that Congress is entitled to extend jurisdiction pursuant to the 'arising under' provision to any case [against] a foreign state." Brief in Opposition at 11. If that is not an issue of constitutional law of an importance that merits the consideration of this Court, it is hard to think what would be.

It is important, however, that the Court should be clear about some of the factual assertions in the Brief in Opposition.

First, there is no danger that to grant jurisdiction in this case would be "to open up our courts to all comers to litigate any dispute which any private party may have with a foreign sovereign anywhere in the world." Brief in Opposition at 18. Congress has guarded against such a request by requiring that, for jurisdiction to attach, the course of conduct out of which the claim arises must have substantial contacts with the United States.

Second, respondent suggests that its course of conduct giving rise to petitioner's claim had no connection with the United States, and in particular that the functions performed by Morgan Guaranty Trust Company of New York (Morgan) in connection with the transaction were insubstantial. The record is otherwise.

The contracts here in suit were part of a major program by which Nigeria undertook to purchase over 16 million metric tons of cement. (V. 189).* In late 1974 and early 1975, it signed 109 separate contracts on mimeographed forms prepared by it, with an aggregate purchase price of almost $1 billion. (*Ibid.*; V. 65a). Payment was to be made under irrevocable letters of credit to be confirmed through a bank designated by the supplier. (*E.g.*, V. 66a).

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* Record references are to the joint appendices in the consolidated cases below, copies of which have been lodged with the Court in *Federal Republic of Nigeria* v. *Texas Trading and Milling Corp.*, No. 81-885, October Term 1981.

Designations used are as follows:

C.... a Consolidated Joint Appendix in *East Europe Import-Export Inc.* v. *Federal Republic of Nigeria*, Docket No. 80-7773; *Chenax Majesty, Inc.* v. *Federal Republic of Nigeria*, Docket No. 80-7771; *Decor by Nikkei International, Inc.* v. *Federal Republic of Nigeria, Docket* No. 80-7783.

V.... a Joint Appendix, *Verlinden B.V.* v. *Central Bank of Nigeria*, Docket No. 80-7413.

Nigeria refused to provide the letters of credit as called for by the contracts. Instead, it ordered CBN to issue "irrevocable" *unconfirmed* letters of credit, payable through banks of CBN's choice. (*E.g.*, V. 59a). For 14 suppliers, including petitioner, the bank chosen by CBN was Morgan, which had not been designated in the original contracts. These changes, which were made by Nigeria and CBN for their own purposes and acquiesced in by petitioner, made New York the place of payment, the only performance required of Nigeria under the contracts, and established New York law as the law governing that performance.

Morgan was and is Nigeria's principal banker in the United States and CBN's sole commercial correspondent bank in this country. (C. 359a, 507a). In addition to petitioner's credit, Morgan advised or confirmed 16 other letters of credit in an aggregate amount of over $265 million in payment for Nigerian cement contracts. (C. 485a; V. 286a). This enormous volume of letter of credit business resulted in a maze of complex transactions in which Morgan was pivotally involved. At the outset, CBN enlisted the aid of Morgan in persuading the suppliers to accept the changed contract terms. (V. 179a). Morgan provided credit information on at least two of the six plaintiffs in the consolidated appeal below. It advised Nigeria on certain terms of the transaction, including the wording of the letters of credit (C. 314a-315a), warning at one point that the demurrage provisions were dangerously open-ended.

While the letters of credit were in force, Morgan, under CBN's authorization, drew on the funds of CBN and Nigeria on deposit with it and with the Federal Reserve Bank of New York to make payments under the letters of credit. (V. 59a). Frequent amendments to the letters of credit, requested by suppliers, were effected through Morgan. (*E.g.*, V. 155a).

When the port congestion that ultimately led to the repudiation of the contracts began to develop, Nigeria consulted with Morgan in New York on the dimensions of the problem and possible remedies. (*E.g.*, C. 458a-462a). In the end, repudiation was accomplished by instructions transmitted to and carried out by Morgan in New York. (C. 180a). Thereafter Morgan suggested that Nigeria should promulgate a shipping decree to create a colorable basis for an act of state claim. (C. 318a). It advised Nigeria and CBN to retain New York counsel and ultimately referred them to the firm now representing them. (C. 472a, 526a; 465a-466a). Morgan's own legal department advised CBN of the possible consequences of its acts (C. 425a), and that Nigeria "could do serious damage to [its] international credit rating" by dishonoring the letters of credit. (C. 318a). It assisted Nigeria in explicating its policy to the U.S. financial community (C. 329a-337a; 478a-479a), and in the settlement of some 44 claims, including many not otherwise connected with the United States. (C. 320a). All these activities, performed by Morgan on respondent's behalf, count as contacts for jurisdictional purposes. *Gelfand* v. *Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967).

It is true that the court below did not comment on the significance of these jurisdictional facts in its *Verlinden* opinion. And properly so. Having held that it was without subject matter jurisdiction under Article III, it could hardly have proceeded to adjudicate the factual issues. But it did rule on the same fact situation in the companion case, *Texas Trading and Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981). And it found that the U.S. contacts were sufficient to sustain jurisdiction under the Act.

Contrary to respondent's contention, however, Brief in Opposition at 4, the *only* relevant factual difference between the two cases was the citizenship of the plaintiff.

Respondent makes much of the involvement in Verlinden's case of Slavenburg's Bank in Amsterdam. (*Ibid.*; see also *id.* at 3). It is true that under the original contract, the letters of credit were to be issued, confirmed and paid by Slavenburg's. But those provisions of the contract were rendered nugatory when respondent, for its own purposes, issued the letters of credit through and made them payable at Morgan. After that, all the communications with Salvenburg's referred to by respondent were legally irrelevant. It had no more functional relation to the transaction than a vermiform appendix.

The advice from Morgan to petitioner stated:

> Your drafts . . . must be presented to our Commercial Credits Department, 15 Broad Street, New York, N.Y. 10015 with specified documents. (C. 80, 84, 90a).

Alfred Koebel, the officer in charge of Morgan's letter of credit department, testified to the same effect with respect to a letter of credit identical with petitioner's except that First National City Bank was originally designated by the supplier, rather than Slavenburg's:

> Q. Mr. Koebel, I'd like to clear up one point with you that has come up in prior testimony. I notice that in EE4 in evidence, that is the Central Bank documentary credit in favor of East Europe, there is a typed item on the bottom of page 2 which states:
>
> > "Credit to be advised First National City Bank, 40th Street and Broadway, New York.'
>
> What is your understanding of that particular language and what is its effect, as far as you know?
>
> A. That we would not mail the credit directly to the beneficiary, but we would mail our advice of

the credit to First National City Bank, ask them—and we would include a copy of the credit. We would ask them to send the original to the beneficiary and to maintain a copy for their files.

Q. Does that clause mean that East Europe, the beneficiary, could, if it wanted to, present documents to First National City in the first instance under the letter of credit or make presentments to First National City Bank?

A. They could make presentments there, but it's not payable there.

Q. And if they made a presentment at First National City, First National City would then have to come and re-present to you, is that correct?

A. That's correct.

Q. Because you got the money. Okay.

Of course, Slavenburg's Bank could have made presentment at Morgan on petitioner's behalf. Indeed, petitioner could, by appropriate action, have authorized a passerby on the street to make presentment. That does not alter the fact that payment—Nigeria's whole performance obligation under the contract—was to be made only by and at Morgan, in New York.

CONCLUSION

It is respectfully submitted that this case presents an important question concerning the scope of "the judicial power of the United States" under Article III of the Constitution, in every way meet for resolution by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CLERK

No. 81-920

In the Supreme Court of the United States

OCTOBER TERM, 1981

VERLINDEN, B.V., PETITIONER

v.

CENTRAL BANK OF NIGERIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act of 1976 violates Article III of the Constitution to the extent that it permits an alien plaintiff to sue a foreign government in federal district court on a non-federal cause of action.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Discussion	7
Conclusion	16
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264	9
Dames & Moore v. *Regan*, No. 80-2087 (July 2, 1981)	11, 12
International Association of Machinists v. *OPEC*, 649 F.2d 1354, petition for cert. pending, No. 81-645	8
Ipitrade International, S.A. v. *Nigeria*, 465 F. Supp. 824	8
Lathrop v. *Drake*, 91 U.S. 516	12
Mexico v. *Hoffman*, 324 U.S. 30	11
National Mutual Insurance Co. v. *Tidewater Transfer Co.*, 337 U.S. 582	12
Osborn v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738	6, 8, 9, 10
Peru, Ex parte, 318 U.S. 578	11
Powell v. *McCormack*, 395 U.S. 486	11
Rex v. *Cia. Pervana de Vapores*, 660 F.2d 61	12
Romero v. *International Terminal Operating Co.*, 358 U.S. 354	11
Ruggiero v. *Compania Peruana de Vapores*, 639 F.2d 872	15
Schumacher v. *Beeler*, 293 U.S. 367	12
Steamship Co. v. *Tugman*, 106 U.S. 118	15
Tennessee v. *Davis*, 100 U.S. 257	12
Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448	10
The Pacific R.R. Removal Cases, 115 U.S. 1	6, 9, 12
The Schooner Exchange v. *McFaddon*, 11 U.S. (7 Cranch) 116	10

Constitution, statutes and rule: Page

United States Constitution, Article III 1, 5, 6, 7, 8, 9, 10, 14
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330 *et seq.* 3
28 U.S.C. 1330(a) 3, 4, 7, 8, 13
28 U.S.C. 1441(d) 13
28 U.S.C. 1602 14
28 U.S.C. 1603(a) 4
28 U.S.C. 1605-1607 7
28 U.S.C. 1605(a)(1) 8
28 U.S.C. 1608(e) 8
28 U.S.C. 1252 3
28 U.S.C. 1257(3) 14
28 U.S.C. 1331 ..... 6, 10
28 U.S.C. 2403 3
28 U.S.C. 2403(a) 1, 2, 4
Sup. Ct. R. 28.4(b) 3

Miscellaneous:

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) 13, 15
Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157 (1953) 9, 12, 14, 15
S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976) 13
C. Wright, *Law of Federal Courts* (3d ed. 1976) 11
13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* (1975) 11

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INTEREST OF THE UNITED STATES

The United States has a particularly substantial interest in this case. The court of appeals has held that the Foreign Sovereign Immunities Act of 1976 is unconstitutional to the extent that it permits an alien plaintiff to sue a foreign sovereign in federal court on a non-federal cause of action. The court of appeals correctly concluded that Congress intended the statute to apply to such cases, but it nonetheless determined that Congress lacks power under Article III of the Constitution to authorize such suits in federal court.

Despite the fact that the court of appeals invalidated an important federal statute, the court failed to perform its duty under 28 U.S.C. 2403(a) to

notify the Attorney General of the pendency of this constitutional challenge. Section 2403(a) provides in unequivocal terms that, in "any action" in which "the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General." [1]

In addition to failing to notify the United States of the existence of this constitutional challenge, the court of appeals denied the timely motion of the United States to intervene, for the purpose of filing a petition for rehearing en banc to defend the validity of the statute, after the panel had rendered its decision (Pet. App. 55a-57a). This too was inconsistent with Section 2403(a), which provides in the clearest possible language that the court "shall permit the United States to intervene for * * * argument on the question of constitutionality." We are aware of no other court of appeals decision denying the United States leave to intervene in a pending proceeding to defend the constitutionality of a federal enactment.

The practical problems created by the court of appeals' default are serious. Not only has the court

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[1] The court of appeals apparently was of the view (see Pet. App. 56a) that it was relieved of its statutory duty to certify to the Attorney General the existence of a constitutional challenge to a federal statute because the court sent a letter to the Department of State and because its clerk's office had certain conversations with government attorneys. However, the letter of the court, which is attached as an appendix to this brief, did not indicate that this case involved a constitutional challenge to a federal statute (and such a challenge was not apparent from the parties' briefs), and the telephone calls dealt only with procedural questions and the government's request for briefs. Neither the court nor its clerk ever advised any governmental official, let alone the Attorney General, that the constitutionality of the Foreign Sovereign Immunities Act was in dispute.

invalidated an important federal statute without receiving the views of the United States on the constitutional questions presented, but it also has interfered with the ability of the United States to defend the statute in this Court as Congress intended. Had the court of appeals permitted the United States to intervene, as it was required to do, the United States would then have had a right to invoke the mandatory appellate jurisdiction of this Court under 28 U.S.C. 1252 to obtain further review. Section 1252 is intended to assure access to this Court when a federal statute is invalidated in a civil case to which the United States is a party.

In view of the importance of the constitutional question presented in this case, and the inability of the United States to perform its duty to defend an Act of Congress until the present time, the United States has an unusually great interest in urging this Court to grant the petition and to review the decision of the court below.[2]

STATEMENT

1. Petitioner Verlinden B.V. ("Verlinden") is a Dutch corporation that brought suit in the United States District Court for the Southern District of New York against respondent Central Bank of Nigeria ("Central Bank") under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330 *et seq.* Section 1330(a) provides that the district

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[2] 28 U.S.C. 2403 would appear to allow the United States to intervene in this Court as of right to defend the constitutionality of the Foreign Sovereign Immunities Act. See Sup. Ct. R. 28.4(b). We have concluded, however, that the interest of the United States will be adequately served by participating as amicus curiae at this stage.

courts shall have jurisdiction of "any nonjury civil action against a foreign state * * * with respect to which the foreign state is not entitled to immunity" under the terms of the statute. It is undisputed that Central Bank is an "instrumentality of a foreign state" within the meaning of the statute (28 U.S.C. 1603(a)), and therefore is subject to suit under Section 1330(a) (Pet. App. 5a).

The gist of Verlinden's claim against Central Bank is that the parties entered into a contract requiring Verlinden to deliver 240,000 metric tons of cement to the ports of Nigeria. Central Bank, in turn, promised to establish an irrevocable letter of credit in favor of Verlinden for the total purchase price, and took steps to make the letter of credit payable through the Morgan Guaranty Trust Company in New York. However, Central Bank subsequently learned that the ports of Nigeria were clogged with ships and could not take delivery. It thereupon decided unilaterally to impose restrictions on its payments to Verlinden under the letter of credit. As the court of appeals noted, "Central Bank does not seriously dispute" that this action violated its payment obligations under the unconditional agreement with Verlinden (see Pet. App. 4a & n.7, 3a n.5).

2. Central Bank moved to dismiss Verlinden's complaint in the district court on three theories: lack of subject matter jurisdiction; lack of personal jurisdiction; and immunity under the act of state doctrine. In contesting subject matter jurisdiction, Central Bank attacked the constitutionality of the Foreign Sovereign Immunities Act as applied to suits between aliens on non-federal causes of action. However, the district court failed to certify that fact to the Attorney General as required by 28 U.S.C. 2403(a).

Following a hearing on Central Bank's dismissal motion, the district court rejected the challenge to its subject matter jurisdiction (Pet. App. 25a-34a). It first concluded that the "broad and inclusive" language of the statute embraces the present suit. It then explained why a suit under the FSIA is a suit "arising under" federal law (*id.* at 34a; footnote omitted):

> [The statute] incorporates into the concept of jurisdiction substantive, federal criteria for determining the validity of assertions of sovereign immunity. It imposes a single, federal standard to be applied uniformly by both state and federal courts hearing claims brought against foreign states. In consequence, even though the plaintiff's claim is one grounded upon common law, the case is one that "arises under" a federal law because the complaint compels the application of the uniform federal standard governing assertions of sovereign immunity. In short, the Immunities Act injects an essential federal element into all suits brought against foreign states.

The district court subsequently concluded, however, that it lacked personal jurisdiction over Central Bank and dismissed Verlinden's complaint (Pet. App. 34a-54a).

3. Verlinden appealed the district court's judgment dismissing the complaint. Although Central Bank did not raise the question of subject matter jurisdiction or renew its constitutional attack, the court of appeals nonetheless concluded that this case was not within the scope of federal question jurisdiction under Article III of the Constitution.

The court of appeals initially agreed with the district court that the Foreign Sovereign Immunities Act authorizes the present action in federal court.

On this issue, it concluded that "the words of the statute control" (Pet. App. 8a). The court determined, however, that the Act is unconstitutional to the extent that it permits a foreign plaintiff to sue a foreign government in federal court on a non-federal cause of action (*id.* at 20a). In reaching that conclusion, the court characterized the Act as merely a jurisdictional or procedural statute and asserted that a federal case or controversy could not "arise under" such a law (*id.* at 18a-19a). In so holding, the court refused to "be deterred" (*id.* at 19a) by the decision of this Court in the seminal case of *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), in which Chief Justice Marshall, writing for the Court, afforded a broad interpretation to the "arising under" jurisdiction of the federal courts.

In the view of the court of appeals, *Osborn* should be limited to its facts; indeed, a subsequent decision of this Court extending *Osborn* beyond its facts (*The Pacific R.R. Removal Cases*, 115 U.S. 1 (1885)) was dismissed by the court of appeals as a "sport" (Pet. App. 20a n.26). Rather than relying on this Court's decisions construing Article III, the court of appeals apparently believed that Congress' power under the Constitution should be delineated by reference to other decisions construing the "arising under" language appearing in 28 U.S.C. 1331 (Pet. App. 10a, 15a-19a).

The court of appeals reached these striking conclusions without the benefit of briefing by any party on the important issues that it decided. Moreover, the court proceeded without discharging its statutory duty to notify the Attorney General of the pendency of this constitutional question and without allowing

the United States to intervene to seek rehearing once it had rendered its judgment (see pages 1-3, *supra*).

DISCUSSION

The court of appeals has concluded that a federal statute is unconstitutional as applied to a category of litigation that Congress intended to bring within the jurisdiction of the federal district courts to serve important interests of national policy. This ruling cannot be reconciled with prior decisions of this Court and will adversely affect the ability of the United States to extend uniform treatment to foreign governments and to protect overseas investments of American citizens. The petition for a writ of certiorari therefore should be granted.[a]

1. *a.* The court of appeals' conclusion that the present case is not a case "arising under" federal law within the meaning of Article III of the Constitution rests on a fundamental misunderstanding of the Foreign Sovereign Immunities Act and this Court's decisions construing Article III.

Every case filed in the district court under the FSIA raises—at the very threshold of the litigation—a substantial question of federal law. 28 U.S.C. 1330(a) provides that the district courts shall have jurisdiction over actions against a foreign state for "any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. 1605-1607, in turn, set forth the specific standards

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[a] We note that the District of Columbia Circuit currently is considering the same question presented in this case in *Maritime International Nominees Establishment* v. *Republic of Guinea*, No. 81-1073.

that Congress adopted as a matter of national policy to determine whether a foreign nation is entitled to invoke immunity. Thus, in every case, the district court must determine ab initio whether the criteria specified by Congress for permitting claims against foreign nations have been satisfied.[4]

Cases of this character are cases "arising under" the laws of the United States within the meaning of Article III of the Constitution. This Court has held from the very beginning that Article III is a broad delegation of power to Congress to vest the federal judiciary with jurisdiction to interpret all federal legislation. As this Court stressed in *Osborn* v. *Bank of the United States, supra,* 22 U.S. (9 Wheat.) at 818-819: "All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we

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[4] The statute forbids the entry of a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. 1608(e). Accordingly, even if the foreign state does not appear to assert its immunity defense, the district court still must verify that immunity is unavailable and that the criteria prescribed by Congress have been satisfied. See, *e.g., International Association of Machinists* v. *OPEC,* 649 F.2d 1354, 1356-1358 (9th Cir. 1981), petition for cert. pending, No. 81-645 (conducting a full hearing to determine if a defaulting sovereign was entitled to assert the defense of sovereign immunity); *Ipitrade International, S.A.* v. *Nigeria,* 465 F. Supp. 824, 827 (D.D.C. 1978). And even if a foreign state waives its immunity, the trial judge still must decide that the terms of the waiver comport with the federal standard prescribed in 28 U.S.C. 1605(a)(1). In the absence of such a finding, the court cannot proceed with the case under 28 U.S.C. 1330(a). See generally *Osborn* v. *Bank of the United States, supra,* 22 U.S. (9 Wheat.) at 823-824.

examine the constitution of the United States, we find, that its framers kept this great political principle in view." The Court then examined the language of Article III of the Constitution, which vests in the federal judiciary power to consider "all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States * * *." It concluded that this language "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it." *Id.* at 819. Accordingly, this Court emphasized that the federal judicial power may be exerted whenever a question of federal law "forms an ingredient of the original cause" (*id.* at 823) or whenever a "title or right," belonging to either party, "may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction." *Id.* at 822. Accord, *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821); *The Pacific R.R. Removal Cases*, *supra*, 115 U.S. at 11-14.[5]

Suits brought under the Foreign Sovereign Immunities Act plainly satisfy the *Osborn* test because the question of foreign sovereign immunity forms an essential "ingredient" of every such case. In addition, sovereign immunity is a "right or title" that our government, in consideration of national policy

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[5] "Thus it seems clear that the 'judicial power of the United States' may validly be exerted over any case where construction or enforcement of national law is necessary." Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 184 (1953).

and international convention, confers upon foreign states that satisfy the criteria specified under the Act. See *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136-146 (1812). In every case, that right or title "may be defeated by one construction of [the Act] and sustained by the opposite construction." *Osborn* v. *Bank of the United States*, *supra*, 22 U.S. (9 Wheat.) at 822.

While the court of appeals appeared to realize that its decision cannot be reconciled with *Osborn* (Pet. App. 19a), it surmounted that difficulty by holding that *Osborn* should be limited to its facts (*ibid.*). However, the only authority that the court of appeals cited for this conclusion is the solitary dissenting opinion of Justice Frankfurter in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 460 (1957).

The court of appeals also appeared to be of the view that cases construing the "arising under" language of 28 U.S.C. 1331 should be followed here rather than decisions such as *Osborn* construing Article III of the Constitution (Pet. App. 10a, 15a-19a). It concluded that, if Congress has any power under Article III to reach beyond the limited scope of Section 1331, that power is "narrow" (Pet. App. 15a). In adopting this conclusion, however, the court of appeals ignored the fundamental difference between construing a jurisdictional statute such as 28 U.S.C. 1331 and construing the Constitution. Congress is free to correct an unduly restrictive statutory construction, but it cannot remedy an unduly narrow constitutional interpretation. Indeed, the decisions of this Court rely on this distinction in concluding that Article III permits Congress to vest in federal courts power to adjudicate all cases raising federal questions, even though 28 U.S.C. 1331 is more limited in scope. See, *e.g.*,

Romero v. *International Terminal Operating Co.*, 358 U.S. 354, 379 n.51 (1959): "the many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts." See also *Powell* v. *McCormack*, 395 U.S. 486, 515 (1969): "[T]he grant of jurisdiction in § 1331(a), while made in the language used in Art. III, is not in all respects co-extensive with the potential for federal jurisdiction found in Art. III." See generally, 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3562, at 400-401 (1975).[6]

b. The restrictive ruling of the court of appeals also appears to have been affected by the court's assumption that the Foreign Sovereign Immunities Act is merely a procedural or jurisdictional statute, which specifies no substantive federal standards (Pet. App. 14a, 18a-19a). However, the "principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity" (*Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 27). The concept of sovereign immunity, recognized in past decisions of this Court, has uniformly been characterized as "an overriding principle of substantive law." *Ex parte Peru*, 318 U.S. 578, 588 (1943); see *Mexico* v. *Hoffman*, 324 U.S. 30, 35-36

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[6] See also C. Wright, *Law of Federal Courts* 64-65 (3d ed. (1976):

> The very expansive reading Marshall gave [in *Osborn* v. *Bank of the United States*] to the "cases arising under" language of the Constitution is appropriate in dealing with a constitution. It leaves room for Congress to grant such particular jurisdiction as may in the future be seen to be necessary.

(1945); *Rex* v. *Cia. Pervana de Vapores*, 660 F.2d 61, 68 (3d Cir. 1981). Indeed, in *Dames & Moore* this Court pointed out that "[n]o one would suggest that a determination of sovereign immunity divests the federal courts of 'jurisdiction' " (slip op. 26), thus recognizing once again that questions of sovereign immunity and jurisdiction are not coterminous.

c. The ruling of the court of appeals also ignores the many decisions of this Court establishing that, under the doctrine of "protective" jurisdiction, Congress may open the doors of federal courts as an incident of its power to safeguard important federal interests. Jurisdiction exists in such cases to protect essential federal policies and interests even when the cases in question do not always require the application of substantive federal law. See, *e.g.*, *National Mutual Insurance Co.* v. *Tidewater Tranfer Co.*, 337 U.S. 582, 588-600 (1949) (plurality opinion); see also *id.* at 614-615 (Rutledge, J., concurring); *Schumacher* v. *Beeler*, 293 U.S. 367, 371-374 (1934); *The Pacific R.R. Removal Cases*, *supra*, 115 U.S. at 11-14; *Tennessee* v. *Davis*, 100 U.S. 257, 260-266 (1880); *Lathrop* v. *Drake*, 91 U.S. 516, 518 (1876). See also Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 160-163, 184-196 (1953). As Professor Mishkin observes, "in all these situations, Congress had established and affirmatively enacted statutes expressing a national policy in the area concerned; the interests on whose behalf a federal forum was invoked were the subjects of developed congressional regulation. * * * The protective forum in such circumstances is then, principally, a shield for federal legislation. In a very real sense do all such cases 'arise *under*' the laws establishing the congressional plan, within

the meaning of Article III." *Id.* at 195-196 (emphasis in original).

In passing the Foreign Sovereign Immunities Act, Congress defined with precision a narrow class of cases that necessarily implicate the strong federal interest in foreign relations and international commerce. Cases under this statute are precisely the type of cases that logically fall within the jurisdiction of the national sovereign. They are cases in which the government must speak consistently, impartially, and with a clear regard for the role of the United States in the community of nations.

2. A major purpose of the Foreign Sovereign Immunities Act was to assure the consistent treatment of foreign governmental defendants. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 12-13, 32 (1976).[7] A second major purpose of the Act was to protect the overseas investments of American citizens. *Id.* at 6-7. The decision of the court of appeals seriously undermines both of these legislative goals.

a. In passing the Foreign Sovereign Immunities Act, Congress recognized that "a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." *Id.* at 13. It therefore made a deliberate effort to draw all such cases into the federal courts, both through a broad grant of "original jurisdiction" and a comparable grant of removal jurisdiction. See 28 U.S.C. 1330(a), 1441(d).[8] See H.R. Rep. No. 94-1487, *supra*, at 12-

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[7] The committee report issued by the House of Representative is identical to the report issued by the Senate. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976); S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976).

[8] Section 1441(d) provides that "[a]ny civil action" brought in state court against a foreign state "may be removed by the foreign state to the [federal] district court" in the local jurisdiction.

13, 32. The practical effect of the decision of the court of appeals is to relegate suits brought by aliens under the Act to state court (see 28 U.S.C. 1602), but without any possibility of removal.[9] Indeed, if the decision of the court of appeals represents an accurate construction of the limits of Article III of the Constitution, then it would appear to follow that *this* Court, which also is an Article III tribunal, similarly would lack authority to review decisions under the Foreign Sovereign Immunities Act that are rendered in the state court system. This would be true even though the highest state court had rendered a final judgment construing the federal statute, which otherwise would be reviewable under 28 U.S.C. 1257(3).

This result would seriously undermine the congressional goal of uniformity under the Foreign Sovereign Immunities Act. If state courts may freely render interpretations of the statute in cases involving claims by foreign plaintiffs against foreign governments, without any possibility of removal to the federal courts or review by this Court under its Article III appellate jurisdiction, then the handiwork of Congress could be set at naught by inconsistent, erroneous or hostile constructions rendered by local state tribunals.[10]

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[9] Under Section 1602, both the "courts of the United States and of the States" are directed to adjudicate sovereign immunity defenses under the standards prescribed in the Foreign Sovereign Immunities Act. If, as the court of appeals believed, the FSIA is merely procedural in nature and does not establish rules of substantive law, then the state courts arguably are not bound by its limitation, contrary to the literal terms of the FSIA.

[10] See Mishkin, *supra*, 53 Colum. L. Rev. at 163: "Thus, whenever in the course of litigation in any tribunal the determination of a federal issue becomes crucial, it must be possible

b. A primary purpose of the Foreign Sovereign Immunities Act was to protect American trade and investment overseas. H.R. Rep. No. 94-1487, *supra*, at 6-7. However, much of this country's international trade is conducted by foreign affiliates or subsidiaries of American corporations. The Commerce Department advises us that foreign affiliates or subsidiaries of American companies had the following amounts of overseas assets and sales in 1977:

Foreign Affiliates (Non-Banking)	Overseas Sales	Overseas Assets
	[in billions of dollars]	
50% or more American ownership	$507.019	$335.006
10% or more American ownership	$648.708	$494.611

It is well settled that a company incorporated in a foreign country is an alien for purposes of federal court jurisdiction. See, *e.g.*, *Steamship Co.* v. *Tugman*, 106 U.S. 118, 120-121 (1882); *Ruggiero* v. *Compania Peruana de Vapores*, 639 F.2d 872, 875 (2d Cir. 1981). In view of the fact that foreign affiliates of American companies are aliens, the decision of the court of appeals raises serious doubts concerning the ability of such companies to sue foreign governments on non-federal claims in federal court under the FSIA. That result clashes with Congress' purpose to protect American investment overseas by enactment of this statute, with its restrictive standards for recognizing defenses of sovereign immunity.

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for the United States Supreme Court to have the final say; the 'arising under' clause of the Constitution must, therefore, be broad enough to comprehend such cases." Professor Mishkin adds that "[a]ny case which ultimately turns on an issue of national law must be constitutionally within the ken of the high Court." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1981

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
New York 10007

A. DANIEL FUSARO
Clerk

January 29, 1981

Legal Advisor
Department of State
Washington, D.C. 20520

Re: Verlinden B.V. v. Central Bank of Nigeria, 80-7413 Gemini Shipping v. Foreign Trade Organization, 80-7851

Dear Sir:

This court will hear the above entitled cases, dealing with the Foreign Sovereign Immunities Act, on March 6, 1981.

It has been suggested that the Department of State may wish to participate by filing a brief amicus curiae.

Your prompt response to this inquiry would facilitate the consideration of these matters.

Very truly yours,

A. DANIEL FUSARO
Clerk

cc: All counsel

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Petitioner's Brief

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CENTRAL BANK OF NIGERIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does Article III of the Constitution preclude Congress from granting jurisdiction to United States District Courts over a suit against a foreign sovereign by a foreign corporation, asserting claims having a substantial connection with the United States, when the jurisdictional grant is an integral part of the Foreign Sovereign Immunities Act, comprehensively regulating actions against foreign sovereigns in all courts of this country, and enacted in the exercise of the power of Congress over foreign affairs?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	8
I. The Grant of Jurisdiction in the FSIA over "Any Nonjury Action against a Foreign State. . . ." Otherwise Meeting the Requirements of the Act, Is Properly Construed To Cover Cases Like the One at Bar Brought against a Foreign State by a Foreign Corporation	12
II. The Grant of Original Federal Court Jurisdiction over All Suits against Foreign Sovereigns Is a Valid Exercise of the Power of Congress to Provide a Federal Forum for Cases Affecting Federally Protected Interests, in this Case the Effective Conduct of the Foreign Relations of the United States.	16
A. The Potential of Suits against Foreign Sovereigns for Embarrassing the Foreign Relations of the United States Is an Important Federal Concern that May Validly Be Met by Providing a Federal Forum for Adjudicating such Disputes.	16
B. This Court Has Consistently Sustained the Validity under Article III of Grants of Jurisdiction to the Federal Courts for the Protection of Important Federal Interests.	23

PAGE

III. Jurisdiction Is Constitutionally Based on the "Arising Under" Clause of Article III in this Case Because Plaintiff's Claim Is Founded Directly on a Substantive Federal Enactment, the Foreign Sovereign Immunities Act of 1976. 30

A. An Essential Element of the Claim in this Case, which Must be Affirmatively Pleaded and Proved by the Plaintiff and Found Specially by the Court, Is the Absence of Sovereign Immunity as Defined in the Act. 30

B. Since the Act Defines Both the Extent of Liability and the Remedies Available against a Foreign Sovereign, the Cause of Action Sued on Here May Be Said to Be Created by Federal Law. 35

CONCLUSION 38

TABLE OF AUTHORITIES

PAGE

Cases

Bank of the United States v. *Planters' Bank of Georgia*, 9 Wheat. (22 U.S.) 904 (1824) 24

Berizzi Brothers Company v. *S.S. Pesaro*, 271 U.S. 526 (1926) 18

Cook v. *United States*, 288 U.S. 120 (1933) 9,14

Dames & Moore v. *Regan*, ___U.S.___, 101 S.Ct. 2972 (1981) 37

Ex Parte *Peru*, 318 U.S. 578 (1943) 19,37

Glidden Company v. *Zdanok*, 370 U.S. 530 (1962) 11,35

Gulf Oil Co. v. *Gilbert*, 330 U.S. 501 (1974) 15

Gully v. *First National Bank in Meridian*, 299 U.S. 109 (1936) 33

Hepburn and Dundas v. *Ellzey*, 2 Cranch (6 U.S.) 445 (1805) 27

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 18

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 15,34

Joy v. *St. Louis*, 201 U.S. 332 (1906) 24

Lanthrop v. *Drake*, 91 U.S. 516 (1875) 11,26,27

Louisville & National R.R. v. *Mottley*, 211 U.S. 149 (1908) 34

McElrath v. *United States*, 102 U.S. 426 (1880) 11,35,36

The Mayor v. *Cooper*, 6 Wall. (73 U.S.) 247 (1857) ... 12

George Moore Ice Cream Co. v. *Rose*, 289 U.S. 373 (1933) 15

Mossman v. *Higginson*, 4 Dall. (4 U.S.) 12 (1800) 21

PAGE

National City Bank v. *Republic of China*, 348 U.S. 356 (1955) 27,36

National Mutual Insurance Co. v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582 (1949) 27,31,32,37

Osborn v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824) 9,10,16,23,24,25 33,34

Pacific Railroad Removal Cases, 115 U.S. 1 (1885) 23,25

Powell v. *McCormack*, 395 U.S. 486 (1969) 30,31

Reale International, Inc. v. *Federal Republic of Nigeria*, 647 F.2d 330 (2d Cir. 1981) 6

Republic of Mexico v. *Hoffman*, 324 U.S. 30 (1945) .. 19

Rex v. *Cia, Pervana de Vapores, S.A.*, 660 F.2d 61 (3d Cir. 1981) 36

Romero v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) 30,31

Ruggiero v. *Compania Pervana de Vapores*, 639 F.2d 872 (2d Cir. 1981) 11,19,36

The Schooner Exchange v. *McFaddon*, 7 Cranch (11 U.S.) 116 (1812) 18,19,35

Schumacher v. *Beeler*, 293 U.S. 367 (1934) 26,32

Shoshone Mining Co. v. *Rutter*, 177 U.S. 505 (1900) . 24,31

Smith v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1928) 11,31,33

Steamship Company v. *Tugman*, 106 U.S. 118 (1882) 13

Swain v. *Pressley*, 430 U.S. 372 (1977) 15

Tennessee v. *Davis*, 100 U.S. 257 (1880) 10,25

Tennessee v. *Union & Planters' Bank*, 152 U.S. 454 (1894) 34

Texas Trading & Milling Corp. v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) 6,7,11,15

PAGE

Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 24,25,28,29

Toledo Fence & Post Co. v. *Lyons*, 290 F. 637 (6th Cir. 1923) 32

United States v. *Batchelder*, 442 U.S. 114 (1979) 15

United States v. *Belmont*, 301 U.S. 324 (1937) 18,37

United States v. *Pink*, 315 U.S. 203 (1942) 18,37

Verlinden B.V. v. *Central Bank of Nigeria*, 488 F.Supp 1284 (S.D. N.Y. (1980) ..... 2, *passim*

Verlinden B.V. v. *Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981) ..... 1-2, *passim*

Verlinden B.V. v. *Central Bank of Nigeria*, 50 U.S.L.W. 3528 (1982) (*cert. granted*) 2

Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 14

Williams v. *Austrian*, 331 U.S. 642 (1947) 11,26

Williams v. *Shipping Corporation of India*, 653 F.2d 875 (4th Cir. 1981) 36

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 15

Statutes

U.S. Const., Art. III 2,5,7,9,16,17,21,22, 23,24,25,27,30,31,32

Bankruptcy Act of 1867 (14 Stat. 517) 26

Bankruptcy Act of 1899 (44 Stat. 664) 26

Federal Rules of Civil Procedure, R.8(a) 32

Federal Rules of Civil Procedure, R.12(h)(3) 34

28 U.S.C. § 1254 2

28 U.S.C. § 1330 ..... 2,5,6,7,8,10,11,12, 13,14,22,28,29,31,32,33

PAGE

28 U.S.C. § 1331 24,31

28 U.S.C. § 1332 27,32

28 U.S.C. § 1391(e) 22

28 U.S.C. § 1441(d) 10,12,20

28 U.S.C. § 1442 (a)(1) 25

28 U.S.C. § 1471(b) 26

28 U.S.C. § 1491 [The Tucker Act] 27,36

28 U.S.C. § 2403(a) 4,8

28 U.S.C. § 2674 36,37

28 U.S.C. § 2680 36,37

28 U.S.C. § 1603(a) 5

28 U.S.C. § 1605 ..... 3,6,8,10,14,15,29, 31,33,36

28 U.S.C. § 1606 21,29,30,36

28 U.S.C. § 1608 10,29,34

28 U.S.C. § 1610 10,22,29

29 U.S.C. § 185 27,28

Treaties

Friendship Commerce and Navigation Treaties:

United States - Federal Republic of Germany 14

United States - Ireland 14

United States - Israel 14

United States - Italy 14

United States - Japan 14

United States - The Netherlands 9,13-14

PAGE

Miscellaneous

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No. 81-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VERLINDEN B.V.,

Petitioner,

-v.-

CENTRAL BANK OF NIGERIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, written by Judge Kaufman, is dated April 16, 1981, and is reported at 647 F.2d 320. (Pet. App. at 1a).* Judge Weinfeld's opinion in the District Court for the Southern District of New York is dated April 30, 1981, and is reported at 488 F.Supp. 1284. (Pet. App. at 21a).

* References to the Appendix to the *Petition for Certiorari* herein are designated: Pet. App. at __a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Second Circuit was rendered on April 16, 1981. Plaintiff's petition for rehearing *en banc* was denied on August 17, 1981. (Pet. App. at 55a). Plaintiff filed its petition for a writ of certiorari on November 13, 1981. It was granted on January 11, 1982. — U.S. —, 50 U.S.L.W. 3528 (1982).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const., Art. III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 2(a) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a):

> The district courts shall have original jurisdiction without regard to amount in controversy of any non-

jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Section 4(a) of the Foreign Sovereign Immunities Act, 28 U.s.C. § 1605(a):

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is

engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 2403(a):

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all

the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

STATEMENT OF THE CASE

Petitioner, Verlinden B.V. (Verlinden), a Dutch corporation, sued Central Bank of Nigeria (CBN) in the District Court for the Southern District of New York. The basis of the claim was CBN's repudiation of its irrevocable letter of credit issued to pay for a $14.4 million purchase of cement by the Republic of Nigeria from Verlinden. Jurisdiction was asserted under Section 2(a) of the Foreign Sovereign Immunities Act (the "Act" or "FSIA"), 28 U.S.C. § 1330(a). That section provides for original jurisdiction in the federal district courts over "any nonjury civil action against a foreign sovereign . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . under sections 1605-1607 of [the Act]. . . ." CBN, as an instrumentality of a foreign state, is a foreign sovereign within the meaning of the Act. 28 U.S.C. § 1603(a). Suit was brought in the United States because CBN caused the letter of credit to be advised and made payable by and at Morgan Guaranty Trust Company of New York (Morgan), out of Nigeria's U.S. funds on deposit with or controlled by Morgan.

Defendant moved to dismiss on the ground that the claim was not one as to which the defense of sovereign immunity was precluded. In the closing phases of the District Court proceeding on that motion, defendant raised the further objection that the statute failed to meet the requirements of Article III of the Constitution. It was conceded that there was no diversity jurisdiction; and, defendant argued, the case was not one "arising under" the Constitution, laws or treaties of the United States. After supplementary briefs and argument on this point, Judge Weinfeld rejected defendant's contention. 488 F. Supp. at 1292, Pet. App. at 34a. He went on to grant the motion to dismiss, however, on

the ground originally asserted: that the claim was not one as to which sovereign immunity was unavailable under § 1605 of the Act, and thus did not fall within the jurisdictional grant of § 1330. *Id.* at 1293-1300, Pet. App. at 34a-49a.

On appeal, this case was consolidated with five others that were identical with it in all respects relevant to the jurisdictional issues, except that the five other plaintiffs were United States corporations. The six plaintiffs filed consolidated briefs on the applicability of the Act. The only issue briefed by either side was whether the claim was one falling within § 1605 so that defendants were not entitled to sovereign immunity. On this issue the Court of Appeals, in an extended opinion, held for the U.S. plaintiffs. *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981.)* It concluded that the decision to operate through Morgan, and thus to make the United States the place of payment (and later the locus of repudiation), "came in the course of a longstanding relationship between Nigeria and Morgan," pursuant to which Nigeria and CBN used Morgan to carry out a broad panoply of functions in the United States on their behalf. 647 F.2d at 304-05; see also *id.* at 314-15. CBN's own conduct thus created the vital nexus between the transactions in suit and the United States.

Among Morgan's activities on behalf of Nigeria and CBN were the following:

—it advised or confirmed letters of credit financing cement contracts totalling $265 million; (II App. 485a; I App. 286a)**

—it helped persuade suppliers to accept fundamental changes in contract terms; (I App. 179a)

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* One of the six cases, *Reale International, Inc.* v. *Federal Republic of Nigeria*, 647 F.2d 330 (2d Cir. 1981), was remanded to the District Court on a ground not relevant here.

** By order of February 22, 1982, the Court authorized the use in this proceeding of the joint appendices in the consolidated cases below. These consist of four volumes designated, for the purposes of record references as I App.-IV App.

—it provided Nigeria with credit information on some suppliers; (II App. 390a)

—it advised Nigeria on the terms of the transactions and the wording of the letters of credit; (II App. 314a-315a)

—it drew on Nigeria's funds on deposit with it or with the Federal Reserve Bank of New York to make payments under the letters of credit; (I App. 59a)

—in the end, repudiation of the letters of credit was accomplished by instructions transmitted to and carried out by Morgan in New York; (II App. 180a)

—it counseled CBN on the mechanics of the repudiation, on the likelihood of litigation in New York and on the counsel to be retained to defend such suits. (II App. 318a, 472a, 526a, 465a-466a)

All these activities, the court held, were properly chargeable to defendants in determining whether the transactions sued on had the requisite contacts with the United States. *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d at 314. In all these respects, Verlinden's position was precisely the same as that of the other plaintiffs.

But as to Verlinden, the Court of Appeals refused to remand. Instead, *sua sponte*, it raised the question of Article III jurisdiction on oral argument, asking a few questions of plaintiff's counsel on this point. Thereafter, and without providing an opportunity for briefs or oral argument directed to the issue, the Court of Appeals held the Act *pro tanto* unconstitutional. It held, as did Judge Weinfeld below, that § 1330, in vesting jurisdiction in the district courts over "any . . . action against a foreign state . . . ," must be construed to include actions brought by an alien plaintiff. The Court asserted, however, that such a case is not one "arising under . . . the Laws of the United States" within the meaning of Article III. Congress was thus without power to grant federal court jurisdiction of this case. The District Court's dismissal of the action was affirmed on this ground.

Upon learning of the decision, the United States moved for leave to intervene and for rehearing on the ground that the Court of Appeals had not certified to the Attorney General, as required by 28 U.S.C. § 2403(a), that "the constitutionality of [an] Act of Congress affecting the public interest [was] drawn in question"; nor had the United States been permitted "to intervene . . . for argument on the question of constitutionality" as is also required by that section. This motion was summarily denied on May 4, 1981. (Pet. App. at 56a). A subsequent petition by the United States for rehearing *en banc* on these issues was denied on August 17, 1981. (Pet. App. at 55a). Verlinden's petition for rehearing *en banc* on these issues was denied by the same order of August 17, 1981.

SUMMARY OF ARGUMENT

The decision below challenges the constitutionality of 28 U.S.C. § 1330 insofar as it authorizes suit by a foreign corporation against a foreign sovereign when the other conditions of the FSIA are met. Under familiar principles, the first inquiry in such a case is whether it is covered by the statutory grant of jurisdiction. Here, both courts below held that it is. 647 F.2d at 323-24, Pet. App. at 5a-8a; 488 F.Supp. at 1288-93, Pet. App. at 25a-34a; see 1 Moore, Federal Practice ¶ 0.66[4] at 700.178-79. The language of the statute is plain. It extends to "*any* nonjury civil action against a foreign state. . . ." (emphasis supplied) where the other requirements of the Act are satisfied, without regard to the citizenship of the plaintiff. The Act guards against unwanted litigation in U.S. courts not by limiting the plaintiffs who can sue, but by requiring that the transaction sued upon should have specified contacts with the United States. 28 U.S.C. § 1605(a); H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 13 (1976) (hereafter H. Rep.)*

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* Reprinted in 1976 U.S. Code Cong. & Admin.News 6604; see also I App. 81a. The Senate Report is identical. S. Rep. No. 94-1310, 94 Cong., 2d Sess. (1976). To avoid duplication this brief cites only to the House Report.

It is argued that the statutory authority to sue should be limited to citizen plaintiffs because the major purpose of the Act was to provide judicial remedies for American enterprises in their dealings with foreign states. This purpose would be frustrated, however, unless foreign corporations can sue, since much U.S. business abroad—and thus with foreign states and their instrumentalities—is conducted through foreign subsidiaries. Moreover, Verlinden, as well as nationals of a number of other countries, are entitled to access to U.S. courts on the same basis as U.S. citizens, under applicable treaties of establishment. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, United States-The Netherlands, March 27, 1956, Art. V, 8 U.S.T. 2043, 2048 (1956). It is axiomatic that a statute will not be construed to abrogate treaty rights without an express manifestation of congressional intent to do so. *Cook* v. *United States*, 288 U.S. 102, 120 (1933). There is no such manifestation here.

Thus, the constitutional issue cannot be avoided.

The seminal case on the "arising under" clause of Article III is *Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824). There Chief Justice Marshall declared that the clause establishes the judicial power as coextensive with the executive and the legislative; and that a case arises under the laws of the United States when "the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction. . . ." *Id.* at 822.

From these pronouncements have emerged the two main branches of federal question jurisdiction. A case is within the "arising under" clause if it is founded directly on the Constitution or a statute or treaty of the United States or on federal common law. But the constitutional grant is broad enough to empower Congress to vindicate important federal interests by providing a federal forum for cases implicating those interests, even when the merits of the claim are governed by nonfederal law.

Verlinden's case qualifies on both counts.

The federal interest at stake here is the effective conduct of the foreign relations of the United States. Foreign affairs are uniquely the province of the federal government. One of the main objects of the Constitutional Convention was to make that so, and to the exclusion of the States. As this Court has repeatedly held, the Framers accomplished that object.

The FSIA is an exercise of the federal power over foreign relations. Congress recognized that, under contemporary conditions where foreign states and their instrumentalities are routine participants in international commerce, it is necessary to subject them in their ordinary commercial transactions having significant contacts with this country to the ordinary course of law. At the same time, Congress was aware that a suit against a foreign sovereign is a delicate matter, potentially disruptive of friendly relations. The Act therefore seeks to concentrate such suits in the federal courts on terms and conditions similar to those on which the United States itself has consented to suit. Although federal jurisdiction is not exclusive, the removal section of the Act, 28 U.S.C. § 1441(d), is congruent with § 1330 and ensures that a foreign state will not be sued in a state court without its consent. In addition to laying down the conditions on which the sovereign will be entitled to immunity, the Act provides for the first time for service of process on the sovereign and execution on its assets, and defines the extent of liability and certain aspects of the remedies. 28 U.S.C. §§ 1608, 1610, 1605(a). All this is expressly made binding on all state and federal courts as a matter of preemptive federal law. H.Rep. at 12.

Thus, "there is an articulated and active federal policy regulating [the] field" of suits against foreign sovereigns. See Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 192 (1953) (hereafter Mishkin); Hart & Wechsler, The Federal Courts and the Federal System 868 (Bator, Shapiro, Mishkin, Wechsler ed. 1973) (hereafter Hart & Wechsler). Under such circumstances, this Court has never failed to uphold "arising under" jurisdiction, even where federal law does not govern the merits of the claim. *E.g. Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824), (suit by federally chartered corporation); *Tennessee* v. *Davis*, 100 U.S.

57 (1880) (removal of suits against federal officers); *Lathrop* v. *Drake*, 91 U.S. 516 (1875) (suits by trustee in bankruptcy against a co-citizen on a claim of the estate); *Williams* v. *Austrian*, 331 U.S. 642 (1947) (same).

Moreover, under § 1330, the action will not lie unless the claim is one as to which the foreign state is not entitled to sovereign immunity as defined in the Act. Since the requirement is jurisdictional, it must be affirmatively pleaded and proved by plaintiff and specially found by the court. Thus, an essential element of plaintiff's claim is governed by federal law. Such a case arises under federal law in the narrowest meaning of the words. *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

Finally, it may be said that the Act actually created the cause of action. The traditional view is that there was no right of action against a foreign sovereign at common law. The Federalist No. 81, 511 (Hamilton) (B. Wright ed. 1961). On this basis, denial of jury trial has been uniformly upheld in suits against the United States, *e.g.*, *McElrath* v. *United States*, 102 U.S. 426 (1880), and under the FSIA. *E.g.*, *Ruggiero* v. *Compania Pervana de Vapores*, 639 F.2d 872 (2d Cir. 1981).

The Act, for the first time, codifies the restrictive theory of sovereign immunity and grants a right of action for injuries growing out of the sovereign's commercial and other ordinary activities. It deals not only with the scope of sovereign immunity, but extensively with both the substance and procedure of suits against foreign sovereigns. The provisions parallel those of the Federal Tort Claims Act and the Tucker Act consenting to suit against the United States. Claims under those acts are said to arise under the laws of the United States. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 556, 565 (1962); Mishkin, *supra*, at 193. The same must hold for this suit under the FSIA.

There is no distinction whatever between the jurisdictional facts here and in the four cases decided below *sub nom. Texas Trading & Milling Corp.*, 647 F.2d 300, except that Verlinden is a Dutch rather than a U.S. citizen. That distinction is without constitutional significance in this case. The decision below

should be reversed and the case remanded to the District Court for trial on the merits.

I. The Grant of Jurisdiction in the FSIA over "Any Nonjury Action against a Foreign State. . . ." Otherwise Meeting the Requirements of the Act, Is Properly Construed to Cover Cases Like the One at Bar Brought against a Foreign State by a Foreign Corporation.

Jurisdiction in this case is founded on 28 U.S.C. § 1330. The first question, therefore, is whether that statutory grant of jurisdiction encompasses cases, like Verlinden's, brought by an alien corporate plaintiff against a foreign sovereign. *The Mayor* v. *Cooper*, 6 Wall. (73 U.S.) 247, 252 (1857). Both courts below agreed that, as a matter of statutory construction, § 1330 should be read to embrace such a case. 647 F.2d at 323-24, Pet. App. at 5a-8a; 488 F.Supp. at 1288-93, Pet. App. at 25a-34a.

The statute is in terms unlimited. It grants jurisdiction over "*any* nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity. . . ." (emphasis supplied). Similarly, 28 U.S.C. § 1441(d), the removal section, which is congruent with the grant of original jurisdiction in § 1330, authorizes removal by the defendant of "*any* civil action brought in a State court against a foreign state. . . ." (emphasis supplied).

The only argument advanced for refusing to give effect to the ordinary meaning of this comprehensive language is that at scattered points in the legislative history reference is made to a purpose to protect "American" businessmen or "U.S. citizens" in their dealings with foreign governments. See 647 F.2d at 323, Pet. App. at 5a-6a. As both courts below pointed out, however, these snippets are balanced by other references to the need for judicial determination of claims against foreign sovereigns without regard to the citizenship of the claimant. *Id.* at 324, Pet. App. at 7a; 488 F.Supp. at 1291-92, Pet. App. at 32a-33a. That was enough to dispose of the matter below and it should be

sufficient here as well. *See* 1 Moore, Federal Practice ¶ 0.66[4] at 700.178-79. There is little to be gained from a further competition in curry-combing the legislative materials.

Two other considerations, not addressed by the Court of Appeals, also argue strongly for the same result. *First*, even on the assumption that the overriding purpose of Congress was to protect U.S. enterprises, that purpose itself cannot be achieved unless the statute is read to grant jurisdiction in cases brought by alien corporate plaintiffs. A very large portion of the overseas business of U.S. concerns, including business with foreign sovereigns, is carried on through subsidiaries organized abroad. According to the Department of Commerce, more than 85% of U.S. foreign direct investment is made through foreign subsidiaries. U.S. Dept of Commerce, *Survey of Current Business* 17 (Aug. 1980). In 1977, majority-owned nonbank foreign affiliates of U.S. companies had over $507 billion in sales and $335 billion in assets. *Brief for the United States as amicus curiae* on Petition for Certiorari herein, at 15. The figures for foreign companies in which there are substantial U.S. minority interests are much larger. *Id.* These affiliates, whether wholly or partially owned by the American parent, are treated for jurisdictional purposes as citizens of the country in which they are organized. *Steamship Co.* v. *Tugman*, 106 U.S. 118 (1882). Unless they can sue under § 1330, many transactions that are in substance between U.S. enterprises and foreign sovereigns would be insulated from the remedial design of the Act.

Second, under treaties of establishment in force between the United States and most of its major trading partners, this country is obligated to extend access to its courts to nationals of the treaty partner on the same basis as it does to its own nationals. In this very case, Verlinden, as a Dutch company, is the beneficiary of our treaty with the Netherlands, which provides:

> Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice . . . within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.

Treaty of Friendship Commerce and Navigation, United States-The Netherlands, March 27, 1956, Art. V, 8 U.S.T. 2043, 2048, T.I.A.S. No. 3942.

Section 1330 must be construed, therefore, to permit suit by a foreign national or company in circumstances where a U.S. national or company would have access to a federal court, or else the United States would be in breach of its treaty obligations not only with the Netherlands, but with numerous other treaty partners as well.* This Court has repeatedly held that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook* v. *United States*, 288 U.S. 102, 120 (1933) (*per* Brandeis, J.); *accord: Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979). No such manifestation of congressional purpose to abrogate treaty rights appears here.

It is true, of course, that in enacting this legislation, Congress had no intention "to open up our courts to all comers to litigate any disputes which any private party may have with a foreign state anywhere in the world." See, *e.g.*, *Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 31 (1976) (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Div., Dep't of Justice). The Act does not establish an international court of claims. Congress ensured against that result, however, not by limitations in § 1330 on the kind of plaintiffs who could sue, but by substantive limitations in § 1605 on the kinds of transactions on which suit could be based. "[E]ach of the immunity provisions in the bill," as the House Report explained, "requires some connection

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* See, *e.g.*, Friendship Commerce and Navigation Treaties: Feb. 2, 1948, United States-Italy, Art. V, 63 Stat. 2255, 2262 T.I.A.S. No. 1965; Jan. 21, 1950 United States-Ireland, Art. VI, 1 U.S.T. 785, 791 T.I.A.S. No. 2155; Aug. 23, 1951, United States-Israel, Art. V, 5 U.S.T. 550, 555, T.I.A.S. No. 2948; April 2, 1953, United States-Japan, Art. IV, 4 U.S.T. 2063, 2067, T.I.A.S. No. 2863; Oct. 29, 1954, United States-Federal Republic of Germany, Art. VI, 7 U.S.T. 1839, 1845, T.I.A.S. No. 3593.

between the lawsuit and the United States." H. Rep. at 13.* Thus, the statute can be availed of only when the underlying transaction is properly a concern of the United States and within the traditional ambit of the jurisdiction to adjudicate of American courts. The requisite contacts, both statutory and constitutional, were present here, as was determined by the court below in the companion case of *Texas Trading & Milling Corp.*, 647 F.2d 300, on facts that were identical to those here except for the citizenship of the plaintiff.

It is of course a properly cautionary principle of statutory construction to read the statute in such a way as to avoid raising constitutional questions. But twice recently the Court has had occasion to remind that this principle is applicable only when an alternative reading is "fairly possible." *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977); *United States* v. *Batchelden*, 442 U.S. 114 (1979). No alternative reading is available here without doing violence to the purpose of Congress and the treaty obligations of the United States. In such a case, as Justice Cardozo said, "[t]he problem must be faced and answered." *George Moore Ice Crean Co.* v. *Rose*, 289 U.S. 373, 379 (1933).

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* Section 1605(a)(1), providing for cases where the foreign sovereign has waived its immunity, contains no express provision that the transaction must be connected with the United States. But the due process clause itself requires minimum contacts with the United States before personal jurisdiction on the merits can be exercised over the foreign sovereign that has waived its immunity in advance of suit, absent an express submission to the jurisdiction of the forum. *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981); *see, e.g., International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). The due process requirements then provide additional assurance that there will be substantial connection with the United States in transactions sued on under the Act. *Forum non conveniens* is also available to prevent imposition on the court's jurisdiction. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1974).

II. The Grant of Original Federal Court Jurisdiction over All Suits against Foreign Sovereigns Is a Valid Exercise of the Power of Congress to Provide a Federal Forum for Cases Affecting Federally Protected Interests, in this Case the Effective Conduct of the Foreign Relations of the United States.

A. The Potential of Suits against Foreign Sovereigns for Embarrassing the Foreign Relations of the United States Is an Important Federal Concern that May Validly Be Met by Providing a Federal Forum for Adjudicating such Disputes.

Article III of the Constitution provides that the judicial power of the United States "shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States. . . ." In its first comprehensive treatment of this clause, the Court, in one of the notable opinions of Chief Justice Marshall, starts from the premise that in "every well-constructed government," the judicial power must be "co-extensive" with the legislative and executive. *Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738, 818 (1824); see also The Federalist No. 80, 500 (Hamilton) (B. Wright ed. 1961) (it is a "political axiom" that "the judicial power of a government [should be] co-extensive with its legislative."). This requirement is fulfilled by the "arising under" clause, which "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it." *Osborn* v. *Bank of the United States*, *supra*, at 819. And in words that have become even more familiar, Marshall held: "it [is] a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction. . . ." *Id.* at 822.

On these principles, as elaborated in later cases, it is beyond dispute that the "arising under" clause extends to any case in

which a question involving the interpretation or enforcement of federal law is an essential element of plaintiff's claim. The case at bar is such a case, as is demonstrated below in Point III.

But there is a more fundamental sense in which this case arises under federal law. Scholars have uniformly concluded that the clause provides a vehicle for "the protection of some congressionally favored interest by exploiting the institutional differences between the federal and state courts." Mishkin, *supra*, at 184. Or, more broadly,

> cases arising under the laws of the United States, within the meaning of Article III, include not only those which are governed on the merits, in whole or in part, by validly established federal rules of decision, . . . but also those brought pursuant to a valid federal statute enacted to prevent the possibility of discrimination against federally-protectible interests.

Hart & Wechsler, *supra*, at 416. This Court, without formulating any comprehensive theory, has repeatedly sustained the validity and propriety of congressional grants of such "protective jurisdiction." See cases discussed in Point II, B., pp. 23-30, *infra*. Indeed, the Court has never invalidated an Act of Congress extending a federal judicial forum for the protection of a federal interest.

In this case, there is a "federally-protectible interest" of the first magnitude: the effective conduct of the foreign relations of the United States. A paramount object of the Constitutional Convention was "to establish a strong central government which should have control of all foreign relations." Farrand, The Framing of the Constitution 47 (1913). In Madison's words, "[i]f we are to be one nation in any respect, it clearly ought to be in respect of other nations." The Federalist No. 42, 302 (Madison) (B. Wright ed. 1961). The same theme is sounded again and again in the opinions of this Court:

> The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42 and 80.

Hines v. *Davidowitz*, 312 U.S. 52, 62 n.9 (1941). And even more sweepingly:

> In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.

United States v. *Belmont*, 301 U.S. 324, 331 (1937). Unlike other branches of federal power, such as that granted by the commerce clause, "[p]ower over external relations is not shared by the States; it is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942).

In enacting the FSIA, Congress expressly asserted that it was exercising its foreign relations powers "to define offenses against the 'Law of Nations [and] to regulate commerce with foreign nations. . . ." H. Rep. at 12. The Act is the product of a decade of careful study and consideration.* It represents a broad policy decision by Congress that, henceforth, foreign states and state enterprises should be answerable with respect to their commercial activities on the same basis as private persons. "In a modern world where foreign state enterprises are every day participants in commercial activities, [the Act] is urgently needed legislation." H. Rep. at 7.

The congressional decision to judicialize the whole subject of sovereign immunity was a sharp departure from earlier practice. Until 1952, the United States followed the "absolute theory" of immunity, under which the foreign sovereign was absolutely immune from suit. *The Schooner Exchange* v. *McFaddon*, 7 Cranch (11 U.S.) 116 (1812); *Berizzi Bros. Co.* v. *S.S. Pesaro*, 271 U.S. 562 (1926). Thereafter, the Executive Branch shifted to the "restrictive theory." Letter dated May 19, 1952 from Jack B. Tate, Acting Legal Adviser, Dep't of State, to the Acting Attorney General (the "Tate letter"), 26 Dep't of State Bull. 984 (1952). But in practice, the immunity decision was made in case-

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* For the original memorandum proposing a statutory solution to the problem of sovereign immunity, presented to the State Department Legal Adviser in 1966, see I Chayes, Ehrlich & Lowenfeld, International Legal Process 150 (1968).

by-case determinations in the State Department that were often affected by political considerations. H. Rep. at 7. These executive branch suggestions were accepted as binding by the courts. Ex parte *Peru*, 318 U.S. 578 (1943); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945).

In adopting this new approach Congress was keenly aware, as this court has recognized, that a suit against a foreign sovereign represents a serious challenge to its dignity and may affect friendly relations with it. Ex parte *Peru*, 318 U.S. at 588. It was the potential impact of such cases for foreign relations that led to the insistence on the absolute rule of immunity in the first place and to the rule that the courts must defer absolutely to an executive suggestion of immunity. *The Schooner Exchange* v. *McFaddon*, 7 Cranch (11 U.S.) 116; Ex parte *Peru*, 318 U.S. 578. The same judicial sensitivity animated the persistence of the rule of deference even after the Executive Branch adopted the restrictive approach to sovereign immunity. *See Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945).

Congress demonstrated its own sensitivity to the foreign relations problems by making foreign sovereigns subject to suit on generally the same terms and conditions on which the United States itself has consented to suit. See 1 Moore, Federal Practice ¶ 0.66[5] at 700.180-81; Point III, B, pp. 35-37, *infra*. As Judge Friendly said,

> . . . Congress could legitimately consider that a partial withdrawal of sovereign immunity from foreign states would interfere with United States' international relations unless such states were accorded protection similar to what it had given itself. Foreign countries can hardly object to the United States' subjecting them to trial by a judge in commercial cases when the United States itself is subject to the same sort of trial in its own courts and in theirs.

Ruggiero v. *Compania Pervana de Vapores*, 639 F.2d 872, 880 (2d Cir. 1981).

To dampen the potential foreign relations impacts of its restriction of sovereign immunity, Congress sought to concen-

trate litigation under the Act in the federal courts. The legislative history is explicit both as to this intent and its purpose:

> [B]road jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. . . .

H. Rep. at 13. To be sure, the Act does not make federal jurisdiction exclusive. But the removal provision, 28 U.S.C. § 1441(d), ensures that the foreign sovereign cannot be sued in the state court unless, by its failure to remove, it consents.*

> In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts.

H. Rep. at 32. The section extends the time for removal to 60 days "in view of the bill's preference that actions involving foreign states be tried in Federal courts. . . ." *Id.* Again, the jurisdictional amount is waived "to encourage the bringing of actions against foreign states in Federal courts." *Id.* at 13.

Professor Mishkin identifies the reasons why Congress might prefer a federal tribunal for suits affecting vital federal interests: "freedom from local biases and pressures, the somewhat different sources from which personnel of the two systems may be drawn and the divergent ranges of daily experience to which they are exposed. . . .", Mishkin, *supra*, at 184-85; and also because of a greater sensitivity to federal concerns. *Id.* at 158-59, 175-76. All these factors are significant in cases involving foreign sovereigns. Indeed, the Constitution has a built-in preference for dealing with international matters in federal tribunals. Hamilton's celebrated exegesis of the heads of federal

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* In this respect the Act simply preserves the *status quo*, since the sovereign always had the option of consenting to suit in a state court. Congress had no intention of reducing existing rights of plaintiffs.

jurisdiction in the 80th Federalist maintains that a primary function of the federal judicial power is to provide for the adjudication of disputes touching foreign affairs.

> The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.

The Federalist No. 80, 500-01 (Hamilton) (B. Wright ed. 1961)

Hamilton speaks only of cases involving citizens of other countries, but of course he adhered to the then-universal view that no cause of action lay against a foreign sovereign. The Federalist No. 81, 511 (Hamilton) (B. Wright ed. 1961); see discussion, pp. 35-37, *infra*. His argument has even greater pertinence to suits against a foreign state, if he could have contemplated them.*

There is still a further consideration favoring the federal forum. The legal content of these cases makes them peculiarly appropriate for federal court adjudication. It is inaccurate to say that cases under the Act are governed by "state law." The language of § 1606 is that "the foreign state shall be liable in the same manner and to the same extent as a private individual." In

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* The court below cited *Mossman* v. *Higginson*, 4 Dall. (4 U.S.) 12 (1880), for the proposition that a suit between two aliens is not within the purview of Article III. As Judge Kaufman recognized, *Mossman* is only a construction of § 11 of the Judiciary Act of 1789. And the alienage issue is a secondary ground of decision at that. The main holding was that in a diversity action, the citizenship of the parties must appear from the complaint. Plaintiff had not pleaded defendant's citizenship, and he tried to rescue the case at the Supreme Court level by arguing that his own alienage brought it within § 11. 4 Dall. (4 U.S.) at 13. There is of course no suggestion that the jurisdictional grant was part of a broader legislative scheme for the regulation of foreign affairs. In any case, *Mossman* was decided before any of the seminal cases on Article III, and it has been suggested that, in light of them, the constitutional premises involved can no longer be maintained. Hart & Wechsler, *supra*, at 417.

many if not most FSIA cases, the applicable law will be foreign law or international law. In this case, for example, the cement contract stipulates the law of the Netherlands (I App. 68a), and the letter of credit is governed by the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce. (I App. 59a). Moreover, the provisions of the Act for service of process and venue are such that the suit can be brought in any State with which the transaction has minimum contacts, not necessarily the one whose law applies. 28 U.S.C. §§ 1330(b), 1391(e).

It is no disrespect to the state courts to recognize that on the whole they do not have frequent occasion to deal with questions of foreign and international law. Nor are they often called upon to handle complex issues of international choice of law that are characteristic of these cases. Lacking such expertise, and with the best of intentions, they may be led into a parochial view of the applicable law. This would not only prevent the just resolution of the dispute, but exacerbate the friction with a foreign sovereign that is compelled to submit to state judicial authority. The potential for such conflict is especially great in view of the unprecedented provisions of the Act for execution on sovereign assets. 28 U.S.C. § 1610.

By the same token, the state interest in FSIA cases brought by foreign plaintiffs is relatively weak. The application of its own law, as we saw, will not necessarily be involved. The dispute is, by hypothesis, between two non-citizens, neither of which is generally subject to the State's laws or a claimant for its protection. Adjudication by the federal courts represents no invasion of areas crucial to the States' concerns and sovereignty. The harsh dilemmas of federalism are not presented here.

If Article III precluded jurisdiction in the instant case Congress would be faced with three choices, all equally unappealing. It could forego the effort to provide judicial redress against foreign sovereigns for foreign subsidiaries of U.S. corporations and others, such as resident aliens or guests, who are entitled to the protection of U.S. law. Or it could consign such suits exclusively to the state courts at the cost of extensive breach of

treaty obligations at a minimum, see *supra*, pp. 13-14, and of other potential disruptions of relations with friendly foreign states. Or, under the commerce power, it could enact a comprehensive code of substantive law governing transactions with foreign sovereigns to provide a foundation for federal jurisdiction. Fortunately, the Constitution imposes no such constricted range of choices.

B. This Court Has Consistently Sustained the Validity under Article III of Grants of Jurisdiction to the Federal Courts for the Protection of Important Federal Interests.

Every time it has been called upon to do so, this Court has sustained the congressional grant of protective jurisdiction on the basis of the "arising under" clause. The occasions, though relatively few, are of great importance. The factual settings are widely disparate. But all of them have at their core a purpose by Congress to vindicate an important national interest by providing a federal forum for resolving disputes implicating that interest.

The first such case is *Osborn* itself. Chief Justice Marshall there said that for Article III purposes the federal question must form "an ingredient of the original cause." 9 Wheat. (22 U.S.) at 824.* But in fact, the federal elements on which he relied to support "arising under" jurisdiction were at best background issues. Although the Bank's claim against the state officers was for unconstitutional seizure of its property, Marshall ignored this decisive federal question. Instead, he argued that the case arose

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* Later holdings of this Court as well as scholarly commentary establish that a potential federal question in the defense or later stages of the action also suffices to bring the case within the broad sweep of the "arising under" clause of Article III. *E.g. Pacific Railroad Removal Case*, 115 U.S. 1 (1885) (federally incorporated corporation on either side of case sufficient for federal question jurisdiction); *see* Chadbourne & Levin, *Original Jurisdiction of Federal Questions*, 90 U.Pa.L.Rev. 639, 650 (1942); American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts 178-79 (1969) (proposed § 1312).

under federal law because the regularity of the Bank's organization under its federal charter, its capacity to sue and be sued, or its power to contract were implicitly involved in any case to which it was a party. On the very same day that *Osborn* was decided, the Court upheld jurisdiction in a suit by the Bank on an ordinary commercial contract involving no federal element other than these potential questions under its charter. *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. (22 U.S.) 904 (1824). The presence of such background issues would not, of course, satisfy today's statutory requirements for original jurisdiction under 28 U.S.C. § 1331. *See, e.g. Joy* v. *St. Louis*, 201 U.S. 332 (1906); *Shoshone Mining Co.* v. *Rutter*, 177 U.S. 505, 507 (1900); discussion, Point III, A, pp. 30-35, infra.

Marshall, however, was not seeking simply to ensure access to a sympathetic forum to decide issues of *federal* law involving the Bank. He doubtless assumed, as Professor Mishkin tells us, that the Bank's contracts and other transactions would be governed by state law and that most of its litigation would not raise any disputed questions of federal law. Mishkin, *supra*, at 161. His purpose was broader. It was "the protection of the Bank in all its legal relations, including those governed wholly by state law." Mishkin, *supra*, at 187. Thus, "the ultimate foundation of *Osborn*" lies in "a protective jurisdiction exist[ing] to prevent discrimination against federal instrumentalities or interests. . . ." Hart & Wechsler, *supra*, at 868.

The court below recognized that *Osborn* was inconsistent with its own analysis of Article III. Nevertheless, it refused to "be deterred," 647 F.2d at 329, Pet. App. at 19a, suggesting that *Osborn* was essentially a political response to political attacks on the Bank and should therefore be confined to its facts. *Id.* The only authority cited for this remarkable proposition is Justice Frankfurter's solitary dissenting opinion in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 481 (1957). In fact Osborn has been repeatedly relied on by courts and commentators as a repository of Article III jurisprudence. "[T]o confine its authority to such situations [involving federally chartered corporations] is to ignore the purpose and function of the decision." Mishkin, *supra*, at 187.

In the area of federal corporations, the *Osborn* holding was extended by the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885). There the Court held, on the authority of *Osborn*, that the presence of a federally chartered *privately-owned* corporation on either side of the case made it one arising under federal law within the meaning of the 1875 *statutory* grant of federal question jurisdiction. Again, on the basis of Justice Frankfurter's *Lincoln Mills* dissent, seconded this time by a remark of Professor Mishkin, Judge Kaufman was prepared to call this holding "a sport." 647 F.2d at 330 n.26, Pet. App. at 20a; *see* Mishkin, *supra*, at 160 n.24. To be sure, Congress has, in 28 U.S.C. § 1349, "repealed" the *Pacific Railroad Removal Cases*. But the same section retains federal court jurisdiction in suits involving corporations owned 50% or more by the United States. The limitation makes it clear that Congress was acting on the same protective principle operative in *Osborn*.

In *Tennessee* v. *Davis*, 100 U.S. 257 (1880), the Court upheld the removal of a state prosecution for murder under Rev. Stat. § 643, permitting removal of cases brought against federal officers for acts done under the authority of the federal revenue laws. Article III, § 2 specifically covers "Controversies to which the United States shall be a Party," but it does not mention suits against officers of the United States. Thus jurisdiction of the case could only be founded on the "arising under" clause. The case cannot be disposed of by regarding the allegation in the removal petition that the defendant was acting under color of federal law as raising a federal question defensively. Once in the federal court by way of removal there was nothing to require the defendant to rely on the federal defense. He could deny the act alleged, plead self-defense or interpose any other available non-federal defense. Action under color of federal law was simply a condition of federal jurisdiction.

In its current incarnation, this removal jurisdiction has been extended to all actions, civil or criminal, against "any officer of the United States . . . for any act under color of such office. . . ." 28 U.S.C. § 1442(a)(1). The origins of this authority in 1815 and its evolution since then are detailed in Hart & Wechsler, *supra*, at 1335-38. Except for *Tennessee* v. *Davis*, 100 U.S. 257, which

focused on the novel feature of removing a criminal prosecution, the jurisdiction has never been seriously challenged. The limitation of the grant to removal jurisdiction has been criticized. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & Contemp. Probs. 216, 220-21 (1948). And it seems to be acknowledged that Congress could provide for original jurisdiction in such cases, "even on the assumption that the right to the remedy remains a matter of state law." Hart & Wechsler, *supra*, at 916; see also Wechsler, *supra*, at 220-21. Again, the principle involved is simply that the United States must be empowered to protect its officials acting to enforce its laws, and the "arising under" jurisdiction is broad enough to accommodate that need.

A third instance of protective jurisdiction, dating from the middle of the 19th century, is the authority of a trustee in bankruptcy to sue in federal court on state law claims on behalf of the bankrupt estate, without regard to the citizenship of the parties. This authority first appeared in the Bankruptcy Act of 1867, 14 Stat. 517, and was upheld in *Lathrop* v. *Drake*, 91 U.S. 516 (1875). Subsequent variations have been endorsed in *Schumacher* v. *Beeler*, 293 U.S. 367 (1934) (Bankruptcy Act of 1899) and, more recently in *Williams* v. *Austrian*, 331 U.S. 642 (1947) (Chandler Act). The latest revision of the Bankruptcy Act further extends federal jurisdiction to all "civil proceedings arising under" bankruptcy law or "arising in or related to" bankruptcy cases. 28 U.S.C. § 1471(b) (effective April 1, 1984).

The bankruptcy decisions cannot be accommodated on ordinary jurisdictional principles. The liability of the debtor to the bankrupt estate is, in the usual case, a matter of state law. Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 Harv. L. Rev. 703, 705-06 nn.14-18. Indeed, it is unlikely that Congress under the bankruptcy power has the authority to prescribe the scope of such liability. *Id.*; Mishkin, *supra*, at 189. Ancillary jurisdiction has been suggested as an explanation, but it fails to account for the authorization to bring trustees' suits not only in the bankruptcy court, but in any federal court. Thus, resort must be had to the protective principle, and this Court, in its earliest treatment of the question, unhesitatingly invokes it:

> [a] uniform system of bankruptcy, national in its character, ought to be capable of execution in national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise.

Lathrop v. *Drake*, 91 U.S. at 518.

As a final example, in *National Mutual Insurance Co.* v. *Tidewater Transfer, Co., Inc.*, 337 U.S. 582 (1949), the Court upheld an Act of Congress conferring original jurisdiction on the federal courts in cases "between citizens of different States and citizens of the District of Columbia or the [territories]." *See* 28 U.S.C. § 1332(d). Justice Jackson's opinion for the plurality starts from the premise that, as held in *Hepburn and Dundas* v. *Ellzey*, 2 Cranch (6 U.S.) 445 (1805), a citizen of the District of Columbia is not a citizen of a State within the meaning of the diversity clause of Article III. With recourse to diversity of citizenship thus precluded, the opinion rested the grant of jurisdiction on the power of Congress under Article I "to exercise, exclusive Legislation . . ." over the District of Columbia, in combination with the "necessary and proper" clause. But six Justices vigorously rejected this rationale as a covert evasion of the Article III limitations on the judicial power of the United States. 337 U.S. at 604 (Rutledge and Murphy, JJ., concurring); *id.* at 626 (Vinson, C.J., and Douglas, J., dissenting); *id.* at 646 (Frankfurter and Reed, JJ., dissenting). A majority in support of the Act was obtained only because Justices Rutledge and Murphy were prepared to overrule *Hepburn*, and so concurred in the result. Subsequent comment on the case is in agreement that it can be supported, given the *Hepburn* premise, only as another example of the provision of a federal forum "to prevent the possibility of discrimination against federally-protectible interests" and grounded on the "arising under" clause. Hart & Wechsler, *supra*, at 416-17.

The "protective jurisdiction" nomenclature originated and the concept was most fully elaborated in relation to § 301 of the Taft-Hartley Act, 29 U.S.C. § 185, granting jurisdiction to federal courts to adjudicate disputes arising out of collective

bargaining contracts. The Court avoided the necessity of passing directly on the issue when the majority construed the section as authorizing the development of a federal substantive common law of collective bargaining agreements. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). But Justices Burton and Harlan concurred on the ground "that some federal rights may necessarily be involved in a § 301 case, and hence that the constitutionality of § 301 can be upheld as a congressional grant to Federal District Courts of what has been called 'protective jurisdiction.' " *Id.* at 460. Professors Bickel and Wellington, in a magisterial article on the case, argued against the majority position as to federal common law. But they had no doubt that the grant of jurisdiction would be valid, even though state substantive law were applicable to the claim, as they thought it should be. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 19-22 (1957).

Professor Mishkin summarizes the position at the end of this development as follows:

> [W]here there is an articulated and active federal policy regulating a field, the "arising under" clause of Article III apparently permits the conferring of jurisdiction on the national courts of all cases in the area—including those substantively governed by state law. This inference arises from the cases where such "protective" jurisdiction has been sustained. In each of them, Congress had by legislation undertaken active regulation in the field, and federal jurisdiction was sustained though the rule for decision of the particular case was local.

Mishkin, *supra*, at 192-93.

The interest protected in the present case by the jurisdictional grant in § 1330 is at least equal in dignity to those involved in the cases discussed above. It is the national interest in the effective conduct of the international relations of the United States. As this Court has often asserted, the conduct of foreign affairs is one of the prime functions of the national government,

one in which it has preeminent if not exclusive power *vis a vis* the States, and is among the most important of the objects that called the Union into being. *See* pp. 17-18, *supra*.

Under Hart and Wechsler's theory of protective jurisdiction, the bare existence of a federal interest of this character would be sufficient to support "arising under" jurisdiction. They ask:

> May not a basis for a protective jurisdiction exist to prevent discrimination against federal instrumentalities or interests even though a basis for enacting an encompassing federal substantive law is lacking?

Hart & Wechsler, *supra*, at 868.

Here there is more. A basis for enacting encompassing federal law does exist in the congressional power over foreign commerce and the national power over foreign affairs. And Congress has acted. The FSIA embodies "an articulated and active federal policy regulating [the] field. . . ." Mishkin, *supra*, at 192. It codifies the restrictive principle of sovereign immunity. H. Rep. at 7. It provides for service of process in personam on sovereign defendants, 28 U.S.C. § 1608, and for execution on their assets, 28 U.S.C. § 1610. The Act excludes named torts from its coverage, 28 U.S.C. § 1605(a)(5); it expressly adopts nonfederal law as a measure of liability, prohibits punitive damages, prescribes compensatory damages where under the law otherwise applicable only punitive damages would be payable, 28 U.S.C. § 1606; and it prohibits jury trial in federal courts. 28 U.S.C. §§ 1330(a), 1441(d).

Where Congress has in fact legislated to this extent, leaving only a portion of the dispute to be resolved under nonfederal law, the propriety of protective jurisdiction cannot be denied. Even Justice Frankfurter, the most niggardly of modern Justices in his approach to "arising under" jurisdiction, was willing to consider that there might be a basis for it where Congress affirmatively adopts state law or where there are "federal rights existing in the interstices of [the] actions." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. at 473, 477 (dissenting opinion). Here both of his requirements are met. There is an express adoption of liability "in the same manner and to the same extent

as a private individual under like circumstances." 28 U.S.C. § 1606. And there are federal rights necessarily "existing in the interstices of the action." To name only the most significant, in addition to the definition of the scope of the immunity itself, there are the novel provisions for service of process in personam and execution against sovereign assets.

To put another series of Hart and Wechsler's rhetorical questions:

> Isn't protection of Congressionally created or recognized interests an essential purpose of extending the judicial power to cases "arising under . . . the laws of the United States"? May not that purpose be served by the grant of federal jurisdiction in situations . . . where an active and articulated Congressional legislative program is at stake—even though the particular cases may involve state substantive law only? In terms of the purposes of the Article III provision, do not such cases truly "arise under" the federal laws creating the program?

Hart & Wechsler, *supra*, at 868.

The answer to all those questions is "Yes."

III. Jurisdiction Is Constitutionally Based on the "Arising Under" Clause of Article III in this Case Because Plaintiff's Claim Is Founded Directly on a Substantive Federal Enactment, the Foreign Sovereign Immunities Act of 1976.

A. An Essential Element of the Claim in this Case, which Must Be Affirmatively Pleaded and Proved by the Plaintiff and Found Specially by the Court, Is the Absence of Sovereign Immunity as Defined in the Act.

The words "arising under . . . laws of the United States" have chiefly been construed in cases involving not Article III directly,

but the statutory grant of federal question jurisdiction in 28 U.S.C. § 1331 and its predecessors, which is cast in the same language. It is universally acknowledged, however, that the statutory grant does not exhaust the constitutional power. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 n.51 (1959); *Powell* v. *McCormack*, 395 U.S. 486, 515 (1969); *see National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 613-14 (1949) (Rutledge, J., concurring); Mishkin, *supra*, at 160-63; *Note on the Effect of the Statutory Adoption of the Constitutional Language*, Hart & Wechsler, *supra*, at 870; Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3562 (1975). Judge Kaufman was aware of this difference.* Yet in holding § 1330 unconstitutional, he relied primarily on § 1331 cases, rather than the Article III cases discussed in Point II above. Even in that narrower context, however, the language covers any case in which an essential element depends on federal law. *E.g.*, *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); Mishkin, *supra*, at 163-76. This is such a case.

Section 1330(a), the statutory basis for federal subject matter jurisdiction here, provides that for jurisdiction to attach, the action must be one "with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." Sections 1605-1607 define the scope of sovereign immunity as a matter of federal substantive law, expressly "intended to preempt any other State or Federal law," H. Rep. at 12, and binding in "courts of the United States or of the States. . . ."* 28 U.S.C. § 1605(a). The Federal Rules of Civil Procedure, reiterating in

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* The opinion below cites *Shoshone Mining Co.* v. *Rutter*, 177 U.S. 505, 506 (1900), to support the proposition that "[t]he Supreme Court has implied, but has never held, that § 1331 occupies less than all the ground. . . ." 647 F.2d at 327-28, Pet. App. at 15a. Not having had the assistance of briefs on the point, the court was presumably unaware of the more explicit statements in *Romero* and *Powell* v. *McCormack*, *supra*, and the authorities cited in the text.

* The analysis applies equally where the absence of sovereign immunity derives from an "applicable international agreement," the alternative mentioned in § 1330, because Article III extends also to "treaties made . . . under [the] Authority [of the United States]." U.S. Const., Art. III, § 2.

this respect that would be required in any event, direct that the complaint "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." Fed.R.Civ.P. 8(a).

From these three interlocking provisions, it follows that in any case brought under the Act, an essential element of plaintiff's claim, to be affirmatively pleaded and proved, is that defendant "is not entitled to sovereign immunity" as defined and regulated by substantive provisions of preemptive federal law.*

In response to this position, the court below argued that a question concerning the construction or application of a jurisdictional grant could never ground jurisdiction under the "arising under" clause. Otherwise, it said, all Article III limits on federal court jurisdiction would be swallowed up.

> [I]f we decided that Verlinden's suit was one "arising under a law of the United States" because it was brought under § 1330, then we could similarly hold that a suit "arose under a law of the United States" because it was brought under § 1332 [the statutory grant of diversity jurisdiction].

647 F.2d at 329, Pet. App. at 19a.

The analogy is specious. In diversity cases, the citizenship of the parties relates only to the jurisdictional issue and has no independent significance. Under § 1330, however, the availability of sovereign immunity in all American courts, state or federal, is regulated by a congressional enactment designed to safeguard important national interests in the conduct of foreign affairs, by defining the conditions under which foreign sovereigns may be haled into the courts of this country. The statutory definition of

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* On the significance of the pleading requirement in relation to the bankruptcy cases, see Rutledge, J., concurring, in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 611-13 (1949). He points out that *Shumacher* v. *Beeler*, 293 U.S. 367 (1934), approves a lower court opinion which makes it decisive for federal jurisdiction that "[t]he trustee must allege and prove that valid proceedings were taken under the Bankruptcy Act, . . . whereby title passed, and . . . he was chosen as trustee." *Toledo Fence & Post Co.* v. *Lyons*, 290 F. 637, 641 (6th Cir. 1923).

sovereign immunity thus has a crucial substantive regulatory significance, quite apart from its operation as a jurisdictional requirement. It establishes the limits of liability of the sovereign defendant. And these substantive limits apply in all cases against a foreign sovereign, including those brought in state courts, without regard to § 1330.

To be sure, the absence of immunity is only one element of plaintiff's claim. But for a case to arise under the laws of the United States, it is not necessary that the claim be wholly governed by federal law. As Chief Justice Marshall remarked in *Osborn*, "[t]here is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States." 9 Wheat. (22 U.S.) at 819-20.

Justice Holmes's view that the cause of action must be created by federal law was specifically rejected, over his dissent, in *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), even as a requirement for the narrower *statutory* grant of federal question jurisdiction. There the plaintiff's claim that the defendant was investing in unauthorized securities was grounded in state law. The challenged investments, bonds of Federal Land Banks, were alleged in the complaint to be unauthorized because the Act of Congress establishing the banks was unconstitutional. The Court sustained jurisdiction because "it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States. . . ." *Id.* at 199. So here, on the face of the complaint, Verlinden's right to relief depends on the construction or application of the definition of sovereign immunity in § 1605. Unless defendant "is not entitled to sovereign immunity" as defined in that section, plaintiff can neither get into court nor reach the merits. Moreover, in this case the federal element is present directly, by virtue of the congressional enactment, rather than derivatively, by reference from the state law, as in *Kansas City Title & Trust*.

Gully v. *First National Bank in Meridian*, 299 U.S. 109 (1936), is not to the contrary. That was a suit by the Mississippi tax collector to recover state taxes allegedly owing from the bank.

The defendant sought to remove, arguing that the original immunity of national banks from state taxes had been qualified by an Act of Congress; thus plaintiff's claim depended on the construction of that Act, and therefore that it arose under federal law. The holding rejecting this argument is simply a reiteration of the familiar proposition that the anticipation of a federal defense in the complaint does not ground jurisdiction under the general federal question statute. *Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454 (1894); *Louisville & National R.R.* v. *Mottley*, 211 U.S. 149 (1908).

According to *Osborn*, where the federal question "forms an ingredient of the original cause," it is unnecessary that it be actually contested. 9 Wheat. (22 U.S.) at 823. "Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up." *Id.* at 824. Again, the case at bar is stronger. Because of the way Congress chose to structure the Act, the federal question goes to subject matter jurisdiction. It cannot be foreclosed by defendant's failure to deny it in the answer. It may be asserted at any time during the course of the action, at the suggestion of any party or by the court on its own motion. Fed.R.Civ.P. 12(h)(3); *see also, e.g., Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908). A federal court is obligated to make findings substantiating its jurisdiction over the subject matter in every case, whether or not the defendant contests the issue. And under the FSIA, even in case of default no judgment can be entered "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). The required showing must necessarily include evidence that the defendant was not entitled to immunity under the substantive provisions of the Act. *See International Association of Machinists* v. *OPEC*, 649 F.2d 1354, 1356-58 (9th Cir. 1981).

Thus, the question of immunity, arising under and governed by federal law, is not only technically or potentially an element of the case against a foreign sovereign, as was the question of corporate regularity in *Osborn*. It must be expressly pleaded and

proved by the claimant and expressly resolved in his favor by the court before relief on the merits can be granted. In such circumstances, even the narrow construction of the "arising under" language adopted by the court below is satisfied.

B. Since the Act Defines Both the Extent of Liability and the Remedies Available against a Foreign Sovereign, the Cause of Action Sued on Here May Be Said to Be Created by Federal Law.

It is arguable that this case arises under federal law in the still narrower sense that the cause of action against a foreign sovereign is created by federal law. In the 81st Federalist, Hamilton pronounced it "inherent in the nature of sovereignty, not to be amenable to the suit of an individual, *without its consent.*" The Federalist No. 81, 511 (Hamilton) (B. Wright ed. 1961) (emphasis in original). "The contracts between a nation and individuals . . . confer no right of action, independent of the sovereign will." *Id.* That was the position of this Court with respect to claims against the United States before the enactment of legislation consenting to suit. The Government was not suable. No cause of action existed against it. It was on this very ground that the Court upheld the denial of jury trial in suits against the United States. No such cause of action could be maintained by a private person in 1791. Suits against the United States therefore were not suits at common law within the meaning of the Seventh Amendment. *McElrath* v. *United States*, 102 U.S. 426, 439-40 (1880); *see Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962).

The situation is precisely parallel here. Hamilton's dictum was applicable to all nations, not just the thirteen States of the Confederation. The foreign sovereign was not suable in courts of the United States, except on such terms and conditions as it might consent to, including presumably the law to be applied. This indeed is the teaching of *The Schooner Exchange* v. *McFaddon*, 7 Cranch (11 U.S.) 116 (1812), the original sovereign

immunity case.* Starting from this premise, Courts of Appeals in three Circuits have already upheld the denial of jury trial under the FSIA on a rationale identical to that of *McElrath* v. *United States*, 102 U.S. at 439-40: there was no action at common law against a foreign sovereign. *Ruggiero* v. *Compania Pervana de Vapores*, 639 F.2d 872 (2d Cir. 1981) (*per* Friendly, J.); *Williams* v. *Shipping Corp. of India*, 653 F.2d 875 (4th Cir. 1981); *Rex* v. *Cia Pervana de Vapores, S.A.*, 660 F.2d 61 (3rd Cir. 1981).

The Act does not content itself with establishing the procedural incidents of suits against foreign sovereigns, however. Section 1606 is entitled "Extent of Liability" and it expressly defines both the scope of liability and the remedies available. In these respects, too, the Act is identical with the Federal Tort Claims Act. The foreign sovereign is "liable in the same manner and to the same extent as a private individual." *Compare* 28 U.S.C. § 1606 *with* 28 U.S.C. § 2674; *see* 1 Moore, Federal Practice ¶ 0.66[5] at 700. 180-81; *compare also* 28 U.S.C. § 1491 (The Tucker Act) authorizing suit against the United States for "all claims . . . for damages . . . not sounding in tort." Like the Tort Claims Act, the FSIA excludes liability of the sovereign for "discretionary functions" and for claims of "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Compare* 28 U.S.C. § 1605(a)(5)(A) and (B) *with* 28 U.S.C. § 2680. Punitive damages are prohibited; and where a state wrongful death act provides only for punitive damages, it is superseded and compensatory damages are provided. *Compare* 28 U.S.C. § 1606 *with* 28 U.S.C. § 2674.

This Court has held that all cases under the Tucker Act "arise . . . under federal law." *Glidden Co.* v. *Zdanock*, 370 U.S. 530,

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* The cases after 1952, when the Tate letter prevailed, do not address the question of the law governing the transaction, and it may be assumed that state law was applied. However, these were invariably *quasi in rem* cases based on the attachment of a vessel or other property of the sovereign. They were not actions *in personam* against the foreign state itself, except where the state had consented, or otherwise submitted to the jurisdiction of the court. *E.g.*, *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955).

556 (1962); *see also National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 610 (Rutledge, J., concurring); Hart & Wechsler, *supra*, at 399; 1 Moore, Federal Practice, ¶ 0.65 [2.-1], at 700.88-89. The same must be true of claims under the Federal Tort Claims Act. *See, id.;* Mishkin, *supra*, at 193. Both of these Acts, like the FSIA, refer to the law otherwise applicable for the measure of substantive liability. It would seem to follow, therefore, that FSIA claims, like Tucker Act claims and federal tort claims, arise under federal law.

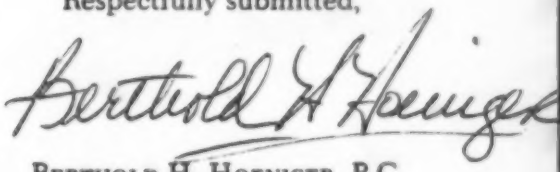
The same conclusion is implicit in an analysis of *Dames & Moore* v. *Regan*, ___ U.S. ___, 101 S. Ct. 2972 (1981). The Court there recognized that the President has historically exercised the power to settle claims of U.S. citizens against foreign sovereigns, *see United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942); and that Congress has consistently acquiesced in these actions. Such settlements are frequently at figures much below the face value of the claims. Before the FSIA, it was never suggested that such a forced settlement was a "taking" under the Fifth Amendment for which the claimant could seek compensation in the Court of Claims. Presumably this was because the claimant had, in Hamilton's words, "no right of action" against the foreign sovereign, but was remitted to such relief as the Executive Branch might afford. *See* Ex parte *Peru*, 318 U.S. 578, 588-89 (1943). In *Dames*, however, the Court suggested that persons whose claims were settled by the President in agreement with Iran might have recourse to the Court of Claims under the Fifth Amendment. ___ U.S. at ___, 101 S. Ct. at 2992. And Justice Powell, concurring, had no doubt that the remedy would be available. *Id.* at 2992-93. What is new in the situation in *Dames* is that Congress, in the FSIA, has provided a judicially enforceable right against the foreign sovereign in place of the discretionary Executive remedy that had previously existed. It has *created a cause of action* in favor of the claimant, and that cause of action, whatever the measure of liability, is the creature of federal law.

Plaintiff asserts this newly created federal cause of action here. The case at bar is therefore a case "arising under . . . the Laws of the United States. . . ."

CONCLUSION

For the reasons set forth above, Congress acted with ample constitutional authority when, in the FSIA, it granted jurisdiction to the Federal District Courts over suits brought by alien plaintiffs against foreign sovereigns. The decision below should be reversed and the case remanded to the District Court for trial on the merits.

Respectfully submitted,



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Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VERLINDEN B. V.,

Petitioner,

-v-

CENTRAL BANK OF NIGERIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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(13329)

TABLE OF AUTHORITIES

PAGE

Cases:

Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) 3

Centraal Stikstof Verkoopkantoor N.V. v. Alabama State Docks Dept., 415 F.2d 452 (5th Cir. 1969) 3

Cook v. United States, 288 U.S. 102 (1933) 4

Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) 3

Insurance Corp. of Iceland v. Compagnie des Bauxites de Guinee, —U.S.—, 102 S. Ct. 2099, 2104 (1982) 4

Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800) 3

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 2

Republic of Guinea v. Maritime International Nominees Establishment, No. 81-1073 (D.C. Cir. Nov. 12, 1982) 4

Steamship Co. v. Tugman, 106 U.S. 118 (1882) 2

Statutes:

U.S. Const., Art. III 3

Foreign Sovereign Immunities Act:
28 U.S.C. § 1330 1
28 U.S.C. § 1441(d) 3

Miscellaneous:

House Report No. 94-1487 3

Mahoney, D., *A Historical Note on* Hodgson v. Bowerbank, 49 U. Chi. L. Rev. 725 (1982) 3

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The Foreign Soverign Immunities Act (FSIA or the Act) grants subject matter jurisdiction to the district courts over "any non-jury civil action against a foreign sovereign" as to which the Defendant is not entitled to sovereign immunity. 28 U.S.C. § 1330. Both the courts below held unequivocally and without hesitation that, as a matter of statutory construction, this comprehensive grant of jurisdiction extends to suits brought by an alien plaintiff, 649 F.2d at 324, Pet. App. at 8a; 488 Supp. at 292, Pet. App. at 32a–34a. The Brief of Amicus Curiae, the Republic of Guinea (hereafter Amicus Brief) urges this Court to reject that reading.

[1] Counsel for respondent, the Central Bank of Nigeria, informed the Court by letter dated March 19, 1982, that he had been instructed by his client not to participate further in this case, either by way of brief or oral argument. The Court, by order dated November 1, 1982, invited Stephen N. Shulman, Esq., counsel for the Republic of Guinea, which had previously filed a brief amicus in support of respondent, to argue the position of the respondent. Counsel have agreed that the Brief of Amicus Curiae, the Republic of Guinea, should stand as the brief in support of respondent's position.

The legislative history does not support the construction urged by the Amicus Brief. As shown in the Petitioner's Brief and that of the United States, passages referring to a congressional intention to protect American business are matched by others indicating a desire to provide for judicial settlement of claims against foreign sovereigns within the scope of the FSIA without any reference to the citizenship of the parties. Brief for Petitioner, p. 12; Brief for the United States, p. 8 n. 2.

Thus the Amicus Brief is forced to argue that suits by alien plaintiffs should be excluded from the generalized language of § 1330 because of an asserted tradition of restrictive construction of statutory grants of federal jurisdiction. Amicus Brief, pp. 13 ff. Whatever may be the force of such a tradition, however, it is overriden where the congressional purpose would be frustrated by a narrow construction of the statute. *Osborn* itself extended the statutory grant of federal jurisdiction over suits by or against the Bank of the United States as broadly as was necessary to vindicate the substantive policies of Congress in establishing the Bank. See discussion in Brief for Petitioner, pp. 23-24; Brief for the United States, pp. 10-13.

This is such a case. As shown in the briefs of petitioner and the United States, a major share of U.S. business abroad is done through foreign subsidiaries. Brief for Petitioner, p. 13; Brief for United States in support of petition for certiorari, p. 15. Such corporations are classified as aliens for the purposes of diversity jurisdiction. *Steamship Co. v. Tugman*, 106 U.S. 118 (1882). Thus, even if congressional policy were limited solely to the protection of U.S. business interests, the statute must extend to alien plaintiffs.

The Amicus Brief contends that this purpose is fully effectuated by the provision of a state forum for such claims. But Congress, concerned about uniformity of decision and the delicacy of suits against foreign sovereigns, intended that such actions be brought in the courts of the nation, unless the defendant acquiesced in state court jurisdiction by not availing itself of its removal right. This much is clear not only from the legislative history but also from the special FSIA removal pro-

vision. See, *e.g.*, H. Rep. at 13, 32; 28 U.S.C. § 1441(d). The availability of a state forum does not fulfill this central statutory purpose.

Finally, a restrictive construction is not appropriate where the effect would be to violate the treaty obligations of the United States. Numerous treaties of friendship, commerce and navigation (FCN) provide access to U.S. courts for citizens of the treaty partner on the same basis as for citizens of the United States. See collection of citations in Brief of Amici Curiae Rule of Law Committee *et al.* in Support of Petitioner herein, Appendix, p. 1a ff. The Amicus Brief misapprehends the thrust of the argument from these treaties.[2] Of course such a treaty provision cannot override constitutional limitations on federal jurisdiction. Since the diversity clause of Article III does not provide for jurisdiction over suits between two aliens,[3] the FCN Treaties do not of their own force supply a basis for diversity jurisdiction. But where jurisdiction over suits brought by aliens is *not* precluded by the Constitution–as for example in federal question jurisdiction–Congress is obligated by the treaties to

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[2] The cases cited at p. 17 of the Amicus Brief are wholly inapposite. They hold only that the foreign plaintiff gains no advantage over a similarly situated citizen plaintiff by virtue of the treaty. In neither case was there any jurisdictional issue. In *Centraal Stikstof Verkoopkantoor N.V. v. Alabama State Docks Dept.*, 415 F.2d 452, 455 (5th Cir. 1969), the holding is that the treaty does not provide a cause of action for a foreign plaintiff against a state instrumentality that would be immune to suit by a citizen plaintiff. *Beuchold v. Oritz*, 401 F.2d 371, 372 (9th Cir. 1968), holds that a foreign plaintiff could not in reliance on the treaty bring a paternity and child support suit in federal court when the court could not entertain such claims brought by a citizen plaintiff.

[3] The Amicus Brief cites *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809) for the proposition that "a statute purporting to confer . . . jurisdiction [over a suit between two aliens] was inconsistent with the diversity clause of Article III." Amicus Brief, p. 26. Recent scholarly research has established that *Hodgson v. Bowerbank* (and the earlier *Mossman v. Higginson*, 4 U.S. [4 Dall.] 12 [1800]) were not constitutional holdings. D. Mahoney, *A Historical Note on* Hodgson v. Bowerbank, 49 U. Chi. L. Rev. 725 (1982). It was simply a construction of the statute, § 11 of the Judiciary Act of 1789, as stated in Brief for Petitioner, p. 21 n.8. Of course, the Court's action was informed by the understanding that the diversity clause did not purport to extend to such suits. But there is no intimation in either case that Congress could not grant jurisdiction over such suits under some other clause of Article III.

grant jurisdiction over such claims to the same extent as over claims brought by citizens. Any tradition of restrictive construction of jurisdictional statutes must give way to the international obligations of the United States. See *Cook v. United States*, 288 U.S. 102, 120 (1933). So here, the statute must be read to extend to alien as well as citizen plaintiffs unless such a reading is constitutionally prohibited.

There is no such constitutional inhibition here, as is amply shown in petitioner's principal brief and the brief for the United States. In enacting the FSIA, Congress has legislated comprehensively in support of a legitimate, indeed an overwhelming federal interest, the conduct of the foreign relations of the United States. In every case under the Act, a federal law element is a major ingredient of the plaintiff's case.[4] Thus there is no occasion for resort to the diversity clause of Article III. FSIA cases "arise under . . . the Laws of the United States."

Respectfully submitted,

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[4] Indeed, the recent decision of the Court of Appeals for the District of Columbia Circuit in the very case forming the basis for the suggestion of interest of the Republic of Guinea as amicus, supports petitioner's position on this point. That court decided that the case should be dismissed for want of subject matter jurisdiction, on the ground that Guinea was entitled to sovereign immunity for the claim asserted, and thus the claim did not fall within § 1330, *Republic of Guinea v. Maritime International Nominees Establishment*, (No. 81-1073, D.C. Cir., decided November 12, 1982). This holding demonstrates, as contended by petitioner, that the federal issue of sovereign immunity is an integral part of plaintiff's case under the Act, and must be decided at the threshold. Brief for Petitioner, pp. 30-35; Brief for the United States, pp. 17-18. See also *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, –U.S.–, 102 S.Ct. 2099, 2104 (1982) . It does not arise as a defense that the defendant may or may not interpose at his option, as contended by the Amicus Brief, pp. 19-22.

Amicus Brief

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMITTEE ON INTERNATIONAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether it is beyond the power of Congress under Articles I and III of the Constitution to provide for federal court jurisdiction over all suits against foreign states and their instrumentalities, including those suits in which the plaintiff is an alien.

TABLE OF CONTENTS

	Page
Interest of the Amicus	1
Summary	4
Argument	9
I. As an Incident of the Federal Plenary Power Over Foreign Affairs, Congress May Confer Federal Court Jurisdiction Over All Cases Against Foreign Sovereigns, Regardless of the Citizenship of the Opposing Party or the Law Governing the Transaction....	9
A. The Power to Exercise Judicial Jurisdiction Over Foreign Sovereigns Was Neither Retained by the States Nor Excluded to the Federal Government in the Adoption of the Constitution.....	12
1. Federal Power in Matters Touching Foreign Relations Has Always Been Exclusive of That of the States and Justifies Appropriate Limitations on the Exercise of State Judicial Power.....	14

Page

2. Foreign Sovereigns Have Historically Been Immune From the Exercise of State Court Jurisdiction Without Their Consent..... 19

3. The Gradual Lowering of the Barriers to Suit Against Foreign Sovereigns Has Been Undertaken by the Federal Government in the Exercise of the Foreign Affairs Power..... 26

B. Congress Has the Power to Provide For Federal Court Jurisdiction Over All Suits in Which a Foreign State Is a Party in Order to Minimize Frictions With Foreign Powers and to Ensure Compliance With the International Obligations of the United States..... 33

II. A Case Brought by an Alien Against a Foreign State Under the Foreign Sovereign Immunities Act Is Within the Scope of the Judicial Power of the United States Under Article III of the Constitution..... 43

Conclusion..... 54

TABLE OF AUTHORITIES

Cases - Federal — Page

Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980)..... 35-36

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). 16-19

Beers v. Arkansas, 61 U.S. (20 How.) 527 (1857)..... 21

Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926).... 26

Compania Espanola v. The Navemar, 303 U.S. 68 (1938)..... 27

Dames & Moore v. Regan, 69 L.Ed. 2d 918 (1918)..... 46, 50-51

Davis v. Packard, 32 U.S. (7 Pet.) 276 (1833)..... 47

De Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900 (E.D. La. 1981)..... 37

Gray v. Permanent Mission of the Congo, 443 F. Supp. 816 (S.D.N.Y.), aff'd mem., 580 F.2d 1044 (2d Cir. 1978)..... 36

Gruber, Ex parte, 269 U.S. 302 (1925)..... 47

Page

Int'l. Ass'n of Machinists v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), aff'd, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3548 (Jan. 11, 1982)..... 34, 53

Ipitrade Int'l, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978)..... 40, 53

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)..... 16, 42

Letelier v. Republic of Chile, 488 F. Supp. 665, judgment awarded, 502 F. Supp. 259 (D.D.C. 1980)..... 34, 36, 53

Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908)..... 43

Maritime Int'l Nominees Establishment v. Republic of Guinea, 505 F. Supp. 141 (D.D.C. 1981), appeal pending.. 53

Mashayekhi v. Iran, 515 F. Supp. 41 (D.D.C. 1981)..... 36-37, 42

Mexico v. Hoffman, 324 U.S. 30 (1945)..... 18, 27, 29, 50

Monaco v. Mississippi, 292 U.S. 313 (1934)..... 20

Oliver American Trading Co. v. Mexico, 264 U.S. 440 (1924).... 51

Page

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)..... 21

Peru, Ex parte, 318 U.S. 578 (1943)..... 18, 27, 29, 50

Powell v. McCormack, 395 U.S. 486 (1969)..... 44

Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61 (3d Cir. 1981)..... 25

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)..... 44

Ruggiero v. Compania Peruana de Vapores, 639 F.2d 872 (2d Cir. 1981)..... 25, 32

Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).. 20, 26, 35

Sumitomo Corp. v. Parakopia Compania Maritima, S.A., 477 F. Supp. 737 (S.D.N.Y. 1979), aff'd mem., 620 F.2d 286 (2d Cir. 1980)..... 40

Tennessee v. Davis, 100 U.S. 257 (1880)..... 51

United States v. Belmont, 301 U.S. 324 (1937)..... 15, 46

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)..... 15, 45

	Page
United States v. Pink, 315 U.S. 203 (1942).....	15, 46-47
Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981).....	13, 40, 49-50
Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978).....	36-38
Zschernig v. Miller, 389 U.S. 429 (1968).....	16-18
40 D 6262 Realty Corp. v. United Arab Emirates, 447 F. Supp. 710 (S.D.N.Y. 1978).....	36

Cases - State	Page
Bradford v. Director General of Railroads of Mexico, 278 S.W. 251 (Tex. Civ. App. 1925).....	24
Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966).....	24
F.W. Stone Engineering Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945).....	24

Page

French Republic v. Board of Supervisors of Jefferson Co., 200 Ky. 18, 252 S.W. 124 (Ky. Ct. App. 1923)..... 24

Hassard v. United States of Mexico, 29 Misc. 511, 61 N.Y.S. 939 (Sup. Ct. N.Y. Co. 1899), aff'd, 173 N.Y. 645, 66 N.E. 1116 (1903)..... 24

Lamont v. Travelers Ins. Co., 281 N.Y. 362, 24 N.E. 2d 81 (1939)..... 23

Leavitt v. Dabney, 37 How. Prac. 264 (N.Y.Super. Ct. 1868)..... 24

Manning v. State of Nicaragua, 14 How. Pr. 517 (N.Y.Sup. Ct. 1857)..... 24

Mason v. Intercontinental Ry of Canada, 197 Mass. 349, 83 N.E. 876 (1908)..... 24

Miller v. Ferrocarrill del Pacifico de Nicaragua, 137 Me. 251, 18 A.2d 688 (1941)..... 24

Nankivel v. Omsk All Russian Government, 237 N.Y. 150, 142 N.E. 569 (1923)..... 23

Nat. Inst. of Agrarian Reform v. Dekle, 137 So.2d 581 (Fla. Dist. Ct. App. 1962)..... 24

Page

Republic of Cuba v. Arcade Bldg. of Savannah, 104 Ga. App. 848, 123 S.E.2d 456 (Ga. Ct. App. 1961)..... 24

Republic of Cuba v. Dixie Paint & Varnish Co., 104 Ga. App. 854, 123 S.E.2d 198 (Ga. Ct. App. 1961)..... 24

United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944), on reargument, 294 N.Y. 265, 62 N.E.2d 64 (1945)..... 23-24

Valarino v. Thompson, 7 N.Y. 576, 579-80 (1853)..... 22

Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923)..... 23

Constitutional Provisions Page

Article I..... 19, 38, 45

§ 8, cls. 3, 10..... 14

§ 10, cls. 1, 3..... 14

Article II..... 45-46

§ 2..... 14

§ 3..... 14

	Page
Article III.....	6-8, 11-12, 41, 43-53
"Ambassadors" Clauses.....	8, 46-49
"Arising under" Clause.....	8, 49-53
Article VI, Supremacy Clause.....	14, 32
Amendment VII.....	25
Amendment X.....	13

Statutes	Page
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, 1441(d), 1602-1611.....	passim
§ 1330.....	4, 10, 31, 52
§ 1441.....	4, 10, 19, 32
§ 1602.....	31-32
§ 1604.....	38, 51-52
§ 1606.....	50
§ 1608.....	48-49, 52-53
§ 1609.....	38

	Page
28 U.S.C. § 1331.....	7, 43, 49, 53
Federal Arbitration Act, 9 U.S.C. §§ 201-208.....	40

Treaties

	Page
Treaties of Friendship, Commerce and Navigation with Belgium, 14 U.S.T. 1284, TIAS 5432; Denmark, 12 U.S.T. 908, TIAS 4797; France, 11 U.S.T. 2398, TIAS 4625; Germany, 7 U.S.T. 1839, TIAS 3593; Greece, 5 U.S.T. 1829, TIAS 3057; Iran, 8 U.S.T. 899, TIAS 3853; Israel, 5 U.S.T. 550, TIAS 2948; Italy, 63 Stat. 2255, TIAS 1965; Japan, 4 U.S.T. 2063, TIAS 2863; Korea, 8 U.S.T. 2217, TIAS 3947; the Netherlands, 8 U.S.T. 2043, TIAS 3942; Nicaragua, 9 U.S.T. 449, TIAS 4024; Pakistan, 12 U.S.T. 110, TIAS 4683.....	39
United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, TIAS 6997.....	39-40

Other Authorities

	Page
H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976).....	10, 19, 30, 49, 51

Page

S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976)..... 10-11, 19, 30, 49, 51

22 C.F.R. § 93.1..... 49

3 Elliot's Debates 533, quoted in Monaco v. Mississippi, 292 U.S. 313, 323-24 (1934)..... 20

Hamilton, The Federalist Papers, No. 81..... 20

Harv. Research in Int'l Law, Competence of Courts in Regard to Foreign States, 26 Am. J. Int'l L. Supp. 451 (1932)..... 35

1 J. Moore, Federal Practice ¶ 0.66[4] n.11 (2d ed. 1980)... 44

Note, Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction, 90 Yale L.J. 1861 (1981)..... 44

30 Rec. A.B. City N.Y. 301 (1975). 2

31 Rec. A.B. City N.Y. 471 (1976). 2

Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, in 1977 Digest of United States Practice in International Law (Appendix)... 29

Tate Letter, 26 Dep't. State Bull. 984-985 (1952)..... 28

INTEREST OF THE AMICUS

The Committee on International Law of the Association of the Bar of the City of New York is one of the standing committees of the Association of the Bar of the City of New York, a nonprofit association established under the laws of the State of New York for the purposes, inter alia, of facilitating and improving the administration of justice. The Committee on International Law has jurisdiction over matters involving international law and the foreign relations law of the United States, and has given careful attention over the years to the law of sovereign immunity and the legal doctrines governing the foreign affairs powers of the federal government.

The Committee on International Law actively advocated the passage of the Foreign Sovereign Immunities Act and

supported the policy embodied in the Act of centralizing litigation against foreign sovereigns in the federal courts.* The ruling below, by ignoring the strong foreign policy reasons for providing a federal forum for these disputes, undermines Congress's integrated plan for immunity determinations developed with the assistance of the Committee and other bar groups. That plan replaced the preexisting system of ad hoc State Department determinations of immunity, which the private bar had found increasingly unsatisfactory. The bar's criticisms of the previous system -- including lack of consistency and susceptibility to politicization -- encouraged Congress to concentrate immunity determinations in the independent federal judiciary.

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* See 30 Rec. A.B. City N.Y. 301 (1975); 31 Rec. A.B. City N.Y. 471 (1976).

Dispersal of a significant category of immunity determinations to state courts under the ruling below would make it extremely unlikely that the objectives of consistency and depoliticization could be achieved.

The Committee on International Law of the Association of the Bar of the City of New York is particularly interested in the outcome of the present case, because much of the commercial litigation that the holding below would exclude from federal jurisdiction (including presumably the very claims at issue here) would devolve upon the state courts in New York.

In accordance with Rule 36 of the Rules of this Court, written consents to the filing of this brief have been obtained from counsel of record for all parties and are on file with the Clerk.

SUMMARY

In enacting the Foreign Sovereign Immunities Act, Congress unambiguously conferred jurisdiction on the federal courts over all cases against foreign states, regardless of the citizenship of the opposing party or the substantive law governing the transaction. 28 U.S.C. §§ 1330, 1441(d). The compelling policy reasons for this congressional decision -- stemming from the foreign relations sensitivity of such cases -- are equally strong whether the plaintiff is a citizen or an alien and whether the substantive law governing the transaction is federal or non-federal.

Despite the weightiness of the federal interest in suits against foreign states, the court below held that Congress is without power to provide for federal court jurisdiction in an impor-

tant category of such suits, those involving an alien plaintiff suing on a cause of action that is not itself federal. The court below reached this conclusion by purporting to discern the Framers' intent, but did so in disregard of the plenary and exclusive nature of the federal power in the area of foreign affairs and without considering that state court suits against foreign sovereigns were unknown in the Framers' day and were therefore surely not reserved to the states in the Constitution's allocation of judicial power. The states never intended to reserve, and never believed that they had, jurisdiction over any category of suits against foreign sovereigns to the exclusion of federal judicial power, and there is no historical or logical basis for the notion that the states have such exclusive power today.

Rather, history and logic compel the opposite result.

In the two centuries since the shaping of Article III, the law of sovereign immunity has gradually evolved to allow certain kinds of suits against foreign sovereigns, but only by virtue of federal decisions taken in implementation of the foreign affairs power. Until 1952 it was federal law, developed from foreign relations concerns and binding upon the states, that foreign sovereigns were absolutely immune from suit without consent; and executive determinations of entitlement to sovereign immunity were conclusive upon all courts, state or federal. From 1952 to 1976, by virtue of a shift in State Department policy, suits against foreign sovereigns were permitted when they arose out of actions taken by states in a commercial capacity, with

determinations as to commercial character (again conclusive on both state and federal courts) being made by the State Department. The Foreign Sovereign Immunities Act of 1976 shifted the function of making the determinations from the executive to the judicial branch of the federal government, but the paramount federal interest in deciding whether foreign sovereigns are entitled to immunity has never been in doubt. If Congress is precluded from implementing federal policy concerning foreign sovereigns by conferring jurisdiction on the federal courts in cases brought by foreign plaintiffs, the foreign policy of the United States could suffer incalculable damage.

The court below also erred in treating case law under 28 U.S.C. § 1331 as dispositive of an Article III issue. Article III should be construed using the

same principles of constitutional interpretation that have led to the articulation of broad legislative and executive powers in the foreign affairs field. When the clauses concerning federal judicial power over "Ambassadors, Public Ministers, and other Consuls" are considered together with the "arising under" clause of Article III, it is clear that the Framers intended the federal judicial power to be broad enough to enable implementation of the policies of the federal legislative and executive branches in the field of suits against foreign sovereigns.

In any event, contrary to the holding of the court below, the standards of the Foreign Sovereign Immunities Act are substantive and not merely "jurisdictional" or "procedural". Nor do they

enter a case merely by way of defense: each plaintiff must prove lack of immunity as an essential element of its case against a foreign sovereign.

In light of all these considerations, Congress clearly has the constitutional power to implement its judgment concerning federal court jurisdiction over all suits against foreign sovereigns.

ARGUMENT

I.

As an Incident of the Federal Plenary Power Over Foreign Affairs, Congress May Confer Federal Court Jurisdiction Over All Cases Against Foreign Sovereigns, Regardless of the Citizenship of the Opposing Party or the Law Governing the Transaction.

In enacting the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441(d), 1602-1611 ("FSIA," or

"the Act"), Congress unambiguously conferred jurisdiction on the federal courts over all cases against foreign states, regardless of the citizenship of the opposing party or the substantive law governing the transaction. 28 U.S.C. §§ 1330(a), 1441(d). The compelling policy reasons for doing so were clearly brought out in the legislative history. Congress explicitly intended to promote "uniformity in decision which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences," and expressly recognized "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 12-13, 32 (1976); S. Rep. No. 94-1310,

94th Cong., 2d Sess. 12, 32 (1976). These policy reasons are equally strong whether the plaintiff is a citizen or an alien and whether the substantive law applicable to the underlying transaction is federal or non-federal.

Despite the weightiness of the federal interest in suits against foreign states, the court below held that Congress is without power to provide for federal court jurisdiction in an important category of such suits, those involving an alien plaintiff suing on a cause of action that is not itself federal. Under the reasoning of the court below, the federal judicial power under Article III does not extend this far, and the parties must be relegated to whatever redress state courts may afford. The court below reached this conclusion by purporting to discern the Framers'

intent, but did so in disregard of the plenary and exclusive nature of the federal foreign affairs power and without considering that suits in state court against foreign sovereigns were unknown in the Framers' day and were therefore surely not reserved to the states in the Constitution's allocation of judicial power.

A. The Power to Exercise Judicial Jurisdiction Over Foreign Sovereigns Was Neither Retained by the States Nor Excluded to the Federal Government in the Adoption of the Constitution.

The court below decided that suits by foreigners against foreign sovereigns are not within the scope of the federal judicial power established by Article III of the Constitution and therefore must be heard, if at all, in state courts. The necessary implication of this holding is

that this category of suits was within the scope of powers "reserved to the States respectively" at the time the states agreed to the constitutional plan. See Constitution, Amendment X. Yet "in discern[ing] the Framers' intent only as seen through a glass, darkly, if at all," 647 F.2d at 330, the court below did not ask whether the Framers would have considered suits against foreign sovereigns to fall within the sphere of powers retained by the states. Two lines of authority show that this question must be answered in the negative: the Framers intended to confer the totality of the foreign affairs power on the federal government, to the exclusion of the states; and state courts were in any event precluded by international law and national policy from entertaining suits against foreign sovereigns (absent

consent) both at the time the Constitution was adopted and until relatively recent times.

1. Federal Power in Matters Touching Foreign Relations Has Always Been Exclusive of That of the States and Justifies Appropriate Limitations on the Exercise of State Judicial Power.

It is settled law that our Constitution does not admit of intrusion by the states into the area of foreign affairs,* and that the powers of the federal gov-

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* The exclusion of the states from the foreign affairs power is made manifest by Article I, § 10, cls. 1 and 3 of the Constitution, which provide that "No State shall enter into any Treaty, Alliance, or Confederation," and that "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power." The same principle is implicit in such provisions as Art. I, § 8, cls. 3 and 10 (congressional power to regulate foreign commerce and to define and punish offenses against the law of nations); Art. II, §§ 2 and 3 (presidential power to make treaties and to appoint and receive ambassadors and public ministers); and Article VI's Supremacy Clause.

ernment over foreign affairs differ in origin from those over domestic affairs and do not depend upon enumerated grants in the Constitution. "[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers . . ." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936). This Court's decisions repeatedly confirm the primacy and exclusivity of federal power in the area of foreign affairs, even where Congress has not acted. See, e.g., United States v. Belmont, 301 U.S. 324 (1937) (external powers of the United States are to be exercised without regard to state laws or policies); United States v. Pink, 315 U.S. 203 (1942) (same; state policy with respect to foreign nationalization decrees must yield to federal policy expressed in

executive agreement); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424 (1964) (problems involved in judicial handling of claims against foreign nations "are uniquely federal in nature"); Zschernig v. Miller, 389 U.S. 429 (1968) (state judicial inquiry into foreign inheritance system may not be undertaken where it "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems"); and Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453 (1979) (state ad valorem property tax on container shipping is unconstitutional "because it prevents the Federal Government from 'speaking with one voice' in international trade").

State judicial proceedings, no less than other forms of state power, can

adversely affect the foreign relations of the United States. In such instances this Court has not hesitated to curb or prohibit the exercise of state judicial power. Thus in Zschernig v. Miller, supra, this Court found that the inquiries of state probate courts into the legal and political systems of foreign states constituted prohibited interference in foreign affairs and international relations -- "matters which the Constitution entrusts solely to the Federal Government."* And in Banco Nacional de Cuba v. Sabbatino, supra, this Court

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* Indeed, the Court reached this conclusion even though the brief for the United States as amicus curiae did not contend that there had been actual interference in foreign affairs. As the concurring opinion of Justice Stewart (joined by Justice Brennan) noted, "[r]esolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. . . . [T]he conduct of our foreign affairs is entrusted under the Constitution to the National government, not to the probate courts of the several States." 389 U.S. at 443.

treated the defense of nonreviewability of the public acts of foreign states under the act of state doctrine as a question of federal common law, binding on state courts and on federal courts exercising diversity jurisdiction.

State court suits directly against foreign sovereigns clearly have at least as great a potential for harming the foreign relations of the United States as the sorts of suit at issue in Zschernig and Sabbatino. The possibility that such suits may interfere with the conduct of foreign relations by the political branches of the federal government is one of the basic conceptual underpinnings of sovereign immunity and related doctrines. See, e.g., Mexico v. Hoffman, 324 U.S. 30, 34-36, 38 (1945); Ex parte Peru, 318 U.S. 578, 588 (1943); Banco Nacional de Cuba v. Sabbatino, supra. To limit this

possibility, Congress decided not only to codify substantive rules of decision in immunity cases, but also to confer federal jurisdiction and give foreign sovereign defendants the right to remove all cases against them to the federal courts. 28 U.S.C. § 1441(d); see H.R. Rep. No. 94-1487, supra, at 32; S. Rep. No. 94-1310, supra, at 32. The power to implement this plan falls well within the Article I powers of Congress.

2. Foreign Sovereigns Have Historically Been Immune From the Exercise of State Court Jurisdiction Without Their Consent.

The court below similarly failed to consider either the state of the law at the time the Constitution was adopted concerning the immunity of sovereigns generally, or the jurisprudential underpinnings of subsequent changes in that law.

The Framers' understanding was that foreign states were not amenable to suit in any court in the United States, state or federal, unless the foreign state waived its sovereign immunity; both Madison* and Hamilton** so stated unambiguously in explicating the Constitution. Chief Justice Marshall gave early recognition to the rule of foreign sovereign immunity in Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136-146 (1812), a case involving federal admiralty jurisdiction, and reaffirmed

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* "I do not conceive that any controversy can ever be decided in these courts, between an American state and a foreign state, without the consent of the parties." 3 Elliot's Debates 533, quoted in Monaco v. Mississippi, 292 U.S. 313, 323-24 (1934).

** "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and general practice of mankind." Hamilton, The Federalist Papers, No. 81, quoted in Monaco v. Mississippi, supra, 292 U.S. at 324.

the rule in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 870 (1824). In Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857), the rule that a sovereign cannot be sued without its consent in its own courts "or in any other" was called "an established principle of jurisprudence in all civilized nations."

If both federal and state courts were precluded by the custom of nations from exercising jurisdictional power over foreign sovereigns at the time of adoption of the Constitution and in the early days of the Republic, then surely the states did not intend to reserve this aspect of judicial power to themselves. Rather, as discussed at pp. 26-33 infra, the relatively recent phenomenon of suits against foreign states without their consent has come about solely by virtue

of developments at the federal level, undertaken by the executive and legislative branches in the exercise of the foreign affairs power.

The case law of the highest courts of the states uniformly confirms the primacy of federal power where suits involving the interests of foreign sovereigns are concerned. Thus, in the early case of Valarino v. Thompson, 7 N.Y. 576, 579-80 (1853), the New York Court of Appeals stated:

> "The states by adopting the federal constitution transferred to the general government the right to exercise a portion of the judicial power which had previously belonged to the several states. The intention was to make the judicial authority of the federal government coextensive with its political powers. . . . The federal government has charge exclusively of the foreign relations of the country, of the regulation of commerce with foreign nations, and of all political intercourse between this country and others."

In accordance with this view of the proper allocation of authority between

the states and the federal government respecting disputes against foreign sovereigns, the state courts have traditionally dismissed cases against foreign states upon the plea of sovereign immunity because they recognized the paramount federal interest in these suits. Indeed, in Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923), the New York Court of Appeals declared that "our courts are not competent" to review the acts of foreign sovereigns, noting that to entertain a complaint against such acts would "vex the peace of nations" and would interfere with the federal government's conduct of foreign affairs. 234 N.Y. at 376 (emphasis added). Accord, Nankivel v. Omsk All Russian Government, 237 N.Y. 150, 142 N.E. 569 (1923); Lamont v. Travelers Ins. Co., 281 N.Y. 362, 24 N.E. 2d 81 (1939); United States of Mexico v. Schmuck, 293

N.Y. 264, 56 N.E. 2d 577 (1944), on reargument, 294 N.Y. 265, 62 N.E. 2d 64 (1945); Mason v. Intercontinental Ry of Canada, 197 Mass. 349, 83 N.E. 876 (1908); Miller v. Ferrocarrill del Pacifico de Nicaragua, 137 Me. 251, 18 A. 2d 688 (1941); F.W. Stone Engineering Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966).*

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* See also Hassard v. United States of Mexico, 29 Misc. 511, 61 N.Y.S. 939 (Sup. Ct. N.Y. Co. 1899), aff'd, 173 N.Y. 645, 66 N.E. 1116 (1903); Leavitt v. Dabney, 37 How. Prac. 264 (N.Y. Super. Ct. 1868); Manning v. State of Nicaragua, 14 How. Pr. 517 (N.Y.Sup. Ct. 1857); French Republic v. Board of Supervisors of Jefferson Co., 200 Ky. 18, 252 S.W. 124 (Ky. Ct. App. 1923); Bradford v. Director General of Railroads of Mexico, 278 S.W. 251 (Tex. Civ. App. 1925); Republic of Cuba v. Dixie Paint & Varnish Co., 104 Ga. App. 854, 123 S.E. 2d 198 (Ga. Ct. App. 1961); Republic of Cuba v. Arcade Bldg. of Savannah, 104 Ga. App. 848, 123 S.E. 2d 456 (Ga. Ct. App. 1961); Nat. Inst. of Agrarian Reform v. Dekle, 137 So. 2d 581 (Fla. Dist. Ct. App. 1962).

As this consistent line of both federal and state court authority shows, suits against foreign sovereigns "were unknown to the common law in 1791 [and] are sui generis." Ruggiero v. Compania Peruana de Vapores, 639 F. 2d 872, 881 (2d Cir. 1981) (holding that the Seventh Amendment does not "preserve" a right to trial by jury in a case against a foreign sovereign, since the defendant "was not suable at all" at common law).* Rather, as shown below, foreign sovereigns may be sued in the United States today only by virtue of decisions taken by the federal government in the exercise of the foreign affairs powers.

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* See also Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61, 68 (3d Cir. 1981)(right of action against a foreign sovereign "never existed at common law" and "has existed always and exclusively at the sufferance of the United States Department of State").

3. The Gradual Lowering of the Barriers to Suit Against Foreign Sovereigns Has Been Undertaken by the Federal Government in the Exercise of the Foreign Affairs Power.

For most of our nation's history the rule of sovereign immunity was applied in absolute form in both state and federal courts: that is, suits against foreign sovereigns without their consent were required to be dismissed regardless of the nature of the cause of action. In this century support began to build for a modification to the rule to permit suits arising out of acts taken by sovereign states in a commercial capacity, but the courts declined the invitation to adopt such a change. Thus in Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926), this Court held that the doctrine of Schooner Exchange was applicable to merchant ships as well as to warships, and required dismissal of the action. In

other cases in the first half of the century, this Court reaffirmed the foreign affairs basis for the absolute sovereign immunity rule and explicitly established the proposition that determinations of the executive branch with respect to entitlement to immunity were conclusive upon the courts. Compania Espanola v. The Navemar, 303 U.S. 68 (1938); Ex parte Peru, 318 U.S. 578 (1943); Mexico v. Hoffman, 324 U.S. 30 (1945). Just as judicial application of the sovereign immunity rule reflected a concern to avoid interfering with the branches of the federal government charged with responsibility for foreign relations, the reshaping of the rule to permit certain kinds of suits against foreign sovereigns also had a foreign affairs basis.

In the "Tate Letter" of 1952 the State Department announced a major change in policy: in place of the theory of absolute immunity previously followed, the Department articulated the "restrictive" theory, which was even then already accepted in many foreign countries, under which foreign states can be sued without consent for acts taken in a commercial or private capacity. 26 Dep't State Bull. 984-985 (1952). In explaining the reasons for the policy shift, the Department noted that "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." Id. at 985. Under "Tate Letter" practice from 1952 to 1976 the State Department determined

whether particular activity was sovereign and immune on the one hand or commercial and non-immune on the other. See Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, in 1977 Digest of United States Practice in International Law (Appendix). Suits could be brought in either state or federal court, but the Department's suggestions of immunity continued to be binding on the courts; and a suggestion, once entered, required dismissal under the rule of Ex parte Peru and Mexico v. Hoffman, supra.

Thus, for the first time in 1952 the door was opened to commercial litigation against foreign states without their consent, provided that the State Department did not interpose a suggestion of immunity. With the growing involvement of state trading companies

and other state-owned instrumentalities in international trade, the volume of this litigation steadily increased over the next twenty-five years. And with the increase in litigation came new sorts of foreign relations frictions, stemming in part from the perception of foreign states that they could affect the outcome of judicial processes by the application of diplomatic and political pressure. See H.R. Rep. No. 94-1487, supra, at 7-8; S. Rep. No. 94-1310, supra, at 9-10.

The Foreign Sovereign Immunities Act of 1976 was the first comprehensive legislation governing suits against foreign sovereigns, following years of study by Congress, the State and Justice Departments, and the private bar. Congress determined that the foreign policy interests of the United States would be promoted by replacing

the system of ad hoc State Department determinations of immunity with judicial determinations controlled by specified standards. See 28 U.S.C. § 1602. Since one of the perceived defects of the prior system was the lack of consistency and the susceptibility to politicization of the State Department process, Congress concluded that a uniform body of federal law, developed and applied by the federal courts, was the best replacement for the system of federal executive determinations, the constitutionality of which had long since been beyond question. The devices chosen to insure that the federal courts would provide the primary forum for suits against foreign states were (1) the grant in 28 U.S.C. § 1330 of federal court jurisdiction over "any non-jury action against a foreign state" (emphasis added), and (2) the amendment

of 28 U.S.C. § 1441 to allow a foreign state to remove any action against it to federal court.*

The policies underlying the Act are wholly federal, and the decision to vest original and removal jurisdiction in the federal courts to hear cases under the Act is constitutionally permissible. In considering an analogous question in Ruggiero v. Compania Peruana de Vapores, supra, the Second Circuit recently concluded that Congress could constitutionally couple its decision to relax sovereign immunity barriers with a decision to have suits against foreign sovereigns tried by judges rather than juries. On the same reasoning, Congress

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* State courts are of course bound under the Supremacy Clause to apply the Act's substantive standards for determination of entitlement to immunity in the event a plaintiff chooses to sue in state court and the foreign state defendant chooses not to remove. 28 U.S.C. § 1602.

may enact a comprehensive foreign affairs statute creating remedies against foreign sovereigns that were unknown to the common law, and may provide for federal court jurisdiction as an integral part of that statute.

B. Congress Has the Power to Provide for Federal Court Jurisdiction Over All Suits in Which a Foreign State Is a Party in Order to Minimize Frictions With Foreign Powers and to Ensure Compliance With the International Obligations of the United States.

The decision below calls into question the ability of the United States to avoid friction with foreign powers and to ensure compliance with international legal obligations. The foreign relations sensitivity of suits against foreign states is well-known and was kept firmly in mind by Congress in deciding to vest jurisdiction in the federal courts

over these suits.* Additionally, many foreign states maintain that there are customary international law limitations on the extent to which one nation may subject a coequal sovereign to judicial jurisdiction within its territory. Although the United States position on the scope of these limitations is not always the same as that of the foreign state claiming immunity, the possibility of running afoul of even such limitations as the State Department would acknowledge is exacerbated when the authority exer-

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* See pp. 9 - 11 supra. Diplomatic protests against the actual or potential exercise of judicial jurisdiction over foreign states have been registered with the State Department in numerous cases, and the State Department has transmitted these communications to the courts. See, e.g., Letelier v. Republic of Chile, 488 F. Supp. 665, 666-68, judgment awarded, 502 F. Supp. 259 (D.D.C. 1980); Int'l Ass'n of Machinists v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), aff'd, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3548 (Jan. 11, 1982).

cising jurisdiction is an arm of a government that has neither international personality nor responsibility for external affairs. From the point of view of foreign sovereigns being hailed into American courts against their will, the insult is worse coming from what they perceive as an "inferior" rather than a "coequal" sovereign.* Significantly, foreign states have exercised their right of removal in virtually every reported case brought in state court. See, e.g., Arango v. Guzman Travel Advisors Corp.,

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* One of the generally accepted rationales for the sovereign immunity doctrine has traditionally been the "perfect equality and absolute independence of sovereigns." Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) at 13. The concept of equality is implicit in the Latin maxim summarizing the doctrine, par in parem imperium non habet (an equal has no dominion over an equal). See Harv. Research in Int'l Law, Competence of Courts in Regard to Foreign States, 26 Am. J. Int'l L. Supp. 451, 527 (1932). It is surely appropriate and constitutional for Congress to have concluded that the courts of the "coequal" sovereign should determine whether exceptions to the immunity rule are applicable.

621 F.2d 1371 (5th Cir. 1980); Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978); Gray v. Permanent Mission of the Congo, 443 F. Supp. 816 (S.D.N.Y.), aff'd mem., 580 F.2d 1044 (2d Cir. 1978); 40 D 6262 Realty Corp. v. United Arab Emirates, 447 F. Supp. 710 (S.D.N.Y. 1978).

Some recent examples from the reported cases show how issues of intense foreign relations sensitivity can come up in suits brought by foreigners against foreign sovereigns. In Letelier v. Republic of Chile, 488 F. Supp. 665, judgment awarded, 502 F. Supp. 259 (D.D.C. 1980), the widow and children of the former Chilean ambassador to the United States sued Chile and its agents for wrongful death resulting from a bomb placed in his car in the District of Columbia. In Mashayekhi v. Iran, 515 F. Supp. 41 (D.D.C. 1981), the former

Washington chief of the Iranian Bureau of Information during the Shah's regime brought suit on his employment contract after the fall of the Shah. In De Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900, 901, 907 (E.D. La. 1981), a suit against the Nicaraguan central bank on an unpaid check was described as arising "against the backdrop of the Nicaraguan revolution which ousted the regime of Anastasio Somoza Debayle;" the bank claimed sovereign immunity and asserted that it had acted to conserve foreign currency in the wake of "the Carter Administration's decision in 1978 to block Nicaragua's access to international monetary funds." In Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978), a Russian emigre writer who described himself in his pleadings as "a persistent defender of the civil and human

liberties of the Russian people" claimed that he had been defamed by official Soviet information agencies in publications circulated in the United States. Regardless of whether the state courts might ultimately have reached the correct result in these cases, or of whether an alternative basis for federal jurisdiction might have been available, the judgment of Congress to provide federal jurisdiction under the FSIA is clearly within the scope of its powers under Article I of the Constitution.

In addition, there are several respects in which sovereign immunity cases may raise questions of United States compliance with treaty obligations. The immunity standards of the FSIA are explicitly subject to "existing international agreements to which the United States is a party." 28 U.S.C. §§ 1604, 1609. Both foreign plaintiffs

and foreign sovereign defendants may contend that the interpretation and application of the access, national treatment and immunity clauses of treaties of friendship, commerce, and navigation are critical aspects of suits brought under the FSIA.* And where the suit involves enforcement of a foreign arbitral award rendered against a foreign state, the United States may be obligated by treaty to enforce the award, even if the party invoking the aid of the court

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* There is such a treaty in force with the Netherlands, the country where Verlinden B.V. is incorporated. 8 U.S.T. 2043, TIAS 3942. See also the comparable provisions in our treaties with, e.g., Belgium, 14 U.S.T. 1284, TIAS 5432; Denmark, 12 U.S.T. 908, TIAS 4797; France, 11 U.S.T. 2398, TIAS 4625; Germany, 7 U.S.T. 1839, TIAS 3593; Greece, 5 U.S.T. 1829, TIAS 3057; Iran, 8 U.S.T. 899, TIAS 3853; Israel, 5 U.S.T. 550, TIAS 2948; Italy, 63 Stat. 2255, TIAS 1965; Japan, 4 U.S.T. 2063, TIAS 2863: Korea, 8 U.S.T. 2217, TIAS 3947; Nicaragua, 9 U.S.T. 449, TIAS 4024; Pakistan, 12 U.S.T. 110, TIAS 4683.

is foreign.* By relegating all these issues to state courts when the parties are both foreign, the holding below casts doubt on the ability of the United States to ensure correct and consistent application of the treaties and agreements to which it is party. The Framers could

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* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, TIAS 6997. The Convention is implemented in the United States by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208, which provides in part that an action under the Convention "shall be deemed to arise under the laws and treaties of the United States," and that the federal district courts shall have original jurisdiction over such an action regardless of the amount in controversy. Prior to the Second Circuit's decision in Verlinden it had been held, as a matter of statutory interpretation rather than constitutional analysis, that federal court jurisdiction over a proceeding under the Convention was proper even though all the parties were foreign. Sumitomo Corp. v. Parakopia Compania Maritima, S.A., 477 F. Supp. 737 (S.D.N.Y. 1979), aff'd mem., 620 F.2d 286 (2d Cir. 1980).

An award against Nigeria, arising out of the same cement crisis at issue in Verlinden, was enforced under the Convention and the FSIA in Ipitrade Int'l, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978), although the plaintiff was foreign.

never could have intended this anomaly.*

The Framers and the drafters of the FSIA were well aware that state courts might be more responsive to local sentiments than to national and international concerns such as those embodied in the FSIA. And it is not difficult to imagine the virtual impossibility of harmonizing inevitably conflicting rulings emanating from the courts of 50 states, as opposed to the more compact federal judicial system.** The risk of retaliation by foreign sovereigns against offensive state

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* Indeed, as the Solicitor General has pointed out in support of the petition for the writ of certiorari in this case (Brief for the United States as Amicus Curiae at p. 41), if the holding below represents a correct construction of Article III, then even this Court would not be able to review state court decisions applying the FSIA.

** It is staggering to contemplate the problems for United States foreign relations if foreigners, including expatriate Iranians living in American communities, had been able to maintain suits against Iran in local courts

(Footnote continued)

actions "is acute, and such retaliation of necessity would be felt by the Nation as a whole." Japan Lines, supra, 441 U.S. at 434. In short, if the holding below stands, there is a significant possibility of incalculable damage to the foreign relations of the United States stemming from erratic or erroneous rulings by state courts in cases brought by foreign plaintiffs against foreign sovereigns.

(Footnote continued)

during the recent Iranian hostage crisis without the possibility of removal to federal courts. Such suits brought in state courts have uniformly been removed. See, e.g., Mashayekhi v. Iran, 515 F. Supp. 41 (D.D.C. 1981) (finding "an exceedingly strong federal interest" in the immunity issues and dismissing the complaint on immunity grounds).

II.

A Case Brought by an Alien Against a Foreign State Under the Foreign Sovereign Immunities Act Is Within the Scope of the Judicial Power of the United States Under Article III of the Constitution.

A fundamental flaw in the reasoning of the court below was its concept that federal issues entering a case under "jurisdictional" statutes or as "defenses" cannot ever give rise to federal judicial power under Article III. The authorities cited for this concept do not purport to construe Article III but rather interpret the similar language of 28 U.S.C. § 1331. See, e.g., Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908). Of course, as this Court has repeatedly held, principles of constitutional construction differ from techniques of statutory interpretation, and the Article III grant is broader than the restrictive concepts that have been

developed in applying § 1331. Romero v. International Terminal Operating Co., 358 U.S. 354, 379 n. 51 (1959); Powell v. McCormack, 395 U.S. 486, 515 (1969).

The court below gave short shrift to Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), although the authorities who have considered the question have concluded that Osborn supports federal jurisdiction over foreigner-foreign state suits.* The cases subsequent to Osborn that the court below found more compelling involved the general federal question grant and dealt with matters of concurrent state and federal concern; none of them involved an express grant of jurisdiction based on the federal foreign affairs power.

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* 1 J. Moore, Federal Practice ¶ 0.66 [4] n. 11 (2d ed. 1980); Note, Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction, 90 Yale L.J. 1861, 1867-68 (1981).

In the foreign affairs area, there is every reason why Article III of the Constitution, like Articles I and II, should be construed in favor of the existence of federal power. See authorities cited at pp. 14 - 16, supra. The broad scope which this Court's decisions give to congressional and executive powers in the field of foreign affairs has been implied as much from the nature of sovereignty and federalism as from the specific words of the Constitution.* Nothing in the Constitution specifically mentions a power of the President to enter into executive agreements or to settle the claims of United States nationals, for example; yet this Court's decisions have held not only that the President has these powers but also that his exercise of them controls over

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* See United States v. Curtiss-Wright Export Co., supra.

any conflicting state policy. United States v. Pink, supra; United States v. Belmont, supra; cf. Dames & Moore v. Regan, 69 L. Ed. 2d 918 (1981). Surely the concepts reflected in the words of Article III justify an equally broad construction in the area of foreign affairs.

The court below did not mention the clauses of Article III conferring jurisdiction on both this Court and the lower federal courts over cases involving "Ambassadors, Public Ministers, and other Consuls." Yet comparable clauses in Article II, giving the President authority to "appoint" and to "receive" these officers, have been cited as supporting the exercise of such broad authorities as recognizing and derecognizing states and governments, prescribing the national policies that follow a change in recognition, and removing obstacles to normalization of relations with foreign

countries. United States v. Pink, supra.

The significance of the "Ambassadors, Public Ministers, and other Consuls" clauses in finding a broad foreign affairs power in Article III can be seen from the several decisions of this Court holding that the privileges and immunities of such officers with respect to judicial process belong to the foreign state itself and not to the persons who represent it. Davis v. Packard, 32 U.S. (7 Pet.) 276 (1833); Ex parte Gruber, 269 U.S. 302 (1925).* If the "high considerations of public policy" reflected in these clauses pertain to relations with foreign states rather than with individuals, id. at 303,

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* Indeed, Chief Justice Marshall in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) at 854-55, noted that the broad reach of these clauses to all cases "affecting" these officers "was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which they were in any manner affected."

then surely these states can equally claim the privilege of their officers to be sued, if at all, in the federal courts.

In considering the relevance of the "Ambassadors" clauses to the present issue, it is also significant that the FSIA carefully limits the situations in which service of process on "Ambassadors, Public Ministers, and other Consuls" is permissible and effective as service on the foreign state itself. Under 28 U.S.C. § 1608(a)(4), a plaintiff may achieve valid service on a foreign state by transmitting specified documents to the Secretary of State to be served through diplomatic channels, but this method of service (which did not exist prior to the FSIA) is only available if service cannot be effected under the methods prescribed by 28 U.S.C. § 1608(a)(1)-(3). A plaintiff is precluded from attempting on its

own to serve an ambassador or consul here in the United States; rather, the plaintiff must comply with the State Department regulations in order to obtain service through diplomatic channels. See H.R. Rep. No. 94-1487, supra, at 24-26; S. Rep. No. 94-1310, supra, at 23-26; 22 C.F.R. § 93.1. The same constitutional power that authorizes Congress to devise methods of service through diplomatic channels supports the concept of federal jurisdiction here.

With respect to the "arising under" clause of Article III, even if the court below were correct in the use of Section 1331 jurisprudence to divine a dichotomy between "jurisdiction" or "procedure" on the one hand and "substance" on the other, it erred in treating the FSIA as merely "regulating judicial practice" rather than creating "substantive rules

of decision." 647 F.2d 327-28.* The categorization of sovereign immunity as "non-substantive" is incorrect in light of the various respects in which the FSIA changes otherwise applicable substantive law (as, for example, in Section 1606, which regulates the availability of compensatory and punitive damages). It is also inconsistent with numerous decisions of this Court. See, e.g., Ex parte Peru, supra, 318 U.S. at 588 (calling the immunity rule "an overriding principle of substantive law"); Mexico v. Hoffman, supra, 324 U.S. at 35-36 (sovereign immunity is "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts"); cf. Dames & Moore v. Regan, supra, 69 L. Ed. 2d at

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* The court denied that a federal question can "arise under" a jurisdictional statute and found the FSIA to be such a statute because it does not "regulate conduct outside the courtroom." 647 F.2d 327, 328-29 n. 24.

943 ("No one would suggest that a determination of sovereign immunity divests the federal courts of 'jurisdiction.'").*

The notion that sovereign immunity is merely a defense is also fallacious.** Although tradition and the legislative history of the FSIA give some support to this concept,*** the terms and structure of the FSIA show that the burden of pleading and proving lack of immunity must be borne by the plaintiff. Section

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* See also Oliver American Trading Co. v. Mexico, 264 U.S. 440, 442-43 (1924)(sovereign immunity is not a question of federal jurisdiction but rather "a question of general law applicable as fully to suits in the state courts as to those prosecuted in the courts of the United States").

** Even if sovereign immunity were merely a defense, it does not follow that federal subject matter jurisdiction is unavailable in the constitutional sense. This Court has sustained federal jurisdiction to protect important federal interests, even though the federal issue may arise by way of defense. Tennessee v. Davis, 100 U.S. 257 (1880).

*** H.R. Rep. No. 94-1487, supra, at 17; S. Rep. No. 94-1310, supra, at 17 (1976).

1604 establishes a presumption of immunity for all foreign sovereigns and their agencies, instrumentalities and property; this presumption is only rebutted if one or more of the exceptions to immunity is affirmatively established. Absence of immunity is an essential ingredient in establishing subject matter jurisdiction under 28 U.S.C. § 1330(a), as to which plaintiff must have the burden of pleading and proof.* Furthermore, Section 1608, which governs cases in which the foreign state fails to appear, requires the claimant to establish his right to relief "by evidence satisfactory to the court." This section has been correctly applied to require the court to conduct a sua sponte inquiry

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* If subject matter jurisdiction fails because the defendant is entitled to immunity, the plaintiff is precluded from relitigating the immunity issue in state court. H.R. Rep. No. 94-1487, supra, at 13; S. Rep. No. 94-1310, supra, at 13.

into whether the plaintiff has proved lack of immunity as an element of entitlement to relief: the court must ascertain the absence of immunity even if the non-appearing foreign state has not pleaded immunity as a defense.*

Thus, even under the restrictive concepts developed in applying 28 U.S.C. § 1331, a case brought under the FSIA "arises under" federal law and falls

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* The lower courts have undertaken such an inquiry in Ipitrade Int'l, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978); Letelier v. Republic of Chile, 488 F. Supp. 665, judgment awarded, 502 F. Supp. 259 (D.D.C. 1980); and Maritime Int'l Nominees Establishment v. Republic of Guinea, 505 F. Supp. 141 (D.D.C. 1981), appeal pending; and have concluded not that the defense was lost by failure to assert it but rather that the foreign state was not entitled to immunity. In Int'l Ass'n of Machinists v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), aff'd, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 50 U.S. L.W. 3548 (Jan. 11, 1982), the district court concluded that the foreign state defendants were entitled to immunity, even though they failed to appear to assert the defense. The court of appeals affirmed on act of state grounds.

within the judicial power of the United States.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the constitutionality of the FSIA sustained as to all suits against foreign sovereigns.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VERLINDEN B.V.,
Petitioner,

v.

CENTRAL BANK OF NIGERIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICI CURIAE* RULE OF LAW COMMITTEE, NATIONAL FOREIGN TRADE COUNCIL, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
1. The Statute	2
2. Article III	3
ARGUMENT	5
I. THE FSIA COVERS SUITS BY ALIENS AGAINST FOREIGN STATES	5
A. The Language of the Statute is Unambiguous	5
B. Congress Intended To Cover Suits by Aliens	6
1. Congress sought the uniformity of decision that only federal jurisdiction can ensure	6
2. Congress required only that the claim, not the parties, have a connection with the United States	7
3. Congress's intent to protect American businesses would be thwarted if suits by aliens were excluded from federal courts	9
C. Closing Federal Courts to Aliens Would Violate U.S. Treaty Obligations	13
II. THREE PROVISIONS OF ARTICLE III SUPPORT THE CONSTITUTIONALITY OF THE FSIA'S GRANT OF JURISDICTION	15
A. The Ambassadors Clause	17
B. The Law of Nations	21
C. The Foreign Diversity Clause	26
CONCLUSION	30
APPENDIX	

TABLE OF AUTHORITIES

Cases: Page

Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962) 28
Arizona v. New Mexico, 425 U.S. 794 (1976) 17
Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979) 17
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 18, 23
Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) 4, 26
Berizzi Brothers v. Steamship Pesaro, 271 U.S. 562 (1926) 20, 24
Bors v. Preston, 111 U.S. 252 (1884) 17, 18
Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) 20
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 25
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) .. 20
Clarkson Co. v. Shaheen, 544 F.2d 624 (2d Cir. 1976) 10
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) .. 16
Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968) 9
Connecticut General Life Insurance Co. v. Johnson, 303 U.S. 77 (1938) 27
Cook v. United States, 288 U.S. 102 (1933) 14
Davis v. Packard, 32 U.S. (7 Pet.) 276 (1833) 3, 18
Employers of Department of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279 (1973) 20
Ernst & Ernst v. Hochfelder, 425 U.S. 185(1976) .. 6
Ex parte Gruber, 269 U.S. 302 (1925) 18
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) 23
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) .. 12
Hilton v. Guyot, 159 U.S. 113 (1895) 14
Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) 26
Illinois v. Milwaukee, 406 U.S. 91 (1972) 17
J. Zeevi & Sons v. Grindlays Bank (Uganda), 37 N.Y.2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, *cert. denied*, 423 U.S. 866 (1975) 7

TABLE OF AUTHORITIES—Continued

	Page
Kansas v. Colorado, 206 U.S. 46 (1907)	23
Louisville, Cincinnati & Charleston Railroad v. Letson, 43 U.S. (2 How.) 497 (1844)	27
Louisville & Nashville Railroad v. Mottley, 211 U.S. 149 (1908)	24
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)	14
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	17
Marshall v. Baltimore & Ohio Railroad, 57 U.S. (16 How.) 314 (1854)	26
Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800)	26
Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971)	17
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868)	27
Piper Aircraft Co. v. Reyno, 102 S. Ct. 252 (1981)	8
Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895)	16
Ruggiero v. Compania Peruana de Vapores, 639 F.2d 872 (2d Cir. 1981)	10
St. Louis & San Francisco Railway v. James, 161 U.S. 545 (1896)	26
Sinking-Fund Cases, 99 U.S. 700 (1878)	27
State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967)	5, 27
Steamship Co. v. Tugman, 106 U.S. 118 (1882)	10, 26
Tag v. Rogers, 267 F.2d 664 (D.C. Cir.), *cert. denied*, 362 U.S. 904 (1959)	23
The Anne, 16 U.S. (3 Wheat.) 435 (1818)	19
The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)	14
The Exchange, 11 U.S. (7 Cranch) 116 (1812)	24
The Nereide, 13 U.S. (9 Cranch) 388 (1815)	3, 23
The Paquete Habana, 175 U.S. 677 (1900)	23
United States v. Nevada, 412 U.S. 534 (1973)	17
United States v. Ortega, 24 U.S. (11 Wheat.) 467 (1826)	21
United States v. Pink, 315 U.S. 203 (1942)	18
Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932)	25
Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)	22

TABLE OF AUTHORITIES—Continued

Page

Washington v. General Motors Corp., 406 U.S. 109 (1972) 17
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U.S. Const. amend. XI 20
U.S. Const. art. II 18
U.S. Const. art. III 17, 19, 20, 27
28 U.S.C. § 1257 (1976) 24
The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 *et seq.* (1976 and Supp. III 1979) ..... *passim*
28 U.S.C. § 1330 (1976) 4, 5, 6, 25, 27
28 U.S.C. § 1331 24
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28 U.S.C. § 1350 (1976) 23
28 U.S.C. § 1441(d) (1976) 5
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H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13 (1976) 2, 6, 7, 9, 11, 21, 24, 28

TABLE OF AUTHORITIES—Continued

Page

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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-920

VERLINDEN B.V.,

Petitioner,

v.

CENTRAL BANK OF NIGERIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICI CURIAE*
RULE OF LAW COMMITTEE,
NATIONAL FOREIGN TRADE COUNCIL, INC.,
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,

AND

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES
IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

This brief is filed (with the written consent of both parties) by four American associations with longstanding interests in international trade. Enterprises owned by foreign governments are increasingly active in international trade, and many of their transactions are with foreign affiliates of private American firms—companies owned by U.S. interests but incorporated or having their principal offices abroad. Enactment of the Foreign Sovereign Immunities Act was an enormously important step toward regularizing commercial relationships between enterprises owned by foreign nations and private American firms.

The decision of the court of appeals has endangered this progress by casting doubt on the ability of American-owned companies incorporated and doing business abroad to sue under the Act in federal court. For this reason, the *amici curiae* urge that the decision be reversed.

The *amici* are:

1. The Rule of Law Committee, an informal voluntary association of legal representatives from major American multinational corporations engaged in world-wide banking, petroleum, manufacturing, export, and construction activities.

2. The National Foreign Trade Council, Inc., a New York not-for-profit corporation concerned with international trade and investment, to which more than 650 corporations now belong. Council members account for over 70% of all U.S. exports and over 70% of all U.S. foreign direct private investment.

3. The Chamber of Commerce of the United States of America, the largest federation of business, trade, and professional organizations and individuals in the United States.

4. The National Association of Manufacturers of the United States, a voluntary non-profit association representing approximately 11,600 manufacturers and related

business concerns that account for an estimated 85% of the nation's manufacturing employees and 80% of the nation's industrial output.

SUMMARY OF ARGUMENT

1. The Statute

a. The Foreign Sovereign Immunities Act ("FSIA" or "Act") gives federal courts jurisdiction over "any" civil action against a foreign government that is not immune under standards set by the FSIA.[1] The law says nothing about excluding certain plaintiffs from U.S. courts. Its plain language requires the federal courts to take jurisdiction of suits brought by aliens and citizens alike.

b. The lower courts were wrong in doubting that Congress intended this result. Congress clearly expressed its intent to achieve "uniformity in decision" in FSIA cases and to "encourage the bringing of actions against foreign states in federal courts." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13 (1976). Relegating suits by aliens to state courts would defeat these goals.

c. A straightforward reading of the FSIA will not require federal courts to hear suits that lack a connection to the United States. Congress prevented this possibility by limiting the kinds of claims that can be heard; it did not limit the class of plaintiffs who can bring them. Excluding plaintiffs based on their citizenship would not have protected American interests, for many companies incorporated abroad are owned by U.S. concerns. The ten largest U.S. companies each have an average of almost twenty-five foreign affiliates, and total U.S. investment in foreign affiliates exceeds $200 billion.

The international consequences of barring aliens from U.S. courts would be severe. The United States has entered into twenty-nine treaties guaranteeing the citizens of other nations the same access to federal courts

[1] 28 U.S.C. §§ 1330 *et seq.* (1976 and Supp. III 1979).

that American citizens have. Even those nations without such treaties could resort to the principle of reciprocity and retaliate for the exclusion of their citizens from U.S. courts by excluding Americans from theirs.

2. Article III

Permitting aliens to bring FSIA suits is constitutional. In addition to the grounds advanced by the petitioner (hereinafter "Verlinden") and the United States, three separate bases for the FSIA may be found in article III of the Constitution.

a. *"Cases affecting Ambassadors, other public Ministers and Consuls."* The ambassadors clause, which was drafted at a time when absolute sovereign immunity prevented suits against foreign governments, conferred federal jurisdiction over every case directly affecting foreign governments. It has long been accepted that the grant protects governments, not individuals. *Davis v. Packard*, 32 U.S. (7 Pet.) 276, 279 (1833). Parallel language in article II (the President may "receive Ambassadors and other public Ministers") is the source of the Executive power to recognize governments as well as their representatives. Moreover, by conveying jurisdiction over all cases "affecting" the representatives of foreign governments, the framers left Congress room to identify additional cases that may affect foreign relations. Congress exercised that power in 1789, expanding the grant to cover servants and relatives of diplomats, and it has exercised the power again in enacting the FSIA.

b. *The law of nations.* International law, or the law of nations, is a part of the law of the United States. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.). Cases arising under the law of nations therefore arise under federal law within the meaning of article III. Foreign sovereign immunity is one of the fundamental doctrines of international law. Because the FSIA confers federal jurisdiction over cases applying this doctrine, FSIA cases arise under federal law.

The court of appeals, however, concluded that no case may "arise under" a federal law that simply confers jurisdiction. It assumed that the FSIA is such a law. This assumption flies in the face of the long history of sovereign immunity as a substantive defense, as well as the elaborate substantive standards for granting immunity that the FSIA itself establishes. 28 U.S.C. §§ 1605-1607 (1976). In characterizing the FSIA as merely jurisdictional, the court of appeals was evidently confused by an unusual but hardly essential cross-reference between the FSIA's jurisdictional and substantive rule: The jurisdictional provision, 28 U.S.C. § 1330 (1976), grants federal jurisdiction over any suit against a foreign government *unless* the government can meet the substantive standards for establishing immunity. If this incorporation of a substantive defense into a jurisdictional grant renders the grant unconstitutional, the solution is not to strike down the entire grant. Both the jurisdictional and substantive provisions of the FSIA can perform their functions without the cross-reference, and the least intrusive remedy would have been simply to strike the cross-reference while leaving the grant of jurisdiction in place.

c. *"Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."* The "foreign diversity" clause supports jurisdiction in the present case if Verlinden may be classified as a citizen of a State for purposes of article III. In *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), Chief Justice Marshall ruled that the citizenship of a corporation's shareholders determined whether the corporation met the diversity requirement. Later modifications of the rule, deeming corporations "citizens" of the State where they are incorporated or have their principal place of business, have been accomplished by fiction or statute. They have not suggested that Congress lacks power to restore shareholders' citizenship as an appropriate measure of corporate "citizenship."

Nor is Congress limited by the complete diversity rule. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967). A corporation's shareholders therefore need not all reside in one State for Congress to deem it a citizen of that State.

There can thus be no constitutional objection to extending the benefits of the FSIA to companies that are owned by Americans, no matter where those companies have their offices or are incorporated. Indeed, given Congress's plain intent to protect American interests, no narrower ruling would be faithful to its wishes. Even if our other arguments are rejected, therefore, the Court should not hold the FSIA unconstitutional in this case without determining the nationality of Verlinden's shareholders.

ARGUMENT

I. THE FSIA COVERS SUITS BY ALIENS AGAINST FOREIGN STATES

A. The Language of the Statute is Unambiguous

The Foreign Sovereign Immunities Act gives the federal district courts jurisdiction over "any" civil action against a foreign state that is not entitled to sovereign immunity under the Act.[2] This straightforward language permits no distinction between suits against foreign states brought by aliens and those brought by citizens of the United States. All are within the jurisdiction of the federal courts.

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[2] 28 U.S.C. § 1330(a) (1976) provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

See also 28 U.S.C. § 1441(d) (1976) (permitting removal to federal court of "[a]ny civil action brought in a State court against a foreign state").

Analysis of the jurisdictional provisions of the FSIA should end here. There is no need to resort to legislative history when a statute's language is as plain as this. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). In any event, the legislative history is consistent with the plain language of the Act.

B. Congress Intended To Cover Suits by Aliens

1. *Congress sought the uniformity of decision that only federal jurisdiction can ensure*

A principal objective of the FSIA was, in the words of the district court below, to "concentrat[e] litigation against sovereign states in the federal courts in order to aid the development of a uniform body of federal law governing assertions of sovereign immunity." Appendix to Petition for Certiorari at 33a, *Verlinden B.V. v. Central Bank of Nigeria*, No. 81-920 [hereinafter cited as Pet. App.]. The House Committee Report on the FSIA bill explains that "uniformity in decision . . . is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13 (1976) [hereinafter cited as 1976 House Report].

Recognizing that this uniformity could best be achieved through the federal court system,[3] Congress went to great lengths "to encourage the bringing of actions against foreign states in federal courts." *Id.* It eliminated the "amount in controversy" requirement. 28 U.S.C. § 1330(a)

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[3] *Cf.* section-by-section analysis accompanying Executive communication transmitted to Speaker of the House of Representatives on January 16, 1973 by the Departments of State and Justice, concerning the proposed legislation, *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 47 (1973) [hereinafter cited as *1973 Hearing*] ("[O]riginal jurisdiction in the federal courts should be conducive to uniformity of decision, and the federal courts may be expected to have a greater familiarity with international law and with the trend of decision in foreign states than would be true of courts of the States.").

(1976). In addition, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area," 1976 House Report, *supra* p. 6, at 32, Congress accorded foreign states "clear authority to remove to a Federal forum actions brought against them in the State courts." *Id.* The FSIA "permits the removal of *any* such action at the discretion of the foreign state." *Id.* (emphasis added). In short, Congress drafted the federal jurisdictional provisions of the FSIA with the object of establishing a "*comprehensive* jurisdictional scheme in cases involving foreign states," encompassing "*any* claim with respect to which the foreign state is not entitled to immunity." *Id.* at 13 (emphasis added). "*Such broad jurisdiction in the Federal courts,*" the House Committee Report explains, "should be conducive to uniformity in decision." *Id.* (emphasis added).

Congress's goal of uniformity would be thwarted if FSIA suits by aliens were arbitrarily excluded from federal court. These suits would remain in the state courts, *e.g., J. Zeevi & Sons v. Grindlays Bank (Uganda)*, 37 N.Y. 2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, *cert. denied*, 423 U.S. 866 (1975), raising the possibility of inconsistent rulings even in cases brought against the same sovereign and arising from the same facts. Nothing could be further from the uniform treatment Congress sought.

2. *Congress required only that the claim, not the parties, have a connection with the United States*

In opening the federal courts to "any" FSIA suit, Congress was alert to the danger of suits with no connection to the United States. It dealt with that danger not by limiting the class of plaintiffs but by restricting the kind of claims they could raise. Under the Act's "long-arm" provisions, suits may ordinarily be brought only if the underlying transaction has a substantial connection with the United States.[4]

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[4] 28 U.S.C. § 1605 (1976); *see also Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before*

The "long-arm" provisions were intended as the primary safeguard against suits in which the United States has no significant interest.[5] When the danger of thrusting federal courts into wholly "foreign" disputes was raised by one of the FSIA's principal architects, he noted only one protection against this possibility—the Act's limitations on long-arm jurisdiction:

> It should also be stressed that the long-arm feature of the bill will ensure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small "international courts of claims." The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.[6]

There is nothing surprising in Congress's decision to focus on whether the underlying claims have a connection with the U.S. rather than on the nationality of the plaintiff. States often have an interest in the proper resolution of

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the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 31 (1976) [hereinafter cited as *1976 Hearings*].

[5] An additional safeguard exists in the traditional doctrine of *forum non conveniens*, which the FSIA left intact. That doctrine, like the long-arm features of the Act, can be applied to close United States courts to cases in which "none of the parties are American, and . . . there is absolutely no nexus between the subject matter of the litigation and the United States." Piper Aircraft Co. v. Reyno, 102 S. Ct. 252, 263 n.17 (1981); *see also* Note, *Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction*, 90 Yale L.J. 1861, 1871-73, 1875-77 (1981) [hereinafter cited as *Suits by Foreigners*].

[6] *1976 Hearings*, *supra* note 4, at 31 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice). The court of appeals quoted the second sentence of this portion of Mr. Ristau's testimony as evidence that Congress intended to restrict federal court jurisdiction under the FSIA to suits brought by American citizens. Pet. App. at 7a. It is clear in light of the preceding sentence, however, that the court misinterpreted Mr. Ristau's meaning.

disputes between non-residents.[7] Numerous state legislatures have enacted long-arm statutes that allow courts to exercise jurisdiction over suits between non-residents when the dispute arises out of a transaction with substantial contacts to the forum. *E.g.*, Md. [Cts. & Jud. Proc.] Code Ann. § 6-103(b)(3) (1980); Okla. Stat. tit. 12, § 1701.03(a)(3) (1980); Va. Code § 8.01-328.1(A)(3) (1977). Among the long-arm statutes permitting such suits is that of the District of Columbia, D.C. Code Ann. § 13-401 (1981), which formed the model for the Act's long-arm provisions. 1976 House Report, *supra* p. 6, at 13; *see also 1973 Hearing*, *supra* note 3, at 23.

3. *Congress's intent to protect American businesses would be thwarted if suits by aliens were excluded from federal courts*

Despite this evidence of Congress's intent, both courts below found the legislative history inconclusive. *See* Pet. App. at 5a-8a, 31a-34a. Their uncertainty arose from occasional passages in which subcommittee witnesses spoke of protecting "American citizens," "American businesses," and "American parties" suing foreign governments; these passages were perceived to conflict with other testimony in which witnesses referred more broadly to "private litigants" and "private parties." *See id.*; *1976 Hearings*, *supra* note 4, at 31, 58, 80.

The occasional references to the Act's effect upon American parties demonstrate only that Americans were expected to be the principal beneficiaries of the Act. The Act was drafted against a background of increasing trade and litigation between the American business community and foreign government entities. *See* 1976 House Report,

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[7] For example, each jurisdiction has an interest in regulating potentially harmful activities within its borders, regardless of the residence of the actors. *See* Conklin v. Horner, 38 Wis. 2d 468, 477, 157 N.W.2d 579, 583 (1968); *Suits by Foreigners*, *supra* note 5, at 1870 & nn. 66-67; Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533, 543-44.

supra, at 6, 7; *1976 Hearings, supra* note 4, at 25, 29, 80, 83. American businesses had been the principal victims of the State Department's discretionary interventions in sovereign immunity cases under the procedure in effect prior to passage of the FSIA; they felt keenly the need for "greater predictability" and for decisions by "courts free from diplomatic or political influence." *Id.* at 80 (testimony of Cecil J. Olmstead, Chairman, The Rule of Law Committee); *see also id.* at 27 (testimony of Monroe Leigh, Legal Adviser, Department of State). No one, however, suggested that *only* American businesses should or would benefit from the Act, and no one urged that the Act exclude foreign plaintiffs.

One powerful reason for the absence of such proposals is that American commercial interests could not be protected by a simplistic rule opening the federal courts to citizens but not aliens. Under the diversity statute, a company incorporated abroad is an alien, even if its offices and shareholders are all in the United States. *Steamship Co. v. Tugman*, 106 U.S. 118 (1882); *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 875 (2d Cir. 1981); *Clarkson Co. v. Shaheen*, 544 F.2d 624, 628 n.5 (2d Cir. 1976).

Excluding companies incorporated abroad but owned by U.S. nationals from the benefits of the Act would greatly limit its value to U.S. companies, for much of their international business is done through such companies. According to the 1981-82 International Directory of Corporate Affiliations, the ten largest U.S. corporations have a total of 246 foreign affiliates that are incorporated or have their principal place of business abroad. As the chart below shows, in 1980, United States investors had a $213.5 billion stake in their foreign affiliates—more than double their investment in 1973.[8]

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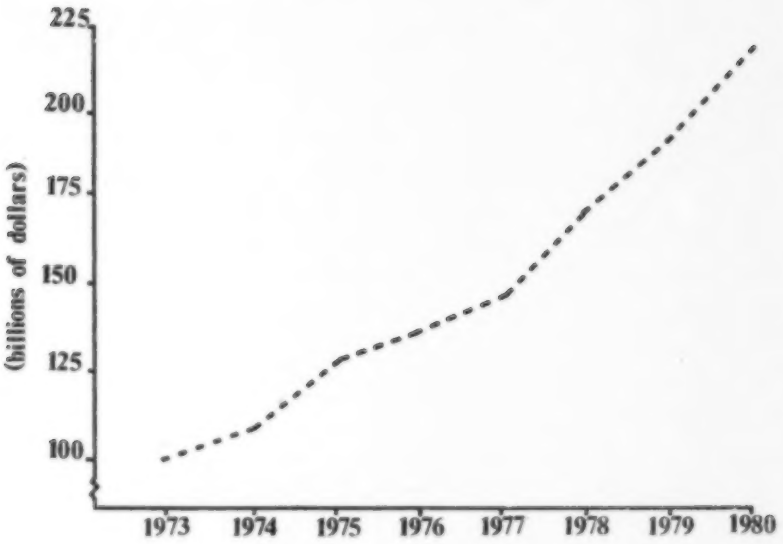
[8] Data compiled by the Bureau of Economic Analysis and published by Office of International Investment, International Trade Administration of the United States Department of Commerce. These figures drastically understate the value of American direct

U.S. Direct Investment Position Abroad



The overall importance of such investments to U.S. companies has also increased. Between 1960 and 1979, the percentage of U.S. companies' gross fixed capital formation represented by direct foreign investment increased by 73%.[9]

As U.S. companies and their affiliates move increasingly into foreign markets, their dealings with state-owned enterprises are also increasing, a development the legislative history of the FSIA repeatedly recognized. *See, e.g., 1976 Hearings, supra* note 4, at 25, 29, 80, 83; 1976 House

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investment because they reflect net book value, unadjusted for inflation, rather than asset replacement cost. Direct investment position is formally defined as the net book value of the investors' equity in, and outstanding loans to, their foreign affiliates where there is at least 10% ownership of the voting securities or the equivalent.

[9] Based upon U.N. Centre on Transnational Corporations, *Salient Features and Trends in Foreign Direct Investments* at table 9, U.N. Doc. ST/CTC/14 (1981) (adv. uned. text).

Report, *supra* p. 6, at 6, 7. As a result of their "staggering" growth, state-owned enterprises accounted in 1980 for at least 15% of all world trade.[10] All indications are that their share will continue to expand rapidly.[11] State-controlled enterprises dominate whole industrial sectors, producing 54% of the non-Communist world's steel, 35% of its polyethylene, and 20% of its automobiles.[12] In raw materials, they are even more pervasive, producing 85% of the non-Communist world's oil, 40% of its copper, and 33% of its iron ore and bauxite. Communist nations have also greatly expanded their commercial contacts with American enterprises. For example, in 1979, Soviet shipping companies carried $2 billion worth of American cargo, a 5,000% increase over 1971, when they carried only $38 million worth.[13]

Given the increasingly complex web of relations among American businesses, their foreign affiliates, and state-owned enterprises, a rule that mechanically excluded companies incorporated abroad from the benefits of the Act would hardly have served Congress's purpose in enacting the FSIA.[14] Rather than embark on a fruitless

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[10] Aharoni, *The State Owned Enterprise as a Competitor in International Markets*, Colum. J. World Bus., Spring 1980, at 15, 16.

[11] The average growth in sales between 1975 and 1976 of all [state-owned enterprises] in the *Fortune* list of the largest non-U.S. corporations was 21.8% p.a. as against 14.9% p.a. for all private firms in the same list over the same period. It is thus not surprising that the 1976 *Fortune* list of 500 largest non-U.S. corporations contained as many as 59 [state-owned enterprises], accounting for 20.7% of total sales of the 500 firms.

Id. at 16 (footnote omitted).

[12] Menzies, *U.S. Companies in Unequal Combat*, Fortune, April 9, 1979, at 103.

[13] *Id.*

[14] Moreover, a law that excluded all aliens from the federal courts would have raised severe constitutional problems, at least as applied to natural persons resident in this country. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); *Suits by Foreigners, supra*

effort to decide which corporations and which natural persons have sufficient connections with the U.S. to bring suits in federal court, Congress chose instead to identify those kinds of claims that are appropriate for U.S. courts.[15] The legislative history and the realities of modern international trade suggest that this decision was both intentional and prudent.

C. Closing Federal Courts to Aliens Would Violate U.S. Treaty Obligations

If the FSIA were read to deny aliens the right to sue foreign governments in federal courts, it would violate the United States' obligations under a number of international treaties in force now and at the time the Act was passed. Indeed, excluding Verlinden would violate an existing treaty between the United States and the Netherlands. Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. V, para. 1, 8 U.S.T. 2043, T.I.A.S. No. 3942.

The treaty with the Netherlands is one of more than three dozen Friendship, Commerce and Navigation ("FCN") treaties that were in effect when Congress adopted the FSIA. Twenty-nine of these treaties accord the citizens of each contracting nation the right to treatment, with respect to access to the courts of the other nations, identical to that accorded within each nation to its own citizens.[16] Such treatment, referred to in many treaties as "national treatment,"[17] is clearly distinguished from

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note 5, at 1878; Gordon, *The Alien and the Constitution*, 9 Cal. W.L. Rev. 1, 14 (1972).

[15] As noted earlier, the doctrine of *forum non conveniens* would also aid in separating cases that belong in U.S. courts from those that do not. *See supra* note 5. Under that doctrine, "[a] foreign company wholly owned by United States citizens, for example, should be treated as a citizen." *Suits by Foreigners, supra* note 5, at 1877 n.114.

[16] *See* Appendix.

[17] *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. V, para. 1, art. XXIII, para. 1, 8 U.S.T. 2043, T.I.A.S. No. 3942.

"most-favored-nation treatment," which means treatment as favorable as that given to nationals of any third country.[18] Thus, these treaties obligate the United States to offer nationals of the Netherlands and twenty-eight other nations access to its courts on the same terms that U.S. citizens enjoy. It is not enough to offer them the same access enjoyed by other aliens.

Nor are the state courts an adequate substitute. These treaties require equal access to courts "in all degrees of jurisdiction, both in pursuit and in defense of . . . rights." [19] It is with federal courts that the FCN treaties are primarily concerned. An authority on the access-to-court provisions of FCN treaties writes that "[f]rom the beginning, the question of access [under FCN treaties] in the United States was related to the assignment of jurisdiction to Federal, as distinct from State, courts." Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 Am. J. Int'l L. 20, 24 (1953).

To impute to Congress an intent to depart from the United States' obligations under these treaties would do violence to established principles of statutory interpretation. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States*, 288 U.S. 102, 120 (1933). *See also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Wholly apart from existing FCN treaties, the United States has a substantial interest in allowing aliens access to federal courts. Even in the absence of a treaty, foreign nations may apply the international relations principle of reciprocity to deny U.S. citizens national treatment in their courts if national treatment is denied their citizens in U.S. courts. *Hilton v. Guyot*, 159 U.S. 113,

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[18] *See, e.g., id.*, art. XXIII, para. 2.

[19] *See, e.g., id.*, art. V, para. 1.

210-28 (1895); *see also* 28 U.S.C. § 2502 (1976); *Case of Certain Norwegian Loans*, 1957 I.C.J. Rep. 9, 51 Am. J. Int'l L. 777 (1957).

This would not only harm U.S. citizens and U.S. businesses, it would directly affect the U.S. government itself. The legislative history of the FSIA reveals that the United States has a considerable interest in enforcing its rights in foreign tribunals. One of the principal drafters of the FSIA testified that the United States is the plaintiff in approximately one-third of the cases to which it is a party in foreign courts. *1976 Hearings*, *supra* note 4, at 36 (testimony of Mr. Ristau); *1973 Hearing*, *supra* note 3, at 28-29. In 1975, the United States recovered $3 million in suits it brought in foreign courts to enforce its rights. *1976 Hearings*, *supra*, at 50 (testimony of Mr. Ristau). There is no reason to believe that Congress intended to jeopardize the United States' access to foreign courts, or the access of its citizens, by enacting unspoken restrictions on the rights of foreign nationals to pursue their claims in our courts.

II. THREE PROVISIONS OF ARTICLE III SUPPORT THE CONSTITUTIONALITY OF THE FSIA'S GRANT OF JURISDICTION

The remaining question is whether Congress had constitutional authority to give the federal courts jurisdiction over this suit. We concur in the arguments made by Verlinden and the United States on this point. We will not repeat their arguments; instead, we will suggest additional bases for Congress's action.

Our constitutional argument may be simply stated. The FSIA permits aliens to sue foreign governments; if article III does not open the federal courts to these suits, they will be heard in the state courts. *See* 28 U.S.C. § 1602 (1976). Yet the notion that the Constitution relegates suits against foreign governments to the state courts is at odds with the express understanding of the framers of the Constitution.

Writing in *The Federalist*, Hamilton stated that "all causes in which the citizens of other countries are concerned" fell within federal jurisdiction—even those involving only state, or "municipal," law:

> As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. . . . A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. *So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.*

The Federalist, No. 80, at 476-77 (A. Hamilton) (New American Library ed. 1961) (emphasis added).[20] Hamilton identified three sources of federal jurisdiction over suits in which foreigners are parties—the federal courts' authority over (1) cases affecting ambassadors, public ministers and consuls, (2) controversies between a State or its

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[20] Since the days of Chief Justice Marshall, the Court has recognized the "great authority" of *The Federalist* in construing the Constitution. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821); *see also* Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 627 (1895).

citizens and foreign nations or citizens, and (3) cases arising under treaties. *Id.* at 480-81. All three provide substantial support for the FSIA's grant of jurisdiction over suits brought by aliens.

A. The Ambassadors Clause

Article III authorizes federal jurisdiction over all "Cases affecting Ambassadors, other public Ministers and Consuls." [21] This clause is designed to bring into federal court cases affecting foreign governments, not simply

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[21] The Constitution confers original jurisdiction over such cases on the Supreme Court. This does not prevent Congress from also granting the district courts jurisdiction over such cases; the lower federal courts may hear cases within the Court's original jurisdiction. Bors v. Preston, 111 U.S. 252 (1884).

While an expansive reading of the ambassadors clause will theoretically increase the number of cases falling within the Court's original jurisdiction, it will have no practical effect on the Court's caseload. The FSIA makes the federal district courts an entirely adequate forum for suits against foreign sovereigns, and since 1970 this Court has consistently declined to exercise its original jurisdiction "where the plaintiff has another adequate forum in which to settle his claim." United States v. Nevada, 412 U.S. 534, 538 (1973) (declining jurisdiction over water rights case; lower federal courts open). *See also* Washington v. General Motors Corp., 406 U.S. 109 (1972) (declining jurisdiction over antitrust case; lower federal courts open); Illinois v. Milwaukee, 406 U.S. 91 (1972) (declining jurisdiction over interstate pollution case; lower federal courts open); Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) (declining jurisdiction over international pollution case; state courts open); Arizona v. New Mexico, 425 U.S. 794 (1976) (declining jurisdiction over Arizona's constitutional attack on a New Mexico tax; New Mexico's state courts open to Arizona), *revisited*, Arizona Pub. Serv. Co. v. Snead, 441 U.S. 141 (1979) (reversing New Mexico state court decision upholding tax).

Cases under the FSIA are particularly amenable to this treatment. The statute's failure to make express provision for bringing original FSIA cases in this Court, while it may not divest the Court of its original jurisdiction, *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) (dictum), shows Congress's preference that these cases begin in federal district court; this preference would presumably be given weight in deciding whether to accept original Supreme Court jurisdiction.

those affecting ambassadors as individuals. The jurisdictional grant is not a personal privilege. "It is the privilege of the country or government which the consul represents . . . . If the privilege or exemption was merely personal, it can hardly be supposed, that it would have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States." *Davis v. Packard*, 32 U.S. (7 Pet.) 276, 284 (1833); *accord Bors v. Preston*, 111 U.S. 252, 256 (1884).[22]

Similar conclusions have been drawn from parallel language elsewhere in the Constitution. Article II authorizes the President to "receive Ambassadors and other public Ministers"; this language has been treated as authorizing him to deal with foreign governments, not just their representatives. "It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize foreign governments and whether to maintain or terminate relations with them." L. Henkin, *Foreign Affairs and the Constitution* 47 (1972). Because article II confers this power solely on the President, it is now well accepted that "[p]olitical recognition is exclusively a function of the Executive." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964). The grant has been a source of broad implied authority, including the power "to remove such obstacles to full recognition as settlement of claims of our nationals." *United States v. Pink*, 315 U.S. 203, 229 (1942).

Reading references to diplomatic representatives to include governments is even more appropriate in ana-

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[22] "The provision, no doubt, was inserted in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments. It is a privilege, not of the official, but of the sovereign or government which he represents, accorded from high considerations of public policy . . . ." Ex parte Gruber, 269 U.S. 302 (1925).

lyzing article III than article II. For unlike article II, article III expressly grants jurisdiction over cases against consuls, who were not diplomats and lacked diplomatic immunity. By bringing into the federal court system even the commercial representatives of foreign governments,[23] the framers demonstrated their intent to cover all cases touching on the interests of foreign governments.

Why then did the framers make no express provision for suits by aliens against foreign governments? The answer is simple. Such suits were not thought possible; the sovereign's absolute immunity was firmly established by the law of nations. John Marshall summarized the views of the era when he said: "It is not rational to suppose that the sovereign power should be dragged before a court." [24] The Judiciary Act of 1789 did not provide for suits against the United States, 1 Stat. 73, and

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[23] In the 17th and 18th centuries, consuls were even more clearly distinguished from diplomatic representatives than they are today. "Their functions [were] a general supervision of the commerce and navigation of their home States, and . . . a kind of protection of the commercial interests of their countrymen." 1 L. Oppenheim, *International Law: A Treatise* 830 (H. Lauterpacht 8th ed. 1955). In the words of Justice Story, "[a] consul, though a public agent, is supposed to be clothed with authority only for commercial purposes." The Anne, 16 U.S. (3 Wheat.) 435, 445 (1818).

That the framers drew a sharp distinction between the two classes of representatives is demonstrated by the Judiciary Act of 1789, which granted the Supreme Court exclusive jurisdiction over cases against ambassadors and public ministers, while permitting suits against consuls in federal district court. Judiciary Act, ch. 20, §§ 9, 13, 1 Stat. 73, 76-77, 80-81 (1789). Even consuls, however, were not exposed to civil suits in state courts; the district courts' jurisdiction was to be exercised "exclusively of the courts of the several States." *Id.* § 9.

[24] 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 555 (2d ed. 1836) [hereinafter cited as *Elliot's Debates*]. Marshall's remarks were made in a slightly different context—a dispute about whether one of the States could be sued in federal court—but they apply *a fortiori* to foreign nations, which surrendered none of their sovereignty to a greater Union.

a 1793 Supreme Court ruling that States could be sued in federal court was quickly overturned by constitutional amendment. *Compare Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *with* U.S. Const. amend. XI. In short, the restrictive doctrine of sovereign immunity, which subjects to suit sovereigns acting in a commercial capacity, was 150 years in the future.[25]

Although they did not foresee suits against sovereigns, the framers left the language of the ambassadors clause broad enough to encompass such suits. Indeed, the language is less restrictive than any other clause in article III, sweeping in all cases "affecting" even the lowest commercial representatives of foreign governments. This broad language left room to expand federal jurisdiction as Congress reached new judgments about which cases "affect" ambassadors.

That the Congress was meant to have such discretion may be inferred from the Judiciary Act of 1789. Enacted by a Congress containing many of the same men who framed the Constitution, and thus entitled to "very great weight," *cf. Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884), the Judiciary Act did not limit federal jurisdiction under the ambassadors clause to cases against ambassadors, other public ministers, and consuls; the Constitution's list was expanded by Congress to include vice-consuls and the family and

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[25] *See* Berizzi Bros. v. Steamship Pesaro, 271 U.S. 562 (1926). The framers' assumption of absolute sovereign immunity is not belied by the grant of jurisdiction over controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, para. 1. Their expectation was that suits "between" foreign States and U.S. citizens would be brought by the foreign government, just as suits "between" States and foreign citizens would cast the State as plaintiff. *See* Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 291-92 (1973) (original understanding that mention of suits between citizens and States in article III "would not provide a mechanism for making States unwilling defendants in federal court") (footnote omitted).

domestic staffs of public ministers, presumably on the theory that suits against these persons would "affect" those actually listed in article III. Judiciary Act, ch. 20, § 13, 1 Stat. 73, 80-81 (1789).

It requires little assistance from Congress's fact-finding powers to conclude that suits against a foreign government "affect" its representatives, often more directly than suits against the ambassador's chauffeur.[26] Although the FSIA restricted direct diplomatic intervention in suits against foreign sovereigns, it did nothing to eliminate the strong concerns about such suits that caused ambassadors to bring to bear "diplomatic influences" and "pressures from foreign governments." 1976 House Report, *supra* p. 6, at 7, 9. Nor did the Act entirely eradicate the direct role of governmental representatives in such suits; in some FSIA cases, for example, the government will receive service of process "through diplomatic channels." 28 U.S.C. § 1608(a)(4) (1976). In the light of these facts, Congress could quite reasonably conclude that FSIA suits are cases affecting ambassadors, public ministers, and consuls.

B. The Law of Nations

A second source of authority for the FSIA is international law—the "law of nations" that governs the relations of sovereign states in matters such as war, peace, piracy, prizes, diplomatic immunities, and the like. *See generally* M. Whiteman, *Digest of International Law* (1968). The framers of the Constitution had no doubt that they had given federal courts the power to hear cases arising under the law of nations,[27] although there

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[26] *But cf.* United States v. Ortega, 24 U.S. (11 Wheat.) 467 (1826) (prosecution of person for attacking diplomat is not case "affecting" the diplomat).

[27] The 13 original States' failure to heed the requirements of international law was one reason for dissatisfaction with the Articles of Confederation. Edmund Randolph's speech opening the Constitutional Convention complained that, under the Articles of Confederation, Congress "could not cause infractions of treaties, or of the law of nations, to be punished." 5 *Elliot's Debates* 127.

was some divergence about which clause did so. As we have seen, Hamilton found the federal courts' international law jurisdiction in the provision granting jurisdiction over "cases arising under . . . Treaties." John Jay, co-author of *The Federalist*, apparently took the same position:

> Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States, or in three or four confederacies, will not always accord or be consistent . . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.

The Federalist No. 3, at 43 (J. Jay).

Most of their contemporaries, however, held the view that has since prevailed: cases arising under the law of nations are "cases arising under . . . the Laws of the United States" within the meaning of article III. As Edmund Randolph, a key figure in drafting the judiciary article, later put it, "The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land." 1 Op. Att'y Gen. 27 (1792). Another participant in drafting article III, James Wilson, offered similar views: "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796).[28]

Judicial opinion followed Randolph and Wilson. In 1815, Chief Justice Marshall announced that the Supreme

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[28] Thomas Jefferson, too, shared this position. While Secretary of State, he informed France's Minister Genet: "The law of nations makes an integral part . . . of the laws of the land." 1 J. Moore, *A Digest of International Law* 10 (1906).

Court "is bound by the law of nations, which is a part of the law of the land." *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *see also Kansas v. Colorado*, 206 U.S. 46, 97 (1907). His statement has been affirmed and reaffirmed down to the modern day.[29]

Because international law is incorporated into the law of the United States, Congress may create federal jurisdiction over cases "arising under" international law. The first Congress exercised this very authority in the Judiciary Act of 1789, creating federal jurisdiction "where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Ch. 20, § 9, 1 Stat. 73, 77 (current version at 28 U.S.C. § 1350 (1976)). Although only occasionally used, the grant has survived to the present day and has supported suits by aliens against foreign governments. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (Kaufman, J.).

The FSIA falls within this grant of authority. Its declaration of purpose relies expressly on international law. 28 U.S.C. § 1602 (1976). Sovereign immunity is a central and longstanding part of the law of nations. *See, e.g.*, 6 M. Whiteman, *Digest of International Law* §§ 20-26 (1968); 2 G. Hackworth, *Digest of International Law* §§ 169-176 (1941); 2 J. Moore, *A Digest of International Law* §§ 250-258 (1906). Since early in this country's history, federal courts have applied the law of

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[29] The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law . . . ."); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 419, 423 (1964) ("United States courts apply international law as a part of our own in appropriate circumstances . . . ."); *see also* Dickinson, *The Law of Nations as Part of the National Law of the United States* (pts. 1 & 2), 101 U. Pa. L. Rev. 26, 792 (1952 & 1953).

This does not mean that international bodies such as the United Nations have authority to prescribe law for the United States or its citizens. An asserted principle of international law will not be enforced in the United States if it is not accepted by the Congress and courts of the United States. *See, e.g.*, Tag v. Rogers, 267 F.2d 664 (D.C. Cir.), *cert. denied*, 362 U.S. 904 (1959).

nations in deciding whether to grant sovereign immunity. *The Exchange*, 11 U.S. (7 Cranch) 116, 137 n.1 & *passim* (1812) (Marshall, C.J.). The FSIA simply codifies and renders more precise the "restrictive" theory of sovereign immunity and provides a procedural framework for handling cases involving foreign sovereigns.[30]

The court of appeals did not quarrel with this analysis. Instead, it held that a case may not "arise under" a jurisdictional federal statute that provides no substantive rules of law. Pet. App. at 17a, 19a. The court of appeals assumed that the FSIA is such a statute. This ignores the long history of sovereign immunity as a substantive rule of law unrelated to federal jurisdiction. *See, e.g., Berizzi Brothers v. Steamship Pesaro*, 271 U.S. 562 (1926). It also overlooks the elaborate set of substantive standards for conferring immunity that the FSIA sets out. 28 U.S.C. §§ 1605-1607 (1976). The standards do not merely determine federal procedures; they are substantive rules that must be applied by state courts as well. 1976 House Report, *supra* p. 6, at 13; *see* 28 U.S.C. § 1602 (1976).

The source of the lower court's confusion is the FSIA's unusual jurisdictional provision. Perhaps in order to ensure that federal courts would always feel free to consider the sovereign immunity defense, Congress incorporated the substantive standards for establishing the defense into the grant of federal jurisdiction. Thus, the federal courts

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[30] 1976 House Report, *supra*, at 7. It cannot be seriously argued that cases do not arise under international law when international law provides a defense, rather than a cause of action. *Cf.* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908). However appropriate the "well-pleaded complaint" rule may be in construing the diversity *statute*, 28 U.S.C. § 1331, it would work only mischief as a limit on Congress's power under article III. It would, for example, make it unconstitutional for this Court to review state court decisions rejecting defenses based on federal statutes or the Constitution. *Cf.* 28 U.S.C. § 1257 (1976) (conferring jurisdiction over federal questions from State courts without regard to whether they arose in the complaint or the defense).

have jurisdiction over "any" suit against a foreign government *unless* the government meets the immunity requirements of 28 U.S.C. §§ 1605-1607 (1976). The standards themselves are substantive and plainly within Congress's foreign affairs power. It is formalistic at best to hold that Congress may not link these substantive standards to the federal courts' subject-matter jurisdiction. And even if so wooden a rule could be found in the Constitution, the least disruptive remedy for its violation would be to sever the link, leaving the federal courts with a simple grant of jurisdiction over sovereign immunity cases and a separate set of substantive rules to apply to those cases.[31]

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[31] The FSIA's jurisdictional provision states:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam *with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.*

28 U.S.C. § 1330(a) (1976) (emphasis added). The italicized material is the source of the constitutional objections raised by the court of appeals.

Section 7 of the FSIA further provides that "[i]f any provision of this Act . . . is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application." Pub. L. No. 94-583, § 7, 90 Stat. 2891, 2898 (1976). The clause creates a presumption of separability that can be overcome only by establishing "the clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part." Carter v. Carter Coal Co., 298 U.S. 238, 312-13 (1936) (quoting Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184-85 (1932)).

In fact, severing the italicized material, while satisfying the objections of the court of appeals, would not drastically tamper with Congress's intent. The sovereign immunity standards of §§ 1605-1607 would remain as a substantive defense but would not be used in determining the federal court's jurisdiction. The simplified jurisdictional provision would then "arise under" these substantive standards. The only change in the intended functioning

C. The Foreign Diversity Clause

The foreign diversity clause is the final provision identified by Hamilton as assuring federal jurisdiction over all cases affecting foreign relations. This clause authorizes federal courts to hear controversies between citizens of a State on the one hand and foreign nations or nationals on the other. If this clause were the FSIA's only support in article III, the statute could not be sustained in its entirety. Early in its history, this Court held that article III's diversity clause does not authorize natural persons who are aliens to sue other aliens in federal court. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809).

Verlinden, however, is a corporation, and history shows that Congress has some leeway in defining corporate "citizenship" for diversity purposes. Although this Court has never ruled directly on how the citizenship requirement of article III applies to corporations, Chief Justice Marshall established early that a corporation's "citizenship" under the diversity statute depends on the citizenship of its members. *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 91-92 (1809). The Chief Justice's assumption that this statutory interpretation was permissible under article III has never been challenged, although his interpretation of the statute has since been modified, first by judicial fiction, *see, e.g., Marshall v. Baltimore & Ohio Railroad*, 57 U.S. (16 How.) 314, 329 (1854) (establishing conclusive presumption that all corporate members are citizens of the State of incorporation),[32] and later by congressional action. *See, e.g.*, 28 U.S. § 1332(c) (1976) ("A corpora-

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of the FSIA would be that sovereign immunity could not be treated as a jurisdictional defense in federal court.

[32] *Accord* St. Louis & San Francisco Ry. v. James, 161 U.S. 545, 562 (1896); Steamship Co. v. Tugman, 106 U.S. 118, 121 (1882) (foreign corporations).

tion shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.").[33] Congress has felt free to modify the statutory definition of corporate citizenship, and this Court has never indicated that Congress is not similarly free to restore the *Deveaux* rule that corporate "citizenship" is to be determined by the citizenship of the corporation's owners.[34]

In returning to that rule, Congress would not be limited by the "complete diversity" requirement; it may treat a corporation as a citizen of a State where some, but not necessarily all, of its members reside. Long after the idea was first advanced, *see Louisville, Cincinnati & Charleston Railroad v. Letson*, 43 U.S. (2 How.) 497, 557 (1844), this Court ruled conclusively that article III demands only minimal diversity. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967). Construed in the light of *Deveaux* and *Tashire*, then, article III gives Congress authority to confer federal jurisdiction over any suit brought against a foreign government by

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[33] *See also* 28 U.S.C. § 1332(c) (1976) (1976 amendment applying to direct actions against insurers deems insurer to be citizen of same State as insured); 28 U.S.C. § 1348 (1976) (national banking associations are "deemed citizens of the States in which they are respectively located").

[34] If any of the various statutory rules on corporate citizenship has a constitutional footing it would seem to be Chief Justice Marshall's insistence that only the natural persons who own the corporation can be "citizens." *Compare* Sinking-Fund Cases, 99 U.S. 700, 718-19 (1878) (corporation a "person" under fifth amendment due process clause), *with* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868) (corporation not a "citizen" under article IV's privileges and immunities clause); *compare* Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938) (corporation a "person" under fourteenth amendment due process clause), *with* Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907) (corporation not a "citizen" under fourteenth amendment privileges and immunities clause). There would consequently seem to be no constitutional bar to Congress's sweeping away the fictions and legislative "deeming" that have encrusted the Chief Justice's rule.

a corporation with American shareholders, even if Americans hold only a minority interest.[35]

If Congress has this power, there is no doubt that it intended to exercise it.[36] We have seen that Congress's desire to protect " 'American citizens,' 'American businesses,' 'American parties,' and 'American nationals,' " Pet. App. at 6a, cannot be carried out unless foreign affiliates of U.S. companies and other corporations owned by U.S. citizens can claim the benefits of the FSIA. If Congress can constitutionally open the federal courts to such corporations under the foreign diversity clause, the Act should be upheld as it applies to their suits, without regard to its application to suits by natural persons or foreign-owned corporations. The FSIA itself stresses that

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[35] Congress's authority under article III to open U.S. courts to corporations with American shareholders does not imply a broad authority to regulate the foreign conduct of enterprises that have U.S. shareholders. In general, the United States has not sought to control the foreign conduct of companies incorporated abroad in which U.S. shareholders hold a minority interest, and its attempts to regulate the foreign conduct even of entities controlled by U.S. shareholders "have engendered much controversy" on the grounds that "the assertion of United States jurisdiction . . . [constitutes] interference with other states' sovereignty." *Restatement of the Law: Foreign Relations Law of the United States (Revised)* § 418, reporters' notes at 152 (Tent. Draft No. 2, 1981). Nor may the United States regulate the foreign conduct of corporations with U.S. ties if that regulation conflicts with the laws of other nations. Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962).

[36] *See supra* pp. 9-13. In enacting the FSIA, Congress was aware of its power to override the complete diversity rule; its intent to exercise this power is revealed by the Act's legislative history. In discussing the FSIA's sweeping removal provisions, the House Report noted approvingly that the Act

> permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants . . . are citizens of the State in which the action has been brought.

1976 House Report, *supra* p. 6, at 32.

the invalidity of one application "does not affect other . . . applications of the Act." *See supra* note 31.

Despite this, the court of appeals made no inquiry into the nationality of Verlinden's shareholders. Instead, evidently reading the current statutory definition of corporate citizenship into the Constitution, the court assumed that no Dutch corporation with principal offices in Amsterdam could be a citizen of a State. The record's silence arguably made it appropriate to dismiss the suit for want of jurisdiction. *Cf.* Fed. R. Civ. P. 8(a)(1). But in presenting its case, Verlinden was entitled to rely on the Act, which requires no showing of corporate ownership. At the very least, Verlinden should have been given an opportunity to amend its pleadings and to introduce evidence showing that it has American shareholders and thus that it could be admitted to the federal courts under the foreign diversity clause. *See* 28 U.S.C. § 1653 (1976). The other grounds advanced in this brief would justify a flat reversal of the court of appeals; if they are rejected, this additional ground requires that the case be remanded for further pleadings and findings on the nationality of Verlinden's shareholders.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reversed and the case remanded.

Respectfully submitted,

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APPENDIX

The following treaties in force between the United States and other nations guarantee foreign nationals access to U.S. courts on terms equal to those applicable to U.S. citizens:

Treaties of Friendship, Commerce and Navigation between the United States and:

Republic of Korea, Nov. 28, 1956, art. V, para. 1, 8 U.S.T. 2217, T.I.A.S. No. 3947;

Netherlands, Mar. 27, 1956, art. V, para. 1, 8 U.S.T. 2043, T.I.A.S. No. 3942;

Nicaragua, Jan. 21, 1956, art. V, para. 1, 9 U.S.T. 449, T.I.A.S. No. 4024;

Federal Republic of Germany, Oct. 29, 1954, art. VI, para. 1, 7 U.S.T. 1839, T.I.A.S. No. 353;

Japan, Apr. 2, 1953, art. IV, para. 1, 4 U.S.T. 2063, T.I.A.S. No. 2863;

Israel, Aug. 23, 1951, art. V, para. 1, 5 U.S.T. 550, T.I.A.S. No. 2948;

Greece, Aug. 3-Dec. 26, 1951, art. VI, para. 1, 5 U.S.T. 1829, T.I.A.S. No. 3057;

Ireland, Jan. 21, 1950, art. VI, para. 1, 1 U.S.T. 785, T.I.A.S. No. 2155;

Italy, Feb. 2, 1948, art. V, para. 4, 63 Stat. 2255, T.I.A.S. No. 1965;

China (Taiwan), Nov. 4, 1946, art. VI, para. 4, 63 Stat. 1299, T.I.A.S. No. 1871;

Paraguay, Feb. 4, 1859, art. IX, 12 Stat. 1091, T.S. No. 272;

Argentina, July 27, 1853, art. VIII, 10 Stat. 1005, T.S. No. 4;

Costa Rica, July 10, 1851, art. VII, 10 Stat. 916, T.S. No. 62;

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Luxembourg, Feb. 23, 1962, art. III, para. 2, 14 U.S.T. 251, T.I.A.S. No. 5306;

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Guatemala, Mar. 3, 1849, art. 12, 10 Stat. 875, T.S. No. 149;

Chile, May 16, 1832, art. 10, 8 Stat. 434, T.S. No. 40;

Treaty of Peace, Amity, Navigation and Commerce, Dec. 12, 1846, United States-Colombia, art. 13, 9 Stat. 881, T.S. No. 54;

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Venezuela, Jan. 20, 1836, art. 13, 8 Stat. 466, T.S. No. 366;

Treaties of Amity and Economic Relations between the United States and:

Thailand, May 29, 1966, art. II, para. 2, 19 U.S.T. 5843, T.I.A.S. No. 6540;

Togo, Feb. 8, 1966, art. III, para. 2, 18 U.S.T. 1, T.I.A.S. No. 6193;

Viet-Nam, Apr. 3, 1961, art. II, para. 2, 12 U.S.T. 1703, T.I.A.S. No. 4890;

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Amicus Brief

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Supreme Court, U.S.
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No. 81-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VERLINDEN B. V.,

Petitioner,

v.

CENTRAL BANK OF NIGERIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE THE REPUBLIC OF GUINEA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the Foreign Sovereign Immunities Act constitutionally grant to a District Court original jurisdiction over a non-federal claim by a citizen of a foreign State against a foreign Sovereign?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE REPUBLIC OF GUINEA	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. The Foreign Sovereign Immunities Act Does Not Extend Subject Matter Jurisdiction To Non-federal Disputes Between Foreign Citizens And Foreign States	5
A. The Act Codifies Rules Governing Personal Jurisdiction While Preserving Preexisting Federal Question and Diversity Jurisdiction	5
B. An Action Against a Foreign Sovereign Based on a Non-federal Claim Does Not Arise Under the Laws of the United States	8
C. The FSIA Does Not Require Jurisdiction	13
II. The Constitution Does Not Permit Original Federal Jurisdiction Over Non-federal Disputes Between Foreign Citizens And Foreign States	19
A. The Immunity Question Does Not Support Original Jurisdiction	19
B. There Is No Protective Jurisdiction	22
III. This Is Not A Suit Against An Ambassador	28
CONCLUSION	29

TABLE OF AUTHORITIES

	Page
CASES	
Albright v. Teas, 106 U.S. 613 (1883)	10
American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828)	27
American Security & Trust Co. v. Commissioners of the District of Columbia, 224 U.S. 491 (1912)	14
Blackburn v. Portland Gold Mining Co., 175 U.S. 571 (1900)	10
Boston Sand & Gravel Co. v. United States, 278 U.S. 41 (1928)	14
Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968)	17
Centraal Stickstof Verkoopkantoor, N.V. v. Alabama State Docks Dep't, 415 F.2d 452 (5th Cir. 1969)	17
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)	24
Erie Railroad v. Tompkins, 304 U.S. 64 (1938)	21
Fay v. Noia, 372 U.S. 391 (1963)	20,21
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	20
Glidden v. Zdanok, 307 U.S. 530 (1962)	24
Gully v. First Nat. Bank, 299 U.S. 109 (1936)	9,11,19 25
Hanson v. Denckla, 357 U.S. 235 (1958)	18
Herb v. Pitcairn, 324 U.S. 117 (1945)	20-21
Hodgson v. Bowerbank, 9 U.S. (5 Cr.0 303 (1809)	17,26
Irvin v. Dowd, 359 U.S. 394 (1959)	20,21
Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829)	17,26
Lathrop v. Drake, 91 U.S. 516 (1876)	25

	Page
Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1878)	9
Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908)	9,10,19
Mayor v. Cooper, 73 U.S. (6 Wall.) 247 (1868)	25
Minnesota v. Northern Securities Co., 194 U.S. 48 (1904)	12
Montalet v. Murray, 8 U.S. (4 Cr.) 46 (1807)	17,26
Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800)	*passim*
Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875)	14,21
National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949)	25,28
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)	14
Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824)	4,22-24, 25
Pacific Railroad Removal Cases, 115 U.S. 1 (1885)	25
Peyton v. Railway Express Agency, 316 U.S. 350 (1942)	14
Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974)	9
Patton v. Brady, 184 U.S. 608 (1902)	24-25
Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852)	25,27
Puerto Rico v. Russell & Co., 288 U.S. 476 (1933)	10-11,25
Railroad Co. v. Mississippi, 102 U.S. 135 (1880)	25
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)	*passim*
Schumacher v. Brady, 184 U.S. 608 (1902)	24

	Page
Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900)	10
Shulthis v. McDougal, 225 U.S. 561 (1912)	9
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950)	9,12
Sumner v. Mata, 449 U.S. 539 (1981)	14
T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964)	14
Tennessee v. Davis, 100 U.S. 257 (1880)	25
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)	25
Wheeldin v. Wheeler, 373 U.S. 647 (1963)	25
Williams v. Austrian, 331 U.S. 642 (1947)	24
Wilson v. Sandford, 51 U.S. (10 How.) 99 (1850)	10,14
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)	20
Zschernig v. Miller, 389 U.S. 429 (1968)	18
STATUTES, RULES AND REGULATIONS	
Fed. R. Civ. P. 8(a)	10
Fed. R. Civ. P. 8(c)	10
Foreign Sovereign Immunities Act	*passim*
28 U.S.C. § 1257 (1976)	14
28 U.S.C. §§ 1331-32 (1970)	5-6
28 U.S.C. §§ 1331-32 (1976)	3,6,14
28 U.S.C. § 1337 (1976)	14

	Page
28 U.S.C. § 1338 (1976)	14
28 U.S.C. § 1362 (1976)	14
28 U.S.C. § 1602 (1976)	6
28 U.S.C. §§ 1604-05 (1976)	7
U.S. Const. art. III, § 2, cl. 1	*passim*
U.S. Const. amend. X	18
Judiciary Act of 1875	8,14,15
Tucker Act	24
LEGISLATIVE MATERIALS	
H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6-8 (1976), *reprinted in* [1976] U.S. Code & Ad. News 6604	*passim*
Presidential Documents, Statement, 12 *Weekly Comp. Press. Doc.* 1554 (Oct. 22, 1976)	7-8
TREATIES	
Convention on the Settlement of Investment Disputes between States and Nationals of Other States [1966] 17 U.S.T. 1270, T.I.A.S. No. 6090	1
Treaty of Friendship, Commerce, and Navigation, March 27, 1956, United States-Netherlands, Article XXIII, para. 1, 8 U.S.T. 2043, T.I.A.S. No. 3942	17
OTHER AUTHORITIES	
Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise In Federalism*, 7 Utah L. Rev. 423 (1961)	20,21
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INTEREST OF THE REPUBLIC OF GUINEA

The Republic of Guinea ("Guinea"), which files this brief with the written consent of both parties, has a substantial interest in this case. Guinea is the appellant in a case pending before the United States Court of Appeals for the District of Columbia Circuit styled *The Republic of Guinea v. Maritime International Nominees Establishment*, No. 81-1073. The case involves an effort by a Swiss-controlled Liechtenstein corporation, the appellee, to enforce a $27 million arbitration award concerning a commercial contract governed by foreign law. The case, thus, presents the same questions as to the scope and constitutionality of the Foreign Sovereign Immunities Act ("FSIA") as are presented here. These questions were briefed and argued in the Court of Appeals, which has had the case under advisement since January 25, 1982. This Court's rulings on the issues presented here will likely have a direct impact on the ultimate resolution of these same issues with respect to Guinea. [1]

Guinea also has a generalized interest in the circumstances under which it would be compelled to defend claims in the United States. While this interest is common to all sovereign states, it is of special significance to emerging African and third world nations holding serious reservations as to Western tribunals. This phenomenon is well illustrated by *The Republic of Guinea v. Maritime International Nominees Establishment*, where the contract at issue provided for arbitration under the auspices of the International Centre for Settlement of Investment Disputes between States and Nationals of Other States ("ICSID"). An ICSID proceeding, which operates pursuant to international treaty, [2] would have involved an inter-

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[1] While a ruling that the FSIA does not permit suit on non-federal claims by foreign citizens or that the FSIA was unconstitutional would result in a judgment in favor of Guinea, there are several separate grounds on which Guinea could prevail.

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, [1966] 17 U.S.T. 1270, T.I.A.S. No. 6090.

national panel, acting under internationally sanctioned rules, and in the French language. ICSID also recognizes and preserves the sovereign immunities of the governmental party and its agents.

Solely by virtue of the asserted jurisdictional grant in the FSIA, Maritime International Nominees Establishment used the federal judiciary to obtain an arbitration before an American panel, under American Arbitration Association Rules, in English. The resulting $27 million award threatens to cripple the Guinean fisc. Ironically, the District Court cited the contractual designation of ICSID, which is headquartered at the World Bank in Washington, D.C., as a United States contact activating FSIA jurisdiction.

Guinea regards this matter with such grave concern that it lodged a formal diplomatic protest with the Department of State. On appeal, the United States filed a Suggestion of Interest in support of Guinea's sovereign immunity with respect to ICSID in *The Republic of Guinea v. Maritime International Nominees Establishment.* [3] The issue of Guinea's sovereign immunity under the FSIA is a separate question from the subject matter jurisdiction of the Act. But a ruling limiting the Act's subject matter reach would no doubt limit the instances in which delicate, problematic immunity issues such as those described above even arise. To this end, Guinea has a pronounced and continuing interest in an affirmance of the decision under review.

SUMMARY OF THE ARGUMENT

The Foreign Sovereign Immunities Act was intended to expand the personal jurisdiction of the state and

[3] The United States also intervened to defend the constitutionality of the FSIA.

federal courts by codifying a restrictive standard for sovereign immunity from suit. With respect to the subject matter jurisdiction of the federal courts, Congress merely recodified, in section 1330 of title 28, United States Code, the jurisdiction previously found in the federal question and diversity jurisdiction statutes. There is no evidence that Congress intended to create a new federal jurisdiction over non-federal claims by foreign citizens against foreign states.

This Court has set forth at least four interrelated conditions necessary to establish federal question jurisdiction under standard jurisdictional statutes: (1) that a right or immunity created by federal law be an essential element of plaintiff's cause of action; (2) that the right or immunity be supported if the law is given one construction and defeated if it receives another; (3) that a genuine and present controversy exist with respect to the federal right or immunity; and (4) that the controversy be disclosed in plaintiff's well-pleaded complaint. An action against a foreign sovereign based on a non-federal claim involves only a potential assertion of a federal defense. Moreover, the action arises under the law creating the right which the plaintiff seeks to enforce, not the FSIA, which merely provides the authority to sue for enforcement.

In the absence of compelling evidence that Congress intended to extend federal jurisdiction to all claims against foreign sovereigns, the FSIA should be interpreted in accordance with the traditional federal question tests. No such intent is evidenced in the legislative history, and petitioner and amici have not identified to the FSIA any policy which would not be fully vindicated by application of the federal immunity standard in state courts. On the other hand, extension of federal jurisdiction to all FSIA cases based on non-federal claims would seriously threaten the independence of the states and clash with well settled concepts of federalism.

If the FSIA were intended to extend the original jurisdiction of the federal courts to all non-federal claims against sovereigns, the Act would be unconstitutional. At the district court level, the federal question of sovereign immunity is hypothetical only. That the federal question cannot, in this form, provide a basis for jurisdiction is demonstrated by the analogous rule that this Court will not review state court judgments supported by an adequate and independent state ground. The constitutional federalism concerns underpinning the independent state ground rule apply here with full force.

The "protective jurisdiction" supposedly recognized in *Osborn v. Bank of the United States* and its progeny does not apply to FSIA cases. The *Osborn* line of cases depends upon both the existence of a federal rule of conduct, which literally made each case one arising under federal law, and a legitimate federal interest in the disposition of the underlying state law issue. In FSIA cases such as this, there is no federal rule of conduct and no federal interest in the disposition of the state law claim.

This case is governed instead by *Mossman v. Higginson*, where the Court ruled invalid a statute conferring federal jurisdiction over all suits between aliens. In *Mossman*, the existence of such background federal questions as the constitutional minimum contacts of the alien defendant with the forum could not save the jurisdictional statute. By parity of reasoning, the existence of the question of sovereign immunity cannot save the jurisdictional provision of the FSIA.

Finally, this suit cannot fall within the Article III grant of jurisdiction over ambassadors and consuls. No ambassador or consul is a party to the action.

ARGUMENT

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT EXTEND SUBJECT MATTER JURISDICTION TO NON-FEDERAL DISPUTES BETWEEN FOREIGN CITIZENS AND FOREIGN STATES

A. The Act Codifies Rules Governing Personal Jurisdiction While Preserving Preexisting Federal Question and Diversity Jurisdiction.

Prior to the Foreign Sovereign Immunities Act, claims against foreign sovereigns could be brought in federal court under either the diversity statute, 28 U.S.C. § 1332 (1970), or the federal question statute, 28 U.S.C. § 1331 (1970). The diversity provision implemented that portion of Article III of the United States Constitution extending the judicial power to actions "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1. It consequently applied only to actions involving a United States party and did not extend subject matter jurisdiction to actions confined to foreign parties. [4]

The federal question provision implemented the separate Article III grant of subject matter jurisdiction over actions "arising under this Constitution, the Laws of the United States and Treaties. . . ." U.S. Const. art. III, § 2, cl. 1. Since this jurisdictional grant depends on the nature of the claim rather than the parties' citizenship, it could have applied to a controversy between two foreign parties.

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[4] The statute provided in relevant part,

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between . . . .
> (2) citizens of a State, and foreign states or citizens or subjects thereof, and
> (3) citizens of different States and in which foreign states and citizens or subjects thereof are additional parties.
>
> 28 U.S.C. § 1332 (1970).

28 U.S.C. § 1331 (1970). Both the diversity and federal question provisions limited jurisdiction to actions in which the amount in controversy exceeded $10,000.

The FSIA transferred the existing diversity and federal question jurisdiction over claims against foreign sovereigns to a new jurisdictional provision. The prior references to foreign parties in section 1332 were deleted. A new subsection was added to provide for continued jurisdiction over actions between a foreign state, as plaintiff, and United States citizens or states. FSIA § 3, 28 U.S.C. § 1332(a)(4) (1976). Section 1331, which contained no references to citizenship, was not amended. The new jurisdictional provision governing actions against foreign states relates directly to the codified standards for sovereign immunity and contains no limitation as to amount in controversy. FSIA § 2, 28 U.S.C. § 1330 (1976).

This history suggests that Congress enacted section 1330 only to facilitate application of the new sovereign immunity rules in the FSIA and to remove the $10,000 amount in controversy requirement in cases in which a foreign sovereign is a defendant. There is nothing whatsoever in the evolution of section 1330 to suggest that Congress, by relating subject matter jurisdiction to the newly codified standards governing personal jurisdiction over a sovereign, intended to create a completely new federal jurisdiction over otherwise non-federal claims brought by foreign parties against foreign states.

Indeed, the focus of the FSIA is overwhelmingly on a question of personal jurisdiction — the sovereign's immunity from process. The Act's primary purposes are (1) to provide for judicial, rather than executive, determination of sovereign immunity claims and (2) to codify the restrictive immunity standards generally accepted in the international community. FSIA § 4(a), 28 U.S.C. § 1602 (1976); H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6-8 (1976), *reprinted in* [1976] U.S. Code & Ad. News 6604,

6605-06. To these ends, Congress both enacted an immunity test based on modern concepts of sovereignty and expressly made the test applicable in state as well as federal judicial proceedings. FSIA § 4(a), 28 U.S.C. §§ 1604, 1605 (1976).

The need for maximum personal jurisdiction over foreign sovereigns to vindicate fully legitimate claims of American citizens is a theme played throughout the legislative history of the FSIA. The following passage from the House Judiciary Committee Report is typical:

> t the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6-7 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6605.

The Congresssional focus on the rights of United States citizens was echoed in President Ford's statement when he signed the FSIA into law. The President observed,

> This legislation will enable American citizens and foreign governments alike to ascertain when a foreign state can be sued in our courts. In this modern

> world where private citizens increasingly come into contact with foreign government activities, it is important to know when the courts are available to redress legal grievances.
>
> This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.

Presidential Statement, 12 *Weekly Comp. Pres. Doc.* 1554 (Oct. 22, 1976).

Just as Congress understood the need to make sovereigns answerable in United States courts, it understood that it need go no further than that. Congress had no interest in the disposition of the underlying disputes between the parties and promulgated no rules on the subject. As stated in the Report accompanying the Act, "The bill is not intended to affect the substantive law of liability." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. Code & Ad. News, 6604, 6610. Similarly, the few specific references in the legislative history to section 1330 suggest that the jurisdictional provision was little more than a housekeeping measure, dovetailing federal subject matter jurisdiction with the universally applicable personal jurisdiction provisions. Apart from elimination of the $10,000 amount in controversy requirement, the history reflects no Congressional awareness of expanding the subject matter jurisdiction of the federal courts beyond the preexisting federal question and diversity statutes. *See id.* at 12-14, *reprinted at* 6612-13.

B. An Action Against a Foreign Sovereign Based on a Non-federal Claim Does Not Arise Under the Laws of the United States.

Since the first enactment of a general federal question jurisdiction in the Judiciary Act of 1875, this Court

has fostered the development of a comprehensive common law defining the limits of its jurisdictional reach. The touchstone of this common law has been that statutes conferring jurisdiction on the federal courts must be construed narrowly. *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Such restraint is born of necessity, lest the federal dockets be filled to overflowing, and, more significantly, of an appreciation for the limited role the federal courts are to play in the constitutional scheme. *See id.; Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950).

This Court has set forth at least four interrelated conditions necessary to establish federal question jurisdiction: (1) that a right or immunity created by the Constitution, laws, or treaties of the United States be an essential element of the plaintiff's cause of action; (2) that the right or immunity be supported if the Constitution, law, or treaty is given one construction and defeated if it receives another; (3) that a genuine and present controversy, not merely a possible or conjectural one, exist with reference to the federal right or immunity; and (4) that the controversy be disclosed by plaintiff's well pleaded complaint, a document which, by definition, states only the elements of the claim and does not anticipate defenses. *Gully v. First National Bank*, 299 U.S. 109, 112-13 (1936); *see, e.g., Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127-28 (1974); *Shulthis v. McDougal*, 225 U.S. 561, 568-70 (1912); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908); *Little York Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 201-04 (1878).

An action against a foreign sovereign based on a non-federal claim manifestly fails to satisfy these conditions. All that is involved in such an action is a potential assertion by the foreign state that it is immune from suit —a defensive matter that in no way goes to the merits of the claim of the plaintiff. This defense is not transformed into an element of the claim simply because the FSIA may require the plaintiff to plead the defendant's non-

immunity as a jurisdictional base. The legislative history makes clear that sovereign immunity should continue to be regarded as an affirmative defense; a foreign state must both specially plead it and carry the ultimate burden of proof on the issue at trial. H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. 17, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6617.[5] Moreover, the Federal Rules of Civil Procedure specify that the jurisdictional statement in a complaint, while mandatory, is something separate and apart from the statement of the claim. Fed.R.Civ.P. 8(a). Thus, the question of a sovereign's immunity under the FSIA stands on precisely the same footing as stood the question of the Interstate Commerce Act's scope and constitutionality in the landmark case of *Louisville & Nashville R.R. v. Mottley*. It is a defense under which the case does not arise.

More fundamentally, an action arises under the law creating the right which the plaintiff seeks to enforce, not under that which merely provides the authority to sue for enforcement. The Court early on adopted this limitation to exclude from federal jurisdiction disputes concerning land held under federal patents. The Court regarded the underlying non-federal dispute as giving these cases their essential character, notwithstanding that federal law both created title to the land at issue and prescribed the procedure for asserting claims against that title. *See Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900); *Blackburn v. Portland Gold Mining Co.*, 175 U.S. 571 (1900). The Court has similarly ruled that a case concerning a contract assigning an invention patent does not arise under federal law, even though the patent assigned was created under an act of Congress. *See Albright v. Teas*, 106 U.S. 613 (1883); *Wilson v. Sandford*, 51 U.S. (10 How.) 99 (1850).

The Court applied this limitation to a case very similar to that here in *Puerto Rico v. Russell & Co.*, 288 U.S. 476

[5] Failure to plead the defense affirmatively would constitute a waiver, thereby removing the issue from the case. *See* Fed.R.Civ.P. 8(c).

(1933). *Russell* involved a suit by the Puerto Rican government to collect a tax. The United States Congress had legislatively reversed court decisions enjoining collection of the tax, but also provided that Puerto Rico could proceed to collect the back revenues only by a suit at law rather than by summary attachment. Puerto Rico initiated a suit in the local courts, and Russell petitioned for removal to the federal courts. Russell asserted that the case was one arising under the laws of the United States both because an act of Congress authorized the suit and because the Puerto Rican government was itself a congressional creation.

Rejecting the congressional statute as a basis for jurisdiction, Justice Stone wrote for the Court,

> Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is nonfederal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The nature of the right is decisive — not the source of the authority to establish it.

288 U.S. at 483.

The last definitive statement on this subject came in *Gully v. First Nat. Bank*, 299 U.S. 109 (1936). *Gully* was a suit to collect a state tax levied against a national bank. The liability for the tax depended ultimately upon whether the state tax law was consistent with an act of Congress limiting the immunity of national banks from state taxation. The Court ruled that the case did not arise under federal law simply because an act of Congress arguably authorized the state's action. As stated by Justice Cardozo,

> If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the

> aid of the Constitution when it came to its defense. . . . That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.
>
> The argument for the respondent proceeds on the assumption that, because permission at times is preliminary to action, the two are to be classed as one. But the assumption will not stand. A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail. . . . Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. Louisville & Nashville R. Co. v. Mottley, supra. With no greater reason can it be said to arise thereunder because permitted thereby.

299 U.S. at 115-16; *cf. Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. at 879 (declaratory judgment act creates only a procedural remedy; does not extend federal jurisdiction); *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 72 (1904) (Full Faith and Credit Clause prescribes only a rule of decision; Clause does not govern conduct of parties; proceeding invoking the Clause does not arise under the Constitution).

The FSIA is, at best, the source of authority for petitioner to establish a claim against respondent, not the source of the claim itself. And this is no less so because respondent may have been absolutely immune under the common law. *See* Brief for Petitioner, 35-37. The case cannot be said to arise under the FSIA simply because it is permitted thereby.

C. The FSIA Does Not Require Jurisdiction.

In the absence of compelling evidence that Congress intended to extend federal jurisdiction to all claims against foreign sovereigns, the FSIA should be interpreted to incorporate the common law limits on federal question jurisdiction. The words of a jurisdictional statute may not be read in a vacuum. Rather, the statute must be interpreted with an eye toward the role of the federal courts in the constitutional scheme. As explained by Justice Frankfurter, rejecting the contention that the federal question statute extended to admiralty cases,

> The simple language of the Act of 1875 conceals complexities of construction and policy which have been already examined. When we apply to the statute, and to the clause of Article III from which it is derived, commonsensical and lawyer-like modes of construction, and the evidence of history and logic, it becomes clear that the words of that statute do not extend, and could not reasonably be interpreted to extend, to cases of admiralty and maritime jurisdiction. The statute is phrased in terms which, as a matter of inert language, lifeless words detached from the interpretive setting of history, legal lore, and due regard for the interests of our federal system, may be used as playthings with which to reconstruct the Act to include cases of admiralty and maritime jurisdiction. If the history of the interpretation of judiciary legislation teaches anything, it teaches the duty to reject treating such statutes as a wooden set of selfsufficient words — a failing to which the Court has not been subject since the Pacific Railroad Removal Cases. (Texas & P. R., Co. v. Kirk). The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding.

> The considerations of history and policy which investigation has illuminated are powerfully reinforced by the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes.

Romero v. International Terminal Operating Co., 358 U.S. at 378-79 (footnotes omitted); *see id.* at 360, 364 n.20.

As *Romero* suggests, the interpretive limitations on federal question jurisdiction are not unique to section 1331 of title 28, United States Code. This Court and the lower federal courts routinely read federal question jurisdictional statutes in this manner. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675-78 (1974) (28 U.S.C. § 1362); *Peyton v. Railway Express Agency*, 316 U.S. 350 (1942) (28 U.S.C. § 1337); *American Security & Trust Co. v. Commissioners of the District of Columbia*, 224 U.S. 491, 494-95 (1912) (Act of March 3, 1911 § 250, 36 Stat. 1087); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875) (forerunner of 28 U.S.C. § 1257); *Wilson v. Sandford*, 51 U.S. (10 How.) 99 (1850) (Act of July 4, 1836 § 17, 5 Stat. 117, 124); *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964) (28 U.S.C. § 1338); *cf. Boston Sand & Gravel Co. v. United States*, 278 U.S. 41 (1928). *See also Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981) (habeas corpus statute). Section 1330, as but another piece of the broad jurisdictional mosaic, must be read in concert with the whole.

The observation of petitioner and its amici that the "plain language" of section 1330 appears to encompass all actions against foreign states must thus mark the beginning of the inquiry, not the end. The wording of section 1330 is no more conclusive than the wording of the Judiciary Act of 1875, now codified at section 1331 of title 28. Section 1331 has been interpreted as encompassing such limitations as the well-pleaded complaint rule, notwithstanding that its "plain language" is nearly identical to that of Article III, and intentionally so. *See Romero v. International Terminal Operating Co.*, 358 U.S. at 363-64; 13 C. Wright, A. Miller, E. Cooper, *Federal Practice and*

Procedure § 3562, p. 401 (1975). In *Romero*, the Court ruled that the federal question statute did not include actions arising under the admiralty clause of Article III. The Court forthrightly refused to accept the literal meaning of the words chosen by Congress. This case is no different. [6]

Petitioner and amici contend that federal jurisdiction is necessary to vindicate the claims of Americans acting through foreign corporations. *See* Brief for Petitioner, 13; Brief of Amici Curiae Rule of Law Committee, National Foreign Trade Council, Inc., Chamber of Commerce of the United States of America and National Association of Manufacturers of the United States [hereinafter "Brief for Rule of Law Committee"], 9-13. Claims by a foreign corporation, however, stand on a very different footing from direct claims by American citizens. If an American could not sue in the United States, he might not be able to sue anywhere at all, save, perhaps, in the courts of the defendant sovereign. Foreign corporations, by contrast, may avail themselves of the laws of their home states. To the extent such laws are, with respect to sovereign immunity, less restrictive than the FSIA, that is simply one small aspect of the larger commercial decision to transact business through a foreign subsidiary or to invest in a foreign corporation. In light of the ability of a foreign

[6] It is noteworthy, in this regard, that the legislative history of the Judiciary Act of 1875, such as it is, indicates that Congress fully intended the federal question jurisdiction to be coextensive with Article III. *See Romero v. International Terminal Operating Co.*, 358 U.S. at 363-64; C. Wright, *supra*. The limitations engrafted to that statute, thus, reflect the restraints placed upon this Court in the Constitutional universe as much as specific Congressional intent. These rules should not be abandoned absent an overwhelmingly evident Congressional intention to do so. The scattered references in the legislative history to the claims of "parties" cited by the petitioner and its amici are hardly sufficient to prove a conscious choice to expand subject matter jurisdiction, much less to overcome the restrictive presumptions created by more than a century of jurisdictional jurisprudence.

citizen to sue at home, Congress' failure to include expressly their claims in the litany of potential legal contacts between Americans and foreign states cannot be lightly dismissed.

In any event, the interests of Americans in non-federal claims by foreign corporations can be fully vindicated in state court proceedings governed by FSIA immunity standards. It is the guiding standard for personal jurisdiction over the foreign sovereign, not the court of original jurisdiction, that provides the necessary protection. Federal jurisdiction, per se, adds nothing.

For the same reasons, the asserted need for uniformity of decision in cases applying the FSIA does not require the existence of original federal subject matter jurisdiction in all cases. *See* Brief for Rule of Law Committee, 6-7; Brief for the United States as Amicus Curiae [hereinafter "Brief for the United States"], 8 n.20; Brief for the Committee on International Law of the Association of the Bar of the City of New York as Amicus Curiae [hereinafter "Brief of New York Bar"], 10-11. The federal statutory immunity standard, as supplemented by federal common law, will guide the state courts in determining all sovereign immunity claims. The very fact that Congress made the standards applicable to state actions evidences an obvious congressional expectation that at least some claims against foreign sovereigns would not be litigated in federal courts.

Another justification for expansive federal jurisdiction suggested by petitioner and its amici—except the United States—is the existence of friendship, commerce, and navigation ("FCN") treaties promising aliens "national treatment" in United States courts. *See* Brief for Petitioner, 13-14. These treaties, however, make no specific reference to the federal courts of the United States. They merely prohibit discrimination in access to United States courts, state or federal, against the citizens of a

contracting sovereign, as such.[7] The federal courts, thus, have routinely refused to entertain suits by citizens of foreign states with which the United States has entered into a FCN treaty absent an independent jurisdictional base. *See, e.g., Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Dept.*, 415 F.2d 452, 455 (5th Cir. 1969) (treaty with Netherlands); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968) (treaty with Germany). These denials of court access do not violate the FCN treaties because they flow not from a targeted discrimination, but from generally applicable constitutional and statutory principles of jurisdiction. The alien plaintiffs, in short, are no different from a U.S. citizen with a non-federal claim against a non-diverse defendant.

Indeed, were petitioner and its amici correct, the FCN treaties would equally require federal jurisdiction for the litigation of non-federal claims by aliens against private alien defendants. Yet, FCN treaties plainly cannot, and do not, provide such jurisdiction. *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136 (1829); *Hodgson v. Bowerbank*, 9 U.S. (5 Cr.) 303 (1809); *Montalet v. Murray*, 8 U.S. (4 Cr.) 46 (1807); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800); Wilson, *Access-To-Courts Provisions In United States Commercial Treaties*, 47 Am. J. Int'l L. 20, 25 n.32 (1953). No one has ever suggested that the jurisdictional lacuna over alien suits against private alien defendants violates United States treaty obligations. Suits against foreign sovereigns are no different.

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[7] Article XXIII of the treaty with the Netherlands, for example, defines "national treatment" as follows:

> The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

Treaty of Friendship, Commerce, and Navigation, March 27, 1956, United States-Netherlands, Article XXIII, para. 1, 8 U.S.T. 2043, 2080, T.I.A.S. No. 3942.

Congress was well aware of the FCN treaties when it crafted the FSIA. But it was concerned only that the FSIA not interfere with rights and obligations created by the treaties. *See* H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. 17-18 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6616. Had Congress also thought the FSIA necessary to implement FCN treaties, it surely would have said so, just as the State Department would doubtless have so testified at one of its appearances during the hearings on the Act. It is not at all surprising that the one party directly responsible for FCN treaty obligations, the United States, makes no mention of the treaties here. They simply are irrelevant to the issues at hand.

Finally, one amicus suggests that the states have no interest in suits by aliens against foreign sovereigns. Therefore, the argument runs, the traditional restrictive approach to jurisdictional statutes is not applicable. *See* Brief of New York Bar, 12-19. While, no doubt, many of these cases will turn on foreign law, many will turn on state law. Indeed, petitioner's claim here may ultimately involve New York commercial law. And one of the due process minimum contacts that underlies the FSIA is that the defendant has availed itself of the protections of the law of the forum state. *See Hanson v. Denckla*, 357 U.S. 235 (1958). The states' interest in state law cases is axiomatic. To the extent that foreign law is involved, state judges are not to be presumed lacking in capacity. This Court has expressly found state tribunals qualified to make decisions on foreign law. *Zschernig v. Miller*, 389 U.S. 429, 433 (1968).

More significantly, this suggestion turns upside down the framers' intention that the federal government be of limited powers and have only those functions specifically granted to it. This theme flows not merely through Article III, but the entire Constitution. *See* U.S. Const. amend X. Indeed, the states presumably have no greater or lesser interest in FSIA suits involving alien plaintiffs than in suits by aliens against private alien defendants.

Yet, as noted above, actions by aliens against private aliens are unquestionably relegated exclusively to the state courts, contrary federal legislation notwithstanding. The restrictive approach to federal jurisdiction implements constitutional principles rising far above the states' interest in the subject matter of any particular class of cases. These principles are no less impelled by suits brought under the FSIA.

II. THE CONSTITUTION DOES NOT PERMIT ORIGINAL FEDERAL JURISDICTION OVER NON-FEDERAL DISPUTES BETWEEN FOREIGN CITIZENS AND FOREIGN STATES

A. The Immunity Question Does Not Support Original Jurisdiction.

If the FSIA were intended to extend the original jurisdiction of the federal courts to claims such as petitioner's, the Act would be unconstitutional. The cases interpreting the federal question statutes take on constitutional proportions at the district court level through the combined effects of the arising under and the case or controversy aspects of Article III. Underpinning the well-pleaded complaint rule is the concern that potential federal defenses, until joined, are hypothetical only. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. at 153-54. The federal question might not, in fact, be litigated and decided. Or, even though the federal issue is decided, a state law ground may dispose of the case. As articulated by Justice Cardozo, ordering a remand to the state courts in *Gully v. First National Bank*,

> The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.

299 U.S. at 117.

Once a case has progressed through the state court system, it can be determined with certainty whether a concrete federal question is raised. Where a federal defense is asserted and decided, this Court may have appellate jurisdiction over the matter. That this appellate review is available, however, in no way suggests that a federal court could have had original jurisdiction. Even if the federal question statute extended to the full limits of Article III, the federal question would have been at best "lurking" and not concrete. By the same token, this Court may obtain appellate jurisdiction over a case in which the state court relied on a federal ground asserted in neither the complaint nor the answer. Obviously, such a case could not have been litigated in the federal courts as a matter of original jurisdiction. Again, the key is the existence of a concrete case or controversy.

The ultimate proof that the well-pleaded complaint rule is of constitutional magnitude at the district court level is its constitutional analog at the appellate level—the independent state ground doctrine. The independent state ground rule precludes the rendering of advisory opinions on federal issues not necessary to support a judgment. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). The rule implements the Article III command that federal jurisdiction be extended only to concrete cases or controversies. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 566; *Fay v. Noia*, 372 U.S. 391, 464 (1963) (Harlan, J., dissenting); *Irvin v. Dowd*, 359 U.S. 394, 407-08 (1959) (Frankfurter, J., dissenting); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise In Federalism*, 7 Utah L. Rev. 423, 434-35 (1961). As the Court explained in *Herb v. Pitcairn*,

> The reason [for the rule] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of

> our own jurisdiction. Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion.

324 U.S. at 125-26.

The constitutional federalism concerns underlying the independent state ground rule prove that the well-pleaded complaint rule is but the other side of the same coin. Where an independent state ground exists, review of the federal question would be advisory unless review is also had of the state ground. But review of the state ground would either be destructive of the states' independence or a futile act under the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).[8] *See Fay v. Noia*, 372 U.S. at 463-68; Brennan, *supra*. Thus, the independent state ground rule has been described as "one of the 'twin pillars'... on which have been built 'the main lines of demarcation between the authority of the state legal systems and that of the federal system.'" *Irvin v. Dowd*, 359 U.S. at 408.

Suits under the FSIA clearly illustrate the need to accord the well-pleaded complaint rule comparable status. The federal immunity defense may be waived. Or, once immunity is determined not to exist, the court may rule that the foreign sovereign has no liability on the under-

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[8] In *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875), the Court ruled that it had no statutory power to review state questions decided in the same case as federal questions. Such review is undoubtedly beyond the Court's Article III authority, as well. Many cases, for example, attack state statutes as violative of both the United States and state Constitutions. Surely, the highest court in a state must be the final arbiter on the meaning of that state's Constitution. The only issue left for this Court is the consistency vel non of such a state court decision with the federal Constitution.

lying obligation. In either event, the exercise of original jurisdiction could only result in the federal courts, perhaps even this Court, deciding numerous dispositive questions of non-federal law. Clearly, this Court would not review these questions on appeal from the state courts. There is no reason why decision as an original matter would be less destructive of the constitutional scheme. Constitutional federalism does not allow federal courts to reach out to parties that are not diverse in order to decide cases that are not federal.

B. There Is No Protective Jurisdiction.

Petitioner seeks to extricate itself from the mainstream of federal question cases by reliance on a line of decisions, commencing with *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), which purportedly predicate original jurisdiction on the legislative expression of a federal interest in the defendant. Brief for Petitioner, 23-30; *see* Brief for United States, 9-18, 21-27. As a technical matter, these cases, unlike a case brought pursuant to the FSIA, truly arise under federal law from the outset. As a policy matter, these cases involve what the FSIA lacks, a direct federal interest in the ultimate disposition of the case. It is this federal interest—lacking in FSIA cases—which, as a constitutional matter, allows the federal judiciary to wrest non-federal questions of law from the states. This Court has already decided, in a line of cases commencing with *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800), that absent a comparable federal interest, no federal jurisdiction exists.

In *Osborn v. Bank of the United States*, Justice Marshall firmly grounded federal jurisdiction on the premise that, as a creature of federal law, each action of the Bank arose under federal law. He stated,

> We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts

jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of a contract, which is put as the strongest against the bank. When a bank sues, the first question which presents itself, and which lies at the foundation of the cause is, has this legal entity a right to sue? . . . The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on.

The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have

> been made, but under the authority of that act. The act itself is the first ingredient in the case; is its origin; is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

22 U.S. at 823-25.

Thus, when read in context, Justice Marshall's broad statement that a federal "ingredient" yields a federal case is clearly limited to those ingredients which compose the nucleus of operative facts on which the plaintiff's claim depends.[9] In cases brought under the FSIA, the conduct of neither party is regulated by federal law and, consequently, the actions from which the claim arises do not flow from the authority of federal law. Indeed, the concept that a foreign sovereign is somehow dependent on the United States Congress for its ability to enter into and perform commercial contracts would be astounding. In short, while *Osborn* arose under federal law as a technical matter, FSIA cases do not.

Every case cited by petitioner or the United States to support the notion of "protective jurisdiction" is bound by this common thread: the conduct giving rise to the claim was taken under color of federal law. *See Glidden v. Zdanok*, 370 U.S. 530 (1962) (Tucker Act claims against United States); *Williams v. Austrian*, 331 U.S. 642 (1947) (actions of federal bankruptcy trustee); *Schumacher v. Beeler*, 293 U.S. 367 (1934) (semble); *Patton v. Brady*, 184

[9] Similarly, Justice Marshall's statement that a federal case exists whenever the right asserted by plaintiff would be defeated by one construction of federal law and sustained by another far exceeds the holding of the case. *See id.* 822; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). At least one commentary has condemned this test on that basis. *See* C. Wright, *supra*, p. 399-400. Justice Marshall also stated, as quoted in text, "The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up."

U.S. 608 (1902) (suit against internal revenue agent to recover tax paid under protest); *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885) (suit involving federally chartered corporation); *Tennessee v. Davis*, 100 U.S. 257 (1880) (removal of criminal prosecution of federal revenue agent who committed homicide in course of official duties); *Railroad Co. v. Mississippi*, 102 U.S. 135 (1880) (removal of action to dismantle railroad bridge constructed pursuant to act of Congress); *Lathrop v. Drake*, 91 U.S. 516 (1876) (federal bankruptcy trustee); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247 (1868) (removal of suit against municipal officers for actions taken under color of federal war legislation). [10] That the holdings of these cases are wholly dependent upon, and limited by, the presence of federal authority is clear. *See Romero v. International Terminal Operating Co.*, 358 U.S. at 379 & n.50; *Gully v. First National Bank*, 299 U.S. at 113-14; *Puerto Rico v. Russell & Co.*, 288 U.S. at 484-85; *cf. The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852).

Apart from consistency with the language of Article III, *Osborn* and its progeny each further a legitimate federal interest in the subject matter at issue. In each case, the ultimate disposition of the merits was capable of frustrating a legislative enactment of Congress. The need

[10] *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), and *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), involved claims predicated on federal common law. Thus, these cases arose under federal law in the most traditional sense. *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582 (1949), concerned whether Congress could make the District of Columbia a "state" for purpose of federal diversity jurisdiction. A three Justice plurality sustained the act on the basis of a "protective jurisdiction" emanating from Article I. *Id.* at 600. The remaining six members of the Court not only rejected, but excoriated the concept of protective jurisdiction. *See id.* at 604-18 (Rutledge, J., joined Murphy, J., concurring); *id.* at 626-45 (Vinson, C.J., joined by Douglas, J., dissenting); *id.* at 646-65 (Frankfurter, J., joined by Reed, J., dissenting). The two Justices completing the majority would have sustained the act based on a simple construction of the diversity clause of Article III. *Id.* at 617-26. The decision, thus, sheds little light on the federal question clause of Article III.

for supremacy of the central government thus justified federal decision of state law questions in these instances.

While Congress has a legitimate interest in the disposition of immunity claims by foreign sovereigns, it has no interest in the underlying state law questions in FSIA cases. Congress has no interest at all in non-federal cases against non-immune sovereigns, and there can be no case against an immune sovereign. The federal interest in the immunity issue can be fully vindicated by having the state courts apply the immunity standards in the first instance and having this Court hear appeals of concrete issues.

Indeed, this procedure subserves the fundamental federalism principles. It brings the federal issue into the federal judiciary without the additional baggage of state law claims. There would be no incursion into state sovereignty whatsoever. By contrast, if all FSIA cases were heard in federal court as original matters, countless state law questions—as to which the United States is completely indifferent—would be taken from the state courts.

In point of fact, this Court effectively decided the question in the line of cases concerning original district court jurisdiction over all suits between aliens. *See Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136 (1829); *Hodgson v. Bowerbank*, 9 U.S. (5 Cr.) 303 (1809); *Montalet v. Murray*, 8 U.S. (4 Cr.) 46 (1807); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800). The Court ruled that a statute purporting to confer such jurisdiction was inconsistent with the diversity clause of Article III. That the Court did not sustain the statute on federal question or protective jurisdiction grounds is crucial. All suits against aliens would potentially raise federal questions—such as whether the means of obtaining personal jurisdiction over the alien comported with due process.

Petitioner and its amici assert that the universally applicable immunity standard enacted by Congress in the FSIA distinguishes this case from *Mossman*. But the

immunity question created by the FSIA is, for these purposes, no different from the constitutional standards for personal jurisdiction lurking in *Mossman*. Indeed, while substantive identity is not necessary to the point, the FSIA represents an attempt to codify the Constitutional minimum contacts test. *See* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 13 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6612. There is simply no principled means for distinguishing *Mossman*. The FSIA is nothing more or less than an attempt to expand federal jurisdiction by fiat. *Mossman* and its progeny say that cannot be done. [11] *See also, The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852).

Mossman itself is no more than a specific application of the long established principle that Congress cannot expand the federal judicial power beyond the confines of Article III. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) at 452. That is especially so when the expansion effectively renders superfluous a separate clause describing the Article III power. *Romero v. International Terminal Operating Co.*, 358 U.S. at 364-65; *see The American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545 (1828). As stated by Justice Rutledge, with respect to the act denominating the District of Columbia a "state" for diversity purposes,

> [H]owever this case may be decided, there is no real escape from deciding what the word "State" as used in Article III, § 2 of the Constitution means. For if it is a limitation on Congress' power as to courts created under that Article, it is hard to see how it becomes no

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[11] Ironically, certain amici suggest that the proof of the FSIA's validity is the fact that the immunity standard written into section 1330 could be severed from the initial language granting jurisdiction. Brief of Rule of Law Committee, 24-25 & n.31. In fact, this clearly demonstrates why section 1330 would be invalid if it purported to cover non-federal claims against foreign sovereigns by foreign citizens. Similarly, the fact that immunity may derive from the law of nations adds nothing. *See id.* at 21-25.

> limitation when Congress decides to cast it off under some other Article, even one relating to its authority over the District of Columbia. If this may be done in the name of practical convenience and dual authority, or because Congress might find some other constitutional way to make citizens of the District suable elsewhere or to bring here for suit citizens from any part of the country, then what is a limitation imposed on the federal courts generally is none when Congress decides to disregard it by purporting to act under some other authorization.
>
> The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded. The very essence of the problem is whether the Constitution meant to cut out from the diversity jurisdiction of courts created under Article III suits brought by or against citizens of the District of Columbia. That question is not answered by saying in one breath that it did and in the next that it did not.

National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 605-06 (1949) (Rutledge, J., concurring).

The rationale of "protective jurisdiction" is offered here for the sole purpose of evading the limits placed on diversity jurisdiction by Article III. If petitioner is correct, then Article III has no limits; Congress could make any case a federal case simply by saying so.

III. THIS IS NOT A SUIT AGAINST AN AMBASSADOR

The most obvious flaw in certain amicis' contention that this case falls within the Article III grant of jurisdiction over cases affecting ambassadors, *see* Brief of Rule of Law Committee, 17-21, is that none of the parties in this case is an ambassador. Amici attempt to leap this rather substantial hurdle by asserting that, since a suit against an ambassador is effectively a suit against the sovereign, the converse must necessarily be true. Of course, it is not.

Article III contains rules concerning suits against foreign states quite separate and distinct from the rules

concerning ambassadors. If, as amici contend, an ambassador is to be treated as a proxy for the state he represents, the separate provisions for states would be rendered superfluous. At a minimum, the provisions concerning suits against foreign states cast serious doubt on the validity of amicis' suggestion that, at the time the Constitution was adopted, the notion of *in personam* jurisdiction over a foreign sovereign was inconceivable. Moreover, the framers intended not to provide a mechanism for obtaining jurisdiction over distant sovereigns, but to avoid insulting foreign sovereigns by unfairly treating their local representatives. *See The Federalist* No. 80, at 495-97, 500 (H. Lodge ed. 1888) (A. Hamilton).

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

VERLINDEN B.V., PETITIONER

v.

CENTRAL BANK OF NIGERIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act of 1976 violates Article III of the Constitution to the extent that it permits an alien plaintiff to sue a foreign government in federal district court on a non-federal cause of action.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
A. The statutory context	1
B. Proceedings in the district court	3
C. The decision of the court of appeals	4
Summary of argument	5
Argument	7
All suits brought against foreign states under the Foreign Sovereign Immunities Act are suits arising under federal law and fall within the federal judicial power defined in Article III of the Constitution	7
I. Congress has power to confer jurisdiction on federal district courts to hear suits brought by foreign plaintiffs against foreign states under the FSIA because such suits raise substantive issues of federal law	9
A. The federal judicial power extends to every case that potentially requires interpretation or application of a federal statute	9
B. The present case arises under federal law because it includes a federal law ingredient requiring judicial resolution	13
C. Decisions restrictively construing the scope of jurisdictional statutes are not applicable when delineating powers granted to Congress by the Constitution	18

Argument—Continued Page

II. Congress has power to confer jurisdiction on federal district courts to hear suits brought by foreign plaintiffs against foreign states under the FSIA because federal court jurisdiction is essential to safeguard important statutory policies 21

A. Controversies "arise under" federal law when Congress determines that their resolution by federal courts is essential to give full effect to a statutory program 23

B. In the exercise of its Article I power over foreign affairs and international commerce, Congress reasonably determined that federal courts must be available to adjudicate suits brought against foreign states 27

Conclusion 33

TABLE OF AUTHORITIES

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Alfred Dunhill of London, Inc. v. *Cuba*, 425 U.S. 682 ..... 2, 17
Association of Salaried Employees v. *Westinghouse Corp.*, 348 U.S. 437 20
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Gully v. *First National Bank*, 299 U.S. 109 18
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 8
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Powell v. *McCormack*, 395 U.S. 486 19
The Propeller Genesee Chief v. *Fitzhugh*, 53 U.S. (12 How.) 443 27
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Rostker v. *Goldberg*, No. 80-251 (June 25, 1981).... 32
The Schooner Exchange v. *McFaddon*, 11 U.S. (7 Cranch) 116 28
Schumacher v. *Beeler*, 293 U.S. 367 .....7, 24, 26
Shoshone Mining Co. v. *Rutter*, 117 U.S. 505 19
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Wheeldin v. *Wheeler*, 373 U.S. 647 13

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Constitution and statutes:

United States Constitution:

Article I 13, 20, 22, 23, 25, 26, 27
Article I, Section 8, Clauses 3, 10 27
Article II, Sections 2, 3 27
Article III ..... *passim*
Article III, Section 2 ..... 10, 27, 28

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28 U.S.C. 1602-1611 1
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28 U.S.C. 1604-1605 21
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28 U.S.C. 1605(a)(3) 2
28 U.S.C. 1605(a)(4) 2
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28 U.S.C. 1605(b) 2
28 U.S.C. 1606 ..... 3, 15
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Page

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has a substantial interest in defending the constitutionality of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330 *et seq.* This interest is discussed in the government's brief as amicus curiae in support of the petition for a writ of certiorari in this case.

STATEMENT

A. The Statutory Context

In 1976 Congress enacted the Foreign Sovereign Immunities Act (FSIA),[1] a comprehensive statute designed to set forth both substantive and procedural standards for suits brought against foreign nations in state and federal courts in the United States. The statute provides that judicial, rather than executive, authorities must henceforth determine claims of foreign states to sover-

[1] Act of October 21, 1976, Pub. L. No. 94-583, 90 Stat. 2891-2898. The FSIA is codified at 28 U.S.C. 1330, 1332(a)(2)-(4), 1391(f), 1441(d), and 1602-1611.

eign immunity, and must do so "in conformity with the principles set forth in this chapter" (28 U.S.C. 1602). The principles prescribed by Congress in the FSIA embody the "restrictive" doctrine of sovereign immunity (see *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 698-705, 711-715 (1976)), under which foreign nations are subject to suit "insofar as their commercial activities are concerned" (28 U.S.C. 1602).

To achieve its goals, the FSIA broadly provides that federal district courts "shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state * * * as to any claim * * * with respect to which the foreign state is not entitled to immunity" under the terms of the statute or any applicable international agreement (28 U.S.C. 1330(a)). The FSIA further provides that "[a]ny civil action brought in a State court against a foreign state * * * may be removed by the foreign state" to federal district court (28 U.S.C. 1441(d)).

The FSIA announces detailed standards for determining when immunity is to be accorded. Foreign states are "immune from the jurisdiction of the courts of the United States and of the States" unless an exception is found in the statute or applicable international agreement (28 U.S.C. 1604). Statutory exceptions from this general grant of immunity exist when immunity has been waived (28 U.S.C. 1605(a)(1)), when the claim arises from specified commercial activities of the sovereign state (28 U.S.C. 1605(a)(2)), when certain rights in property taken in violation of international law are at issue (28 U.S.C. 1605(a)(3)), when rights in specified property situated in the United States are at issue (28 U.S.C. 1605(a)(4)), and when rights arising from certain tortious injuries to person or property occurring within the United States are at issue (28 U.S.C. 1605(a)(5)). The FSIA also denies sovereign immunity in certain admiralty proceedings based on specified commercial activities of the foreign state (28 U.S.C. 1605(b)).

The FSIA also delineates the scope of liability to be imposed on sovereign defendants. Generally, sovereign defendants are subject to the same liability as individual defendants, but "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages" (28 U.S.C. 1606). And in wrongful death actions, in which controlling law provides for punitive damages only, the FSIA vests the plaintiff with a right to "actual or compensatory damages" (*ibid.*). The statute further prescribes the circumstances under which the property of the sovereign defendant may be subjected to attachment or execution (28 U.S.C. 1609-1611).

Finally, the FSIA sets forth procedural rules for litigation commenced against foreign sovereigns, including special rules governing venue (28 U.S.C. 1391(f)), jury trial (28 U.S.C. 1330(a)), service of process (28 U.S.C. 1608), answers to complaints (28 U.S.C. 1608), and counterclaims (28 U.S.C. 1607). In addition, the FSIA provides that "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state * * * unless the claimant establishes his claim of right to relief by evidence satisfactory to the court" (28 U.S.C. 1608(e)).

B. Proceedings in the district court

Petitioner Verlinden B.V. ("Verlinden"), a Dutch corporation, brought suit in the United States District Court for the Southern District of New York against respondent Central Bank of Nigeria ("Central Bank") under 28 U.S.C. 1330(a). The gist of Verlinden's claim against Central Bank is that Central Bank breached its contractual obligations under an irrevocable letter of credit. As the court of appeals noted, "Central Bank does not seriously dispute" that it violated its payment obligations under the unconditional agreement with Verlinden (see Pet. App. 4a & n.7, 3a & n.5; see also *id.* at 23a-24a).

Central Bank moved to dismiss Verlinden's complaint in the district court on several theories, including lack

of subject matter jurisdiction. In contesting subject matter jurisdiction, Central Bank attacked the constitutionality of the FSIA as applied to suits between aliens on non-federal causes of action.

The district court rejected the challenge to its subject matter jurisdiction (Pet. App. 25a-34a). It first concluded that the "broad and inclusive" language of the statute embraces the present suit. It then explained why a suit under the FSIA is a suit "arising under" federal law (*id.* at 34a; footnote omitted):

> [The statute] incorporates into the concept of jurisdiction substantive, federal criteria for determining the validity of assertions of sovereign immunity. It imposes a single, federal standard to be applied uniformly by both state and federal courts hearing claims brought against foreign states. In consequence, even though the plaintiff's claim is one grounded upon common law, the case is one that "arises under" a federal law because the complaint compels the application of the uniform federal standard governing assertions of sovereign immunity. In short, the Immunities Act injects an essential federal element into all suits brought against foreign states.

The district court subsequently concluded, however, that it lacked personal jurisdiction over Central Bank and dismissed Verlinden's complaint (*id.* at 34a-54a).

C. The decision of the court of appeals

The court of appeals agreed with the district court that the FSIA authorizes the present action in federal court. It determined, however, that the Act is unconstitutional to the extent that it permits a foreign plaintiff to sue a foreign government in federal court on a non-federal cause of action (Pet. App. 20a). In reaching that conclusion, the court characterized the Act as merely a jurisdictional or procedural statute and asserted that a federal case or controversy could not "arise under" such a law (*id.* at 18a-19a). In so holding, the court refused to "be deterred" (*id.* at 19a) by the deci-

sion of this Court in the seminal case of *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), in which Chief Justice Marshall, writing for the Court, afforded a broad interpretation to the "arising under" jurisdiction of the federal courts.

In the view of the court of appeals, *Osborn* should be limited to its facts; indeed, a subsequent decision of this Court extending *Osborn* beyond its facts (*Pacific R.R. Removal Cases*, 115 U.S. 1 (1885)) was dismissed by the court below as a "sport" (Pet. App. 20a n.26). Rather than relying on this Court's decisions construing Article III, the court of appeals concluded that Congress' power under the Constitution should be delineated by reference to other decisions narrowly construing the "aris[ing] under" language appearing in 28 U.S.C. 1331 (Pet. App. 10a, 15a), and by reliance on "history, good sense, and sound concepts of judicial administration" (*id.* at 20a).

The court of appeals reached these striking conclusions without the benefit of briefing by any party on the important issues that it decided. Moreover, the court proceeded without discharging its duty under 28 U.S.C. 2403(a) to notify the Attorney General of the pendency of this constitutional question and without allowing the United States to intervene to seek rehearing once it had rendered its judgment.

SUMMARY OF ARGUMENT

1. A case "aris[es] under" federal law within the meaning of Article III of the Consitution whenever resolution of the case requires the court to "expound[]" a federal law, whenever an issue of federal law forms an "ingredient" of a cause of action or defense, or whenever a "title or right" belonging to either party "may be defeated by one construction of the * * * law * * * and sustained by the opposite construction." *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 818-824 (1824). Cases brought under the FSIA plainly meet the alternative tests set forth in *Osborn*. In every

case brought under the FSIA, including cases such as this in which a foreign plaintiff sues a foreign state, the federal district court must determine, at the very threshold of the litigation, whether sovereign immunity should be recognized pursuant to detailed criteria prescribed by Congress. 28 U.S.C. 1330(a), 1602-1607. Thus, cases brought under the FSIA are cases "arising under" federal law because the FSIA imposes a duty on the district courts to expound and apply federal standards, because the issue of sovereign immunity forms an essential ingredient of every such case, and because the defendant's right to immunity will be defeated by one construction of the FSIA and sustained by the opposite construction.

The court of appeals nonetheless believed that the present suit could not arise under federal law because the FSIA is "jurisdictional" and does not prescribe "substantive rules of decision" (Pet. App. 17a, 19a). That characterization, however, does not advance the constitutional inquiry. As this Court recognized in *Osborn*, the federal judicial power is "co-extensive" with the federal legislative power. 22 U.S. (9 Wheat.) at 818. Accordingly, federal courts may receive power from Congress to adjudicate *any* case that requires the construction or application of *any* federal law. Beyond this, moreover, there is no basis for viewing the FSIA as merely a procedural statute. The FSIA codifies standards defining the elements of the defense of sovereign immunity—standards that, as this Court has recognized, embody an "overriding principle of substantive law." *Ex parte Peru*, 318 U.S. 578, 588 (1943).

The court of appeals also sought to justify its restrictive constitutional ruling by reference to decisions construing 28 U.S.C. 1331. However, the court lost sight of the fact that it is the Constitution that must be interpreted in this case, not a jurisdictional statute. And "the many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the

federal courts." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 n.51 (1959).

2. Although the decision below can be reversed on the simple ground that all suits brought under the FSIA raise substantive issues of federal law, and therefore fall within the "arising under" jurisdiction granted in Article III, the result would not be different even if such suits did not present substantive federal law issues. Under the principle of "protective jurisdiction" (*Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton, J., concurring)), Congress may open the doors of the federal courts to hear cases that raise only non-federal questions if federal court jurisdiction is needed to safeguard legislative policies embodied in a federal enactment. See, *e.g.*, *Schumacher* v. *Beeler*, 293 U.S. 367, 374-375 (1934); *Lathrop* v. *Drake*, 91 U.S. 516, 518 (1875).

In enacting the FSIA, Congress determined that federal court jurisdiction was essential to assure uniform treatment of foreign sovereigns and to reduce tensions in international relations that have resulted from assertions of jurisdiction by state courts over the objection of foreign sovereigns. Because Congress reasonably concluded that federal court jurisdiction was needed to give effect to important legislative policies embodied in the FSIA, suits under the FSIA are properly viewed as suits "arising under" federal law.

ARGUMENT

ALL SUITS BROUGHT AGAINST FOREIGN STATES UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT ARE SUITS ARISING UNDER FEDERAL LAW AND FALL WITHIN THE FEDERAL JUDICIAL POWER DEFINED IN ARTICLE III OF THE CONSTITUTION

The district court and the court of appeals agreed that the FSIA encompasses suits brought by foreign plaintiffs against foreign states if the standards prescribed in the statute are satisfied. Section 2(a) of the

FSIA, 28 U.S.C. 1330(a), broadly vests the district courts with jurisdiction over "any nonjury civil action against a foreign state * * * as to any claim * * * with respect to which the foreign state is not entitled to immunity" under the statute. In view of this unequivocal language, both lower courts correctly concluded (Pet. App. 8a, 34a) that "the words of the statute control." Congress has permitted foreign plaintiffs to sue foreign states in federal district court if statutory prerequisites are met.[2]

Despite its finding that Congress intended to permit foreign plaintiffs to sue foreign states under the FSIA, the court of appeals concluded that Congress lacks constitutional power to authorize such suits in federal district court. That conclusion is wrong for two separate reasons. First, every suit brought against a foreign state under the FSIA raises for adjudication substantive issues of federal law. Accordingly, every such suit "aris[es] under" federal law within the meaning of Article III of the Constitution. Second, even if suits under the FSIA did not raise substantive issues of fed-

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[2] Given the unambiguous language used in the statute, reference to the legislative history for evidence of congressional intent is unnecessary. See 1 *Moore's Federal Practice* ¶ 0.66[4] at 700.178-700.179 (2d ed. 1980) ("the plain intention is to confer on the district court jurisdiction of an action by an alien against a foreign state if the action otherwise meets the requirements of that section"). Congress is not required "to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). In any event, the legislative history confirms that Congress fully intended the "naturally broad and inclusive meaning" of the words that it selected. *Pfizer Inc.* v. *India*, 434 U.S. 308, 312 (1978). See Pet. App. 5a-8a. Closing the doors of the federal courts to foreign plaintiffs who bring suit against foreign sovereigns in this country would defeat a major purpose of the statute. As discussed on pages 27-33, *infra*, Congress believed that federal court jurisdiction must be available in *all* suits brought against foreign nations because assertions of jurisdiction by state tribunals, over the objection of a foreign government, would produce serious irritations in international relations. See also page 15 of our brief as amicus curiae at the certiorari stage.

eral law, it would not follow, as the court of appeals assumed, that Congress lacks power to confer federal court jurisdiction. Under the principle of "protective jurisdiction," Congress may open the doors of the federal courts whenever that is necessary to safeguard important statutory policies, as it sought to do under the FSIA.

I. CONGRESS HAS POWER TO CONFER JURISDICTION ON FEDERAL DISTRICT COURTS TO HEAR SUITS BROUGHT BY FOREIGN PLAINTIFFS AGAINST FOREIGN STATES UNDER THE FSIA BECAUSE SUCH SUITS RAISE SUBSTANTIVE ISSUES OF FEDERAL LAW

The court of appeals adopted a grudging view of Congress' power to confer federal question jurisdiction on the district courts. It asserted (Pet. App. 15a) that Congress has only "narrow" power to enlarge the grant of jurisdiction made by statutes such as 28 U.S.C. 1331. In adopting this restrictive approach, the court of appeals lost sight of the fact that "it is *a constitution* we are expounding." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original). The decisions of this Court leave no doubt that Article III of the Constitution generously endows Congress with authority to vest federal question jurisdiction in the district courts. Congress did not exceed that broad power here.

A. The Federal Judicial Power Extends To Every Case That Potentially Requires Interpretation Or Application Of A Federal Statute

1. Although Article III of the Constitution is not unrestricted in its delineation of federal judicial power, there can be little dispute that the framers intended a comprehensive grant of jurisdiction suitable to the present and future needs of the nation. As Justice Story, writing for the Court in *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326-327 (1816), observed long ago, the powers granted by the Constitution were "not intended to

provide merely for the exigencies of a few years, but * * * to endure through a long lapse of ages * * *. Hence [constitutional] powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects * * *."

Article III, Section 2 broadly extends the federal judicial power to "all Cases," at law or in equity, "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[3] From the beginning, this Court has construed the "arising under" grant expansively. Thus, in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), this Court held that any suit brought by a bank created pursuant to federal statute was a suit "arising under" federal law, because questions of federal law potentially could arise in such a proceeding. Chief Justice Marshall explained that the federal judicial power extends not only to cases in which federal issues actually are litigated, but also to all cases in which such issues *might* be litigated. For example, if the plaintiff bank sued to enforce a right recognized under state law, a federal claim would not likely be asserted by either party. Nonetheless, because federal law issues "may" arise (*id.* at 824), a federal question "forms an original ingredient in every cause" (*ibid.*). For this reason, it is immaterial that "a suit brought by the bank may depend in fact altogether on questions unconnected with any law of the United States" (*id.* at 826). The Court applied these principles the same day that it decided *Osborn* by ruling in *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824), that a federally chartered bank could bring suit in federal court to enforce an ordinary contract claim.

Osborn also established that the legislative and judicial powers of the federal government are "co-extensive" (22

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[3] See *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 251 (1867): "The broadest language is used. 'All cases' so arising are embraced. None are excluded."

U.S. (9 Wheat.) at 818). Thus, the "judicial department may receive * * * the power of construing every * * * law" enacted by Congress. The Court stressed that "[a]ll governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws" (*id.* at 818-819). Accordingly, the "arising under" jurisdiction of the federal judiciary "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it" (*id.* at 819). The Court added that it is "a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction" (*id.* at 822).

The principles set forth in *Osborn* have been reaffirmed by this Court on many occasions. See, *e.g.*, *Pacific R.R. Removal Cases*, 115 U.S. 1, 11-14 (1885);[4] *Federal Intermediate Credit Bank* v. *Mitchell*, 277 U.S. 213, 214 (1928). *Osborn* stands today as the authoritative exposition of the scope of Congress' power under the federal question clause of Article III.[5]

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[4] Contrary to the suggestion of the court of appeals (Pet. App. 20a n.26), this Court's decision in the *Pacific R.R. Removal Cases* "has been limited by statute but never by subsequent constitutional construction." *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 615 (1949) (Rutledge, J., concurring).

[5] See 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3562 at 400 (1975) ("The very expansive reading Marshall gave to the 'cases arising under' language of the Constitution is appropriate in dealing with a constitution. It leaves room for Congress to grant such particular jurisdiction as may in the future be seen to be necessary"); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 482 (1969); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. Pa. L. Rev. 639, 649 (1942). See also *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting on other grounds) ("federal jurisdiction

2. *Osborn* also establishes that the "arising under" jurisdiction that Congress may confer on federal trial courts is co-extensive with the appellate jurisdiction of this Court. *Osborn* v. *Bank of the United States*, *supra*, 22 U.S. (9 Wheat.) at 821 ("We perceive, then, no ground on which the proposition can be maintained, that congress is incapable of giving the circuit court original jurisdiction, in any case to which the appellate jurisdiction extends"). It follows that Congress may confer upon federal district courts jurisdiction to decide cases in which a federal "ingredient" is raised in any form, whether by complaint or answer. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821), holding that assertion of a federal defense produces a case "arising under" federal law within the meaning of Article III. The Court observed that it is unnecessary that the case "be one in which a party comes into Court to demand something conferred on him by the constitution or a law * * *. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."

Subsequent decisions of this Court reaffirm that assertion of a defense, predicated on federal law, gives rise to a case falling within the judicial power defined in Article III. See, *e.g.*, *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252-253 (1867) (the rule prescribed in *Osborn* "applies with equal force where the plaintiff claims a right, and where the defendant claims protection, by virtue of" a federal law or the Constitution. In either case, it "is the right and the duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals"); *Tennessee* v. *Davis*, 100

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under the 'arising' clause of the Constitution, though limited to cases involving potential federal questions, has such flexibility that Congress may confer it whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question").

U.S. 257, 264 (1879); *Railroad Co.* v. *Mississippi*, 102 U.S. 135, 141 (1880); *Patton* v. *Brady*, 184 U.S. 608, 611 (1902); *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963). See also *Textile Workers Union* v. *Lincoln Mills*, *supra*, 353 U.S. at 475 n.5 (Frankfurter, J., dissenting on other grounds) (Article III power exists when Congress puts "federal law in the forefront as a defense").

In short, a case arises under federal law within the meaning of Article III in any instance in which a potential federal law ingredient exists by virtue of Congress' exercise of its legislative powers under Article I. That is true in cases in which the federal ingredient is injected by either the plaintiff or the defendant. As we demonstrate below, every case brought under the provisions of the FSIA against a foreign nation is a case "arising under federal law" within these constitutional standards.

B. The Present Case Arises Under Federal Law Because It Includes A Federal Law Ingredient Requiring Judicial Resolution

1. Every case filed in the district court under the FSIA raises—at the very threshold of the litigation—a substantial federal law "ingredient" within the meaning of *Osborn*. 28 U.S.C. 1330(a) provides that the district courts shall have jurisdiction over actions against a foreign state for "any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. 1605-1607, in turn, set forth the specific standards that Congress adopted as a matter of national policy to determine whether a foreign nation is entitled to invoke the defense of sovereign immunity.[6] Thus, in every case, the district court must render a ruling at the outset of the litigation that requires it to determine whether the cri-

[6] Foreign sovereign immunity, unlike, for example, the sovereign immunity of the states, is a federally-created defense wholly dependent upon the details of federal common law or governing statute.

teria specified by Congress for permitting claims against foreign states are satisfied.[7]

These general observations are fully applicable to the present case. As the district court correctly concluded (Pet. App. 34a), this case "is one that 'arises under' a federal law because the complaint compels the application of the uniform federal standard governing assertions of sovereign immunity. In short, the Immunities Act injects an essential federal element into all suits brought against foreign states." The court of appeals went even further (Pet. App. 12a-13a) in acknowledging the substantiality of the federal "ingredient" in this case:

> Undoubtedly, the FSIA, an act of Congress, will be construed if Verlinden's suit is permitted beyond the courthouse door. Delicate questions of sovereign immunity, which Congress in the Act made wholly federal * * * will be the fulcrum of considerable controversy. If decided adversely to plaintiff, * * * they will determine the outcome of the litigation.

Having reached that conclusion, the court of appeals should have ruled that the case falls within the federal judicial power delineated in Article III. See Note, *Suits by Foreigners Against Foreign States in United States*

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[7] The statute forbids the entry of a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. 1608(e). Accordingly, even if the foreign state does not appear to assert its immunity defense, the district court still must verify that immunity is unavailable and that the criteria prescribed by Congress have been satisfied. See, *e.g.*, *International Association of Machinists* v. *OPEC*, 649 F.2d 1354, 1356-1358 (9th Cir. 1981), cert. denied, No. 81-645 (Jan. 11, 1982) (conducting a full hearing to determine if a defaulting sovereign was entitled to assert the defense of sovereign immunity); *Ipitrade International, S.A.* v. *Nigeria*, 465 F. Supp. 824, 827 (D.D.C. 1978). And even if a foreign state waives its immunity, the trial judge still must decide that the terms of the waiver comport with the federal standard prescribed in 28 U.S.C. 1605(a)(1). In the absence of such a finding, the court cannot proceed with the case under 28 U.S.C. 1330(a).

Courts: A Selective Expansion of Jurisdiction, 90 Yale L. J. 1861, 1868 (1981) (footnotes omitted):

> Suits against foreign states * * * should be considered to raise a federal question that, like the incorporation of the Bank in *Osborn*, forms an "ingredient of the original cause." * * * An essential question * * * in every suit against a foreign state is whether federal sovereign immunity standards permit the suit. This implicit federal question is made explicit by section 1330; accordingly, that section should be considered within the federal question jurisdiction for Article III. [8]

2. The court of appeals nonetheless concluded that the present case does not "arise under" federal law because the FSIA is merely "a jurisdictional statute" (Pet. App. 19a), which does not prescribe "substantive rules of decision" (*id.* at 17a). The labels relied on by the court of appeals, however, do not advance the constitutional inquiry. If the court of appeals were correct in concluding that those characterizations prevent a suit like the present one from falling within the Article III judicial power, then it would follow that such suits would have to be litigated in state court (see 28 U.S.C. 1602). And if the court of appeals' construction of Article III were correct, then it also would appear to follow that *this* Court—which, like the district court, is an Article III tribunal—would lack authority to review decisions rendered by state courts in such cases. This would be true even though the highest state court had rendered a final judgment applying the provisions of the FSIA, which otherwise would be reviewable in this Court under 28 U.S.C. 1257(a). This illustrates, we submit, the fundamental error in the reasoning of the court of appeals. The federal judicial power is co-extensive with the legislative power: as this Court held in *Osborn*, both federal appellate courts and courts

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[8] The FSIA also prescribes the "extent of liability" in every suit, and thus injects an additional federal law "ingredient." See 28 U.S.C. 1606; see also Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 Stan. L. Rev. 385, 391 (1982).

of original jurisdiction may receive power from Congress to adjudicate *any* case that requires the construction or application of *any* federal law. See pages 9-13, *supra*.

Beyond this, however, there simply is no basis for characterizing the FSIA as merely a procedural statute without "substantive" content. The "principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity" (*Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 27). The concept of sovereign immunity, which defines the circumstances in which foreign states may invoke a federal law defense, has uniformly been described as "an overriding principle of substantive law." *Ex parte Peru*, 318 U.S. 578, 588 (1943); see *Mexico* v. *Hoffman*, 324 U.S. 30, 36 (1945) (sovereign immunity is an "accepted rule of substantive law"); *National Bank* v. *China*, 348 U.S. 356, 362 (1955) (the doctrine of sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign"). In short, sovereign immunity is a substantive defense that the federal government, in consideration of national policy and international custom, confers on foreign states that satisfy governing legal standards.[9]

Prior to passage of the FSIA, sovereign immunity questions were resolved by the courts in accordance with "suggestions of immunity" filed by the Attorney General on behalf of the Department of State (*Ex parte Peru*, *supra*), or, in the absence of any such suggestion, in conformity with principles accepted by the Department of State (*Mexico* v. *Hoffman*, *supra*). After 1952, the Department of State applied the so-called "restrictive" theory of sovereign immunity that had gained acceptance in most civil law jurisdictions instead of the traditional

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[9] Congress declined to give the FSIA retroactive effect (see 90 Stat. 2898; H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 33 (1976)) because it recognized that the statute is "not only procedural" but also "substantive" (*Immunities of Foreign States: Hearings Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 21 (1973)).

absolute theory of sovereign immunity. See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 698-705, 711-715 (1976). The FSIA was intended to "codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law" (H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7 (1976)) and to place on the judiciary the duty to decide whether, in a given case, a sovereign was entitled to immunity under the standards that Congress prescribed. See *id.* at 6-8. Congress believed that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law." *Id.* at 14. And while Congress believed that it had set forth "comprehensive rules governing sovereign immunity" (*id.* at 12), it fully recognized that courts applying its rules would be required to develop a supplemental body of case law through the litigation process.[10]

It is not difficult to apply the teaching of *Osborn* to cases such as this, raising immunity issues under the FSIA. *Osborn* establishes that Congress may confer federal court jurisdiction whenever a federal law must be "expounded," whenever a federal law forms an "ingredient" of a cause of action or defense, or whenever a "title or right" belonging to either party "may be defeated by one construction of the * * * law * * * and sustained by the opposite construction" (22 U.S. (9 Wheat.) at 818-824). Lawsuits brought under the FSIA satisfy these alternative tests because the FSIA imposes a duty on the courts to "expound" and apply its statutory criteria, because the question of sovereign immunity forms an essential "ingredient" of every such case, and because the foreign state's "right" to immunity will be "defeated by one

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[10] Thus, Congress believed that courts construing the FSIA would be required to "fashion federal law where federal rights are concerned." *Textile Workers Union* v. *Lincoln Mills*, *supra*, 353 U.S. at 457. For example, while the Act withholds immunity for commercial acts, "[t]he courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill." H.R. Rep. No. 94-1487, *supra*, at 16.

construction of [the Act] and sustained by the opposite construction" (ibid.).[11]

C. Decisions Restrictively Construing The Scope Of Jurisdictional Statutes Are Not Applicable When Delineating Powers Granted To Congress By The Constitution

The court of appeals stated (Pet. App. 10a) that, "in exploring whether Verlinden's suit 'arises under' federal law for purposes of Article III," it is appropriate to "first turn" to the "huge body" of case law interpreting 28 U.S.C. 1331. Under that statute, which grants the district courts general federal question jurisdiction over any case that "arises under the * * * laws * * * of the United States," numerous restrictive rules have been formulated to prevent an inundation of litigation in the federal judicial system. Applying those restrictive rules—in particular, the rule requiring that a substantial federal law issue appear on the face of a well pleaded complaint—the court of appeals found that the complaint in this case could not be upheld under 28 U.S.C. 1331.[12] In support of that conclusion, the court relied (Pet. App. 13a-14a) on decisions such as *Louisville & N.R.R.* v. *Mottley*, 211 U.S. 149 (1908); *Gully* v. *First National Bank*, 299 U.S. 109 (1936); and *Skelly Oil Co.* v. *Phillips Petroleum Co.*,

[11] The court of appeals apparently was of the view that the federal standards prescribed by Congress in the FSIA are beyond the scope of the federal judicial power because they "do not regulate[] conduct outside the courtroom" (Pet. App. 18a n.24; see also *id.* at 14a). In fact, however, the conduct of parties outside the courtroom is regulated by the FSIA in the same sense that all substantive legal provisions affect conduct: if a foreign state wishes to structure its business transactions to permit, or to preclude, litigation and subsequent liability in this country, it must attend to the provisions of the FSIA. Thus, whether a foreign state waives its defense of immunity by agreeing to arbitrate here, or subjects itself to damages by engaging in commercial activity with a direct effect in the United States, it will be the substantive provisions of the FSIA that will guide its conduct and govern its liability.

[12] The court remarked that "the issue of sovereign immunity is not disclosed by Verlinden's well-pleaded complaint" (Pet. App. 13a).

339 U.S. 667 (1950). Having thus "established that Verlinden's suit does not 'arise under' federal law by principles developed in cases construing § 1331" (Pet. App. 15a), the court drew the further conclusion that the present case could not be brought within Article III because the scope of Article III exceeds that of Section 1331 by only a "narrow" margin (*ibid.*). Both the major and minor premise of this analysis are in error.

1. The decisions of this Court clearly establish that the "arising under" clause of Article III is not circumscribed by restrictive rules developed under jurisdictional statutes such as 28 U.S.C. 1331. As Justice Frankfurter observed in his opinion for the Court in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 (1959), Section 1331 is properly construed in a restrictive manner because it "is a statute, not a Constitution, we are expounding." Justice Frankfurter was quick to point out, however, that the very restrictions relied on by the court of appeals here—and, indeed, the very precedents relied on by the court below—are irrelevant in construing the scope of Article III (*id.* at 379 n.51):

> Of course the many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts. See * * * *Louisville & Nashville R. Co.* v. *Mottley*, 211 U.S. 149; *Gully* v. *First National Bank*, 299 U.S. 109; *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 * * *.

Thus, "the grant of jurisdiction in § 1331(a), while made in the language used in Art. III, is not in all respects co-extensive with the potential for federal jurisdiction found in Art. III." *Powell v. McCormack*, 395 U.S. 486, 515 (1969); accord, *Shoshone Mining Co.* v. *Rutter*, 177 U.S. 505, 506 (1900); *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 614 (1949) (Rutledge, J., concurring).[13]

[13] See also 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure, supra*, at 400; Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 162 (153).

In view of these authorities, the court of appeals plainly erred when it turned "first" (Pet. App. 10a) to decisions under Section 1331 when attempting to delineate Congress' power under Article III. Congress' constitutional power is described in *Osborn* and its progeny, not in cases decided under Section 1331. And, as discussed on pages 9-18, *supra*, Congress acted well within its constitutional power in authorizing federal district courts to hear suits like the present suit brought under the FSIA.[14]

2. Even though it is not necessary for the present complaint to survive scrutiny under pleading rules developed by the courts under Section 1331, we observe that Verlinden's complaint would in fact be sufficient even if those rules did apply. Section 1331 is satisfied if "the right to relief depends upon the construction or application of the Constitution or laws of the United States * * *." *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921); see also *Association of Salaried Employees* v. *Westinghouse Corp.*, 348 U.S. 437, 450 (1955). The complaint in this case plainly meets that standard.

In every suit brought under the FSIA, the plaintiff must plead facts sufficient to show that the sovereign defendant is not entitled to immunity under federal criteria, for otherwise the district court would lack jurisdiction. The legislation is structured to provide for immunity in all cases unless a statutory exception is applicable. See 28 U.S.C. 1604. And under 28 U.S.C. 1330

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[14] The court of appeals also found support for its restrictive constitutional ruling (Pet. App. 16a-18a) in this Court's opinions in *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12 (1800), and *Hodgson* v. *Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809). However, those cases dealt only with Article III's grant of judicial power over controversies "between a state, or the citizens thereof, and foreign states, citizens or subjects." They correctly rejected the claim that this limited grant of diversity jurisdiction encompasses suits between two aliens. Neither *Mossman* nor *Hodgson* addressed the question presented here: whether a case brought under a statute enacted by Congress pursuant to its Article I powers, which sets forth comprehensive standards for adjudicating the immunity and scope of liability of foreign nations, is a case "arising under" a federal statute within the meaning of Article III.

(a), the district court has "jurisdiction" only in cases "with respect to which the foreign state is not entitled to immunity" under the provisions of the Act.[15] Accordingly, Verlinden's complaint necessarily contained an allegation of jurisdiction under Section 1330(a) (see C.A. App. 325a), including an allegation of facts sufficient to establish non-immunity under 28 U.S.C. 1604-1605.[16] Thus, the court of appeals clearly erred in asserting (Pet. App. 13a) that "the issue of sovereign immunity is not disclosed by Verlinden's well-pleaded complaint."

II. CONGRESS HAS POWER TO CONFER JURISDICTION ON FEDERAL DISTRICT COURTS TO HEAR SUITS BROUGHT BY FOREIGN PLAINTIFFS AGAINST FOREIGN STATES UNDER THE FSIA BECAUSE FEDERAL COURT JURISDICTION IS ESSENTIAL TO SAFEGUARD IMPORTANT STATUTORY POLICIES

As we have demonstrated above, Congress has constitutional power to confer jurisdiction on Article III courts to entertain suits brought against foreign sovereigns under the FSIA because every such suit raises substantive

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[15] See Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning, and Effect*, 3 Yale Studies in World Public Order 1, 14 (1976): "if the action at hand is in federal court and its sole jurisdictional basis is the foreign public character of the defendant, the plaintiff must plead * * * an absence of immunity * * * since the existence of immunity will be a jurisdictional question." The legislative history confirms that the statute "starts from a premise of immunity." H.R. Rep. No. 94-1487, *supra*, at 17. Although the House Report refers to immunity as an "affirmative defense" (*ibid.*), the statute is drafted in such a way that absence of immunity must be pleaded by the plaintiff as a predicate for federal court jurisdiction.

[16] The complaint alleges that Central Bank engaged in "large-scale commercial activity carried on in the United States" and also engaged in "acts performed in the United States * * * in connection with a commercial activity of said defendant elsewhere" (C.A. App. 329a). The complaint supports these general allegations with considerable factual detail (see *id.* at 326a-328a, 330a-331a). The complaint therefore pleads facts sufficient to show non-immunity under the standards prescribed in 28 U.S.C. 1605(a)(2).

federal law issues requiring adjudication. Under *Osborn* v. *Bank of the United States, supra*, this in itself is a sufficient basis for upholding Congress' grant of jurisdiction. But even if this Court were to disagree with that submission, the FSIA still would be constitutional as applied to this case. That is so because Congress has constitutional power to vest federal courts with "protective jurisdiction" (*Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton, J., concurring)) to hear certain types of cases that do not involve any substantive issue of federal law.

This Court has not yet settled how far Congress may go in vesting Article III tribunals with power to entertain such cases. In *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949), Justices Jackson, Black and Burton concluded that Congress has constitutional power to extend federal court jurisdiction to every subject over which it has power to legislate under Article I: "We conclude that where Congress in the exercise of its powers under Art. I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship." [17] In the present case, there is no need to pursue this principle to its limit—*i.e.*, the situation before the

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[17] "In other words if Congress can validly legislate concerning a matter it may constitutionally confer jurisdiction upon the federal courts of any claim arising within the ambit of that legislative power." *Moore's Commentary on the U.S. Judicial Code* ¶ 0.03(22) at 138 (1949). Other distinguished commentators have formulated the principle in similar terms. See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216, 224-225 (1948); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 20 (1957); see also P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and The Federal System* 415-417, 866-870 (2d ed. 1973) (hereinafter cited as Hart & Wechsler).

Court in *Tidewater*, where Congress opened the doors of the federal district courts solely to safeguard the interests of a particular class of litigants.

In enacting the FSIA, Congress determined, in the exercise of its powers under Article I of the Constitution, that federal court jurisdiction is essential to safeguard the vital interests of the entire nation in the field of foreign relations. Congress conceived of federal court jurisdiction as a tool to pursue specific statutory policies: uniform treatment of sovereign nations and avoidance of conflicts in foreign affairs. The decisions of this Court leave little doubt that Congress may confer federal court jurisdiction when it is essential to give effect to such a statutory plan. "The protective forum in such circumstances is then, principally, a shield for federal legislation. In a very real sense do all such cases 'arise *under*' the laws establishing the congressional plan, within the meaning of Article III." Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 196 (1953) (emphasis in original).

A. Controversies "Arise Under" Federal Law When Congress Determines That Their Resolution By Federal Courts Is Essential To Give Full Effect To A Statutory Program

The principle that federal courts may entertain controversies raising non-federal issues in order to protect federal statutory policies has its origin in *Osborn* v. *Bank of the United States*, *supra*. Although this Court noted in *Osborn* that every action involving a federally chartered bank raises a *potential* question of federal law, it did not limit its holding to cases where such issues were present. It broadly ruled that Congress can open the doors of the federal courts to all controversies involving the legal rights of national banks. See *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904, 905 (1824). As Professor Mishkin has observed, "[t]he *Osborn* case indicates that there are situations in which Congress may, within the 'arising

under' clause of Article III, use the 'inferior' federal courts as a means of protecting interests around which it proposes to throw its cloak." Mishkin, *The Federal "Question" in the District Courts*, *supra*, 53 Colum. L. Rev. at 188. The need for conferring this form of protective jurisdiction shortly after the formation of the federal government was sufficiently clear: "The Bank [of the United States] was the object of great popular hatred and of measures of reprisal by many state legislatures. It was sadly in need of a federal haven for its litigation." Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L. J. 393, 405 (1936).

Subsequently, in *Schumacher* v. *Beeler*, 293 U.S. 367 (1934), this Court held that Congress may vest jurisdiction in the federal district courts to hear claims asserted by bankruptcy trustees, even though those claims rest solely on state law and even though "diversity of citizenship" is absent. The Court concluded that "Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction." *Id.* at 374. The Court reached the same result in *Williams* v. *Austrian*, 331 U.S. 642, 658 (1947), where it noted that Congress intended under the bankruptcy laws to "establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking." See also *Lathrop* v. *Drake*, 91 U.S. 516, 518 (1875), holding that an assignee in bankruptcy may sue in federal court regardless of citizenship: "a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise." As Justice Jackson later observed in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, *supra*, 337 U.S. at 599, these bankruptcy cases "called for a de-

termination of no law question except those arising under state laws. The only way in which any law of the United States contributed to the case was in opening the district courts to the trustee, under Art. I. powers of Congress * * *."

In later years, plurality opinions of the Court have addressed the scope of Congress' power to vest Article III courts with jurisdiction to entertain controversies raising non-federal issues. In *National Mutual Insurance Co.* v. *Tidewater Transfer Co., supra,* 337 U.S. at 600, this Court upheld a federal statute that conferred jurisdiction on federal district courts to hear civil actions between citizens of the District of Columbia and citizens of the several states. The claims in those cases rested solely on state law; moreover, this Court previously had held that such cases did not fall within the diversity of citizenship clause of Article III. *Hepburn* v. *Ellzey,* 6 U.S. (2 Cranch) 445 (1805). Justice Jackson's plurality opinion nonetheless concluded that federal jurisdiction could be asserted as an incident of Congress' legislative power over the District of Columbia under Article I.

The Court returned to these issues in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 456-457 (1957), which upheld the constitutionality of Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. Section 301 empowers federal district courts to adjudicate collective bargaining disputes "without regard to the citizenship of the parties." The Court found that Congress intended federal courts to "fashion federal law" under this provision (353 U.S. at 457) and that cases arising under the provision therefore were cases arising under federal law within the meaning of Article III. Justices Burton and Harlan, however, disagreed that "the substantive law to be applied in a suit under § 301 is federal law." *Id.* at 460. Nonetheless, they concurred in the Court's judgment because they believed that "the constitutionality of § 301 can be upheld as a congressional grant to Federal District Courts of what has been called 'protective jurisdiction.'" *Ibid.* And while

Justice Frankfurter, in his dissenting opinion in *Lincoln Mills*, criticized the broad view of "protective jurisdiction" endorsed by Justices Burton and Harlan (*id.* at 469-484), he too recognized the propriety of granting federal courts jurisdiction over non-federal claims based on "the presence of some substantial federal interest" (*id.* at 483-484). Justice Frankfurter acknowledged that protective jurisdiction was appropriate in bankruptcy cases such as *Beeler* and *Williams* because "the whole purpose of the congressional legislative program * * * required the availability of federal jurisdiction * * *" (*id.* at 484).

These decisions confirm that Congress may open the doors of the federal courthouse to suits raising only non-federal issues if that is essential to facilitate a statutory program enacted pursuant to Article I of the Constitution. In summarizing this line of cases, Professor Mishkin has observed (*The Federal "Question" in the District Courts*, *supra*, 53 Colum. L. Rev. at 195):

> In the net analysis, the function served by the federal judicial "haven" in such cases is not so much the defense of the specific interests concerned, as the protection of the congressional legislative program in the area. And that will be the situation in any area of active national regulation. Regardless of the source of the law applicable to a particular case, an uninformed or hostile attitude on the part of the tribunal deciding cases in such an area might well constitute a significant stumbling block in the way of effectuating federal policy. Even in cases where no specific statutory provision is itself involved, the overall federal policy thus may nonetheless be better protected if all connected litigation is adjudicated by courts well versed in, and receptive to, the national policies established by the legislation.

Accordingly, when it is necessary to centralize a category of litigation in the federal district courts to achieve the objectives of a statutory program, such litigation is properly said to "arise under" the laws establishing the

congressional plan. This is true regardless of the source of substantive law to be applied. *Id.* at 195-196.[18]

As we demonstrate below, cases arising under the FSIA are cases in which weighty statutory policies depend on an invocation of the jurisdiction of the federal district courts. Thus, even under the most restrictive view of the "protective jurisdiction" principle, as articulated by Justice Frankfurter in his dissenting opinion in *Lincoln Mills* (353 U.S. at 484), Congress may confer jurisdiction because "the whole purpose of the congressional legislative program * * * require[s] the availability of federal jurisdiction * * *."

B. In The Exercise Of Its Article I Power Over Foreign Affairs And International Commerce, Congress Reasonably Determined That Federal Courts Must Be Available To Adjudicate Suits Brought Against Foreign States

As this Court has observed, the provisions of the Constitution, giving the federal government pervasive power over international commerce and foreign affairs (see United States Constitution, Article I, Section 8, Clauses 3, 10; Article II, Sections 2, 3; Article III, Section 2), reflect "a concern for uniformity in this country's dealings with foreign nations and * * * a desire to give

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[18] In *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 451-452 (1851), the Court stated in dictum that Congress could not use its power to regulate interstate commerce to expand the admiralty jurisdiction of federal district courts in the absence of some legislation having regulatory purpose or effect. The Court observed that the statute in question "merely confers a new jurisdiction on the district courts; and this is its only object and purpose." As noted on pages 13-15, *supra*, and 28-37, *infra*, that dictum has no application to the FSIA, whatever its correctness. The FSIA is a comprehensive enactment setting forth a statutory program to assure uniform treatment of foreign sovereigns and to harmonize international relations. In the words of Professor Mishkin, Congress has "established and affirmatively enacted [a statute] expressing a national policy in the area concerned * * *." Mishkin, *The Federal "Question" in the District Courts*, *supra*, 53 Colum. L. Rev. at 195.

matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964).[19] Assertions of state authority in matters of international importance "may disturb foreign relations." *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968). Such assertions have "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." *Ibid.*

These observations are particularly germane to assertions of judicial power. "Every judicial action exercising or relinquishing jurisdiction over * * * a foreign government has its effect upon our relations with that government." *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945). See also *Ex parte Peru*, 318 U.S. 578, 588-589 (1943). Indeed, a foreign sovereign may perceive a particular assertion of jurisdiction as "an affront to its dignity," with profound implications for the foreign relations of the nation. *Mexico* v. *Hoffman*, *supra*, 324 U.S. at 35-36.[20]

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[19] "That the national government should have exclusive power to deal with foreign nations was common ground at the [Constitutional] Convention." Hart & Wechsler, *supra*, at 15-16. See also Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 55 (1952).

[20] In *The Federalist* No. 80 at 534, 536 (Cooke ed. 1961), Alexander Hamilton stressed the importance of federal jurisdiction over cases "which involve the Peace of the Confederacy," including those which concern "the intercourse between the United States and foreign nations." He observed that "[t]he union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."

At the time the Constitution was adopted, foreign sovereigns enjoyed absolute immunity. *The Schooner Exchange* v. *McFadden*, 11 U.S. (7 Cranch) 116 (1812). However, to the extent that foreign nations *were* amenable to suit—*i.e.*, through their diplomatic officers—Article III left no doubt about the necessity for federal jurisdiction. Under Article III, Section 2, the federal judicial power extends to "all Cases affecting Ambassadors, other public Ministers and Consuls."

As described on pages 1-3, *supra*, the FSIA represents an exercise by Congress of its Article I power to establish guidelines for the conduct of litigation against foreign nations that will safeguard the vital policy interests of the United States. In enacting this statute, Congress carefully reviewed the scope of its constitutional authority (H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 12 (1976)):

> Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. I, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested * * * in the Government of the United States * * *."

In the exercise of this authority, Congress determined that reliance on the jurisdiction of the federal district courts was essential to achieve its regulatory objectives. The jurisdictional grant was needed "to encourage the bringing of actions against foreign states in Federal courts" (*id.* at 13), and thus to promote uniform treatment of foreign states and avoid harmful consequences to our international relations. As the House Report explains (*id.* at 12-13):

> Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.

See also 122 Cong. Rec. 17466 (1976) (analysis of proposed legislation by Sen. Hruska). From the beginning of the development of the proposed legislation, the drafters stressed the importance of federal court juris-

diction to achievement of statutory policies (119 Cong. Rec. 2219 (1973)):

> Original jurisdiction is accorded to the federal courts because certain actions against foreign states, no longer possessed of absolute immunity, may be politically sensitive and may impinge in an important way on the conduct of foreign relations. Moreover, original jurisdiction in the federal courts should be conducive to uniformity of decision, and the federal courts may be expected to have a greater familiarity with international law and with the trend of decision in foreign states than would be true of courts of the States.

These concerns were deemed implicated even when causes of action rest on "state law" (*ibid.*).

Congress' belief that federal court jurisdiction under the FSIA is essential to serve the foreign policy interests of the United States also appears in its determination that every suit commenced in state court may be removed by the foreign state to federal court. 28 U.S.C. 1441(d). The House Report explains the need for removal jurisdiction as follows (H.R. Rep. No. 94-1487, *supra*, at 32):

> In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

See 122 Cong. Rec. 17471 (1976) (analysis of the bill introduced by Senator Hruska); see also the colloquy between Rep. Danielson and Bruno Ristau of the Department of Justice (*Immunities of Foreign States: Hear-*

ings Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 30 (1973)):

> Mr. Ristau. * * * Now there have been repeated attempts to subsume foreign sovereign governments to the jurisdiction of State courts and, on occasion, by means of attachment, litigants have succeeded in bringing suits in State courts. * * *
>
> Mr. Danielson. What we are simply doing here would be to try to provide certainty that these can be removed at the request of the foreign state to the U.S. district court?
>
> Mr. Ristau. Yes, sir, we feel the question of the suability of a foreign government in the courts of the United States is inextricably intertwined with one aspect of foreign relations. As a result of this, we feel and we are convinced that the Congress has absolute authority to legislate in this area.

As these passages demonstrate, Congress reasonably believed that a broad grant of original and removal jurisdiction was essential "to minimize irritations in foreign relations" (H.R. Rep. No. 94-1487, *supra*, at 45).

Thus, in passing the FSIA, Congress defined with precision a narrow class of cases that necessarily implicate the strong federal interest in foreign relations and international commerce.[21] Cases of this kind are precisely the type that logically fall within the jurisdiction of the national government.[22] They are cases in

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[21] The FSIA is drafted in such a way that only cases having a substantial "connection" with the United States will be litigated in federal court. See H.R. Rep. No. 94-1487, *supra*, at 13. This requirement was intended to "insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small 'international courts of claims.'" *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 31 (1976) (remarks of Mr. Ristau).

[22] See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law*

which the government must speak consistently, impartially, and with a clear regard for the role of the United States in the community of nations.[23] In view of Congress' careful consideration of its constitutional authority, and its express findings on the need to utilize the jurisdiction of the federal district courts to give effect to the statutory plan, this Court's decisions recognizing the principle of "protective jurisdiction" (see pages 21-27, *supra*) have direct application.

"Congress, after careful consideration, determined that it preferred, and had the power to utilize" this jurisdictional scheme. *Palmore* v. *United States*, 411 U.S. 389, 409 (1973). Congress' judgment that invocation of federal court jurisdiction is essential to the success of the statutory program, and therefore to the exercise of its powers under Article I, is entitled to great respect. See *Rostker* v. *Goldberg*, No. 80-251 (June 25, 1981), slip op. 6. *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980). Indeed, as this Court has stated with regard to jurisdictional statutes challenged under Article III: "Every doubt is to be resolved in favor of the constitutionality of the law." *The Mayor* v. *Cooper*, *supra*, 73 U.S. (6

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and Governmental Relations of the House Comm. on the Judiciary, *supra*, at 35-36 (1976) (remarks of Mr. Ristau): "we have a somewhat incongruous situation right now, * * * [T]he constitution itself and the Judicial Code provide that foreign ambassadors who are but representatives of foreign states * * * may be sued only in Federal courts. The Federal courts have exclusive jurisdiction. Yet * * * their principal, the foreign government itself, under existing law * * * can be sued in any municipal court anywhere in the United States."

[23] "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889). Thus, to the extent that Congress provides that suits against foreign sovereigns may be adjudicated in federal court, it is exercising power of a kind traditionally vested in the national government and is not encroaching on the authority of the states.

Wall.) at 251. Such deference is appropriate here. Instead of relying on its own notions of "history, good sense, and sound concepts of judicial administration" (Pet. App. 20a), the court of appeals should have deferred to Congress' reasonable judgment on the necessity for the jurisdictional scheme that it selected. See *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, *supra*, 337 U.S. at 603 (opinion of Jackson, J.).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Docket Sheet

NO. 81-920-CFX See: 81-885	TITLE Verlinden B. V., Petitioner v. Central Bank of Nigeria

DOCKETED	COURT
Nov. 13, 1981	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Berthold H. Hoeniger
	Counsel for Respondent: James G. Simms,
Nov. 13, 1981	Petition for writ of certiorari filed. (Record filed).
Dec. 12, 1981	Brief for the respondent in opposition filed.
Dec. 16, 1981	DISTRIBUTED. 1-8.
Dec. 17, 1981	Brief for the U. S. as amicus curiae filed. (D).
Dec. 28, 1981	Reply brief for the petitioner filed.
Jan. 11, 1982	Petition GRANTED.

Jan. 25, 1982	Motion of petitioner to dispense with printing the joint appendix filed.
Jan. 27, 1982	DISTRIBUTED. 2-19. (Above motion).
Feb. 1, 1982	Order extending time to file petitioner's joint appendix and brief on the merits until March 15, 1982,
Feb. 22, 1982	The motion of petitioner to dispense with printing the joint appendix is granted.
Feb. 26, 1982	Application for leave to file amicus curiae brief in excess of page limitations, and order denying same by Marshall, J., 3/2/82.
March 10, 1982	Application for leave to file amicus curiae brief in excess of page limitations, and order granting same by Marshall, J., 3/11/82, not to exceed 33 pages.
March 12, 1982	Brief, amicus curiae, for the U. S. filed.
March 12, 1982	Brief, amici curiae, of Rule of Law Committee, et al. filed.
March 15, 1982	Brief for the petitioner filed.
Mar. 15, 1982	Brief, amicus curiae, for The Committee on International Law of the Association of the Bar of the City of New York filed.
Mar. 26, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for additional time for oral argument filed.
Apr. 5, 1982	The motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is GRANTED. The request for additional time for oral argument is DENIED.

(Over)

81-920

Title

No.

DATE	PROCEEDINGS AND ORDERS
Apr. 12, 1982	Brief, amicus curiae, of The Republic of Guinea in support of respondent filed.
Oct. 25, 1982	In the matter of appointment of amicus curiae to argue i support of judgment below. (No papers filed).
Oct. 25, 1982	DISTRIBUTED. 10-29. (In the matter of appointment of amicus curiae).
Nov. 1, 1982	Stephen N. Shulman, Esquire, of Washington, D. C., a member of the Bar of this Court, is invited to argue this case, as amicus curiae, in support of judgment below.
Nov. 17, 1982	CIRCULATED.
Jan. 3, 1983	Reply brief for the petitioner filed. (D).
Jan. 11, 1983	ARGUED.